FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5077/2012

In the matter between:-

ABSA BANK LIMITED Applicant

and

ROELOF CHARLES MALHERBE Respondent

HEARD ON: 14 MARCH 2013

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 16 MAY 2013

---

[1] This was an application for summary judgment. I shall refer to the parties as in convention because the proceedings were essentially action proceedings in nature. On 14 March 2013 I granted, *ex tempore,* summary judgment against the defendant. On the 19 March 2013 the defendant filed a request for written reasons. What follows is my response to that request.

[2] The background of the application revealed that the plaintiff instituted an action against the defendant. The summons contained two separate claims. The global sum of the two claims together was R5 383 133,77. The ancillary relief sought included interest at different but specified rates, the

costs of the action, a different but specified scales, declaring three specified farms especially executable as well as authorising the registrar to issue writs against such immovable properties.

[3] The first claim was based on a mortgage loan secured by a mortgage bond over one specific immovable properties. The capital amount was R2 400 000,00 and the additional amount was R480 000,00. The mortgage bond number B13629(2008) was registered in favour of the plaintiff at the deeds office in Bloemfontein on 31 October 2008. The terms and conditions of the mortgage bond were fully set out in "anx a" to the summons.

[4] The second claim was based on an overdraft facility. It was also secured by a mortgage bond over two specific immovable properties. The capital amount was R3 200 000,00 and the additional amount R640 000,00. The mortgage bond was also registered at the deeds office in Bloemfontein on 4 March 2009 under number B1592(2009). A copy thereof was attached to the summons as "anx b".

[5] The sheriff duly served the summons on the defendant. He reacted by filing a notice of intention to defend. The service triggered off a prompt response from the plaintiff. The plaintiff immediately launched the current application for summary judgment. The plaintiff alleged, in the supporting affidavit that the defendant had no *bona fide* defence and that he had filed

the notice to defend the action for the sole purpose of delaying the finalisation of the matter.

[6] The defendant would have none of that. He filed an opposing affidavit in which he set out the grounds of his resistance. He denied the plaintiff's allegations. On the contrary he alleged that he had a *bona fide* defence to the plaintiff's claim and that he did not file the notice of intention to defend the action for the sole purpose of delaying its finalisation.

[7] The defendant acknowledge and declared himself to be truly and lawfully held and firmly bound unto and in favour of the defendant in the aforesaid capital as well as additional amount – vide clause 2 read with clause 3 "annexure a".

[8] In terms of clause 15 "annexure a" the defendants specifically bound, as a first mortgage and as security for the repayment of the loan and interest thereon, an immovable property, commonly known as Baviaansfontein Farm, district Boshof, Province Free State in extent 360,9283 hectares held under Deed of Transfer No T17264(2005).

[9] The bond remains in force as continuing covering security for the capital amount, the interest thereon and the additional amount. Moreover, it remains as such for each and every further sum of money in which the defendant may, after the signing of the bond, become further indebted to the plaintiff – vide clause 4 "annexure a".

[10] The bond also makes provision for the method, manner and rate(s) to be used in order to calculate interest on all amounts owing or to be owed by the defendant to the plaintiff – vide clause 7 “annexure a”.

[11] The amount(s) owing at any time by the defendant to the plaintiff, and so secured, may be determined and proved by a certificate signed by any manager of the plaintiff. Such certificate serves as *prima facie* proof of the outstanding balance. Similarly, an averment in that certificate to the effect that an amount as stated therein has become due and payable *prima facie* proves that as a fact – vide clause 9 “annexure a”.

[12] The plaintiff averred that although it had complied with all its contractual obligations towards the defendant, the defendant had breached the terms and conditions of the agreement. The essence of the breach was that the defendant had neglected to pay the agreed instalments and that he was in arrears in the sum of R141 009,24.

[13] The plaintiff, as a result of the defendant’s default, demanded the full outstanding balance of R2 434 265,45 together with interest thereon at the rate of 10,5% per annum calculated from 1 June 2012. To that end the plaintiff relied on “annexure c”, a certificate signed by one A G Lombard in Johannesburg on 7 June 2012 in accordance with clause 9 “annexure a”.

[14] The plaintiff averred that it had duly complied with the law by sending to the defendant the requisite notice in terms of

section 129 read with section 130, National Credit Act, 34 of 2005 as would more fully appear from “annexure d1 – d5”.

[15] The plaintiff further averred that it had duly complied with the legal requisites relating to the delivery of the notice in terms of section 129 as would more fully appear from “annexure e1 – e3”. The plaintiff added that the defendant had been in default for at least 20 business days (section 130); that at least 10 business days had elapsed since the requisite notice was delivered to the defendant (section 129); that despite proper delivery of such notice the defendant had failed to respond or to take any steps as suggested therein; and that, in the light of all this, the plaintiff was entitled to institute these proceedings for the recovery of the debt, in other words, the first claim.

[16] As regards the second claim, I do not intend to pay particular attention to the details of specific clauses of “anx b” save for two or so. In terms of clause 15 “anx b” the defendant specifically bound an immovable property commonly known as Farm Kwaggafontein 328, district Boshoff, Province Free State as first mortgage bond and as security for the repayment of the loan by way of an overdraft facility and interest.

[17] In addition to the aforesaid, the defendant also bound, as the second mortgage bond and as security for the repayment of the overdraft facility loan, another immovable property commonly known as Farm Helpmekaar, district Boshoff Province Free State.

[18] The comments I made in paras [7] – [15] in respect of the first claim apply *mutatis mutandis* to the second claim as well.

[19] The defendant opposes the grant of a summary judgment in respect of each of the two claims. He relied on three grounds. I now turn to examine those grounds.

* [20] As regards the third ground of opposition, the defendant contented that he and the plaintiff's representative reached a verbal *pactum de non petendo* at Kroonstad during September 2012. The defendant alleged that the agreement was that the plaintiff undertook not to enforce its contractual rights in terms of the loan agreement(s) by way of legal action before 31 December 2014. The underlying idea of the verbal pact was to afford the defendant an opportunity of settling all the debts he owed to the plaintiff.

[21] The defendant's defence of verbal variation *pactum de non petendo* was also attacked from another front. The plaintiff's second challenge was that the mortgage bonds expressly prohibited any variation of its written terms and conditions by way of an oral agreement.

[22] On the one hand, counsel for the plaintiff also argued that the pact between the respondent and Mr Marx, even if was truly concluded, an allegation which the plaintiff persistently denied, was of no consequence in view of the fact that the agreement relied upon was never reduced to writing but remained nothing more than an oral variation.

[23] On the other hand, counsel for the defendant, argued that the Shiffren-clause, contained in the mortgage bond on which the plaintiff relied in rebuttal of the defendant's *pactum* defence was voidable on the ground of its unfairness. He then submitted that if the defendant's defence was rejected as null and void on the grounds that the *pactum* had not been reduced to writing and signed by both parties – such a finding would have the effect of offending public policy as particularly expressed in section 33 and 34 of our constitution.

[24] Mr Snyman heavily relied on the decision in **Nyandeni Local Municipality v Hlazo**.[1] In that case the question was whether the operation of the entrenched clause, on the peculiar facts of that particular case, would have the effect of offending public policy as it is particularly expressed in section 33 and 34 of the constitution of our land. Now the public policy embodied in section 33 concerns the right to a fair public hearing and that embodied in section 34 the right to a just administrative action.

[25] In that case of **Hlazo** *supra*, at para [126] Alkema J after considering the conflict between an entrenched contractual clause in a written agreement protected by the principle of *pacta sunt servanda* premised on the right to freedom of contracting on the one hand versus the right to due process of law on the other hand protected by public policy against abuse of due process of law concluded:

[1] **Nyandeni Local Municipality v Hlazo** 2010 (4) SA 261 (ECM).

> "I therefore believe that the facts and circumstances of this case justify the departure from the *Shifren* principle."

[26] The only other case where the Shifren principle was departed from, as far as I can ascertain, was **Miller and Another v Dannecker.**[2] I was also referred to that decision. In that case, as in the instant matter, the thrust of the attack, on the entrenched clause principle enunciated in **SA Sentrale Ko-op Graanmaatkskappy Bpk v Shifren en Andere**,[3] was grounded on the argument that upholding the "shifren" principle would offend the principle of good faith. Before me it was submitted that good faith was an equitable and ethical value which requires that parties to contracts be held to their words by requiring them to honour their promises or undertakings and by denying them the right to invoke the "shifren" principle. To let contractants off the hook by enforcing the entrenched clause would have the effect of undermining public policy considerations that are constitutionally protected in sections 33 and 34. So went the argument

[27] The argument of the defendant found support in **Miller's** decision *supra*. However, that decision was overruled – **Brisley v Drotsky**.[4] At par [31] the SCA made the following instructive comments about the judicial power to invalidate written contracts on the strength of public policy:

---

[2] **Miller and Another v Dammecker** 2001 (1) SA 928 (C) at par [17].
[3] **SA Sentrale Ko-op Graanmaatkskappy Bpk v Shifren en Andere** 1964 (4) SA 760 (A).
[4] **Brisley v Drotsky** 2002 (4) SA 1 (SCA) at par [13].

"[31] *Sasfin* se saak is 'n toepassing van die beginsel dat kontraksterme wat dermate onbillik is dat dit in stryd is met openbare belang, om dié rede ongeldig is. Aangesien die verskansingsklousule op sigself nie ongeldig is nie, vind die *Sasfin*-beginsel geen direkte toepassing nie. Op die veronderstelling dat die *Sasfin*-beginsel uitgebrei kan word om die afdwing van kontraksbepalings (wat nie *per se* in stryd met die openbare belang is nie) te verhoed, **sal sodanige toepassing noodwendig beperk moet word tot gevalle wat analoog is aan *Sasfin*, synde gevalle waar die afdwinging van die verskansingsklousule so onbillik sal wees dat dit as 'inimical to the interests of the community' (op 8C-D) beskryf kan word.** Voorts sal die oorwegings wat uit die volgende *dicta* van Smalberger AR (op 9B-E) blyk, ook daarop van toepassing te wees:

'The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12:

" ... **the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds**"

...

> **In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by the restrictions on that freedom.' "**

[28] What emerges from the **Brisley** decision *supra* was instructive in many ways, among others:

- It was held that the "shifren principle" is trite;
- That it is an authoritative decision with binding force;
- That such principle protects both parties;
- That good faith is an ethical value in the substantive law of contracts;
- That much more than lack of good faith alone is required in the law of contracts to justify relaxation of the principle;
- That the principle is not absolutely inflexible;
- That the principle imperils no social values.

[29] Prof Hutchinson (on 743-4) articulated the role of good faith in the law of contracts as follows:

> "[22] ...'What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. **Good faith thus has a creative, a controlling and a**

> **legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one**.'"

Prof Hutchinson's opinion was quoted with approval by the court in **Brisley** *supra*, at par [22] – vide footnote 7 *supra.*

[30] It follows, therefore, that if I were to relax the "shifren" principle, on the facts of this case, where the crux of the attack was launch from one front only, namely: the principle of good faith without something more, such as fraud attributable to the plaintiff, I would be elevating the principle of good faith to a higher functional sphere of operation that is not currently recognised in our substantive law of contract. Here I could detect nothing so morally inequitable in the plaintiff's conduct that it could only be objectively described as inimical to the interests of the community.

[31] In the instant matter it appears easier to appreciate how the departure from the "shifren" principle would detrimentally affect the interests of the community than the enforcement thereof would. To depart from the principle and to enforce contractual performance by the plaintiff, in accordance with, the terms of the oral *pactum* would have a detrimental impact on the interest of the community. If the shifren principle were to be suddenly relaxed, on the strength of the peculiar facts of this particular matter, great legal uncertainty would be created. A floodgate of endless disputes would be opened. Commercial instability would bedevil the business markets. A mortgage bonds as an instrument of hypothecation would lose its vital

significance as a real security mostly preferred in the banking industry. There is so much to lose and so little to gain through relaxation of the principle in these uncompelling circumstances.

[32] The case of **Hlazo** *supra* is distinguishable. In that case, unlike in the instant matter, the party who involved the protection of the "shifren" principle was the first respondent. Alkema J found that he was actuated by an ulterior motive to do so; that his conduct was tainted by fraudulent actions; that he had fully participated in his workplace disciplinary proceedings; that he was fully aware of the terms and conditions of employment and his contractual rights; that he challenged the procedure adopted at his disciplinary hearing for the first time after his dismissal; and that in support of his challenge, for the first time invoked the protection of the "shifren" principle. That, according to Alkema J, amounted to an abuse of the due process of law for a morally indefensible ulterior purpose.

[33] In the instant matter the party who involved the protection of the "shifren" principle was the plaintiff. There was no suggestion let alone a contention that he had abused a due process of law in any manner whatsoever. There was no suggestion that the actions of the plaintiff or its representative, Mr Marx, were tarnished by any fraudulent acts. Fraud is repugnant to public policy considerations – *contra bonos mores*. The same can be said about wilful abuse of a due process of law. It was never alleged, argued or suggested, in

this matter, that the plaintiff's representative expressly or tacitly represented to the defendant that the mere conclusion of the pact, would, without first having it written and signed, automatically render the entrenched clause inoperative.

[34] In the **Hlazo** case *supra*, the dice as regards the substantive merits of the dispute, was heavily loaded against the litigant who invoked the "shifren" principle in a calm attempt order to protect his alleged right to a fair public hearing. What he really wanted was to have a public rehearing, of precisely the same dispute, which had already been held where the merits had already been determined.

[35] About the first respondent's ulterior motives in that case for invoking breach of the entrenched clause in order to have a second bite of the cherry, Alkema J commented:

> "[104] The municipal manager would get a second bite at the cherry in the hope that he might be found not guilty, but that hope was not substantiated by any facts before us. Even if he were again found guilty, the financial benefits to him are substantial, with the added benefit that it gave him the opportunity of seeking alternative employment in the meantime without a tag of dismissal from his neck.
>
> [105] From the perspective of the municipality, the entire exercise would be one of futility, with great expense and inconvenience. The procedure would serve no purpose at all and the additional salary would be funded by the fiscus which would recover if from the members of the public."

[36] By belatedly invoking the protection of the "shifren" principle as entrenched in a clause of his contract of employment, the first respondent, Mr Hlazo, was not prompted to do so by any genuine consideration of good faith to assert any constitutional right in terms of section 33 or section 34. He was undoubtedly actuated by bad faith to prolong his disciplinary hearing so that he could continue milking the public cow – the fiscus – for as long as possible. Clearly that was an abuse of a due process of law for an ulterior motive and inequitable purpose.

[37] The "shifren" principle should only be invoked in clear, and I may add morally clean, cases in which the harm to the public is substantially contestable if the principle is not relaxed – **Fender's** case, *supra*.[5] The present matter fails the test. The judicial power to declare contracts contrary to public policy has to be exercised sparingly and only in the clearest of cases lest indiscriminate, power creates unwelcome legal uncertainty in the law of contracts.

[38] In the instant matter the defendant admitted that he was in breach of his contractual obligation. Therefore, the merits strongly favour the applicant, a party invoking the "shifren" principle in order to protect its legitimate right to a speedy adjudication of the matter. The plaintiff has no other swift procedural remedy faster than the procedure by way of summary judgment. That right is one of the vital values

[5] Vide footnote 7.

protected by the entrenched clause. The parties so mutually agreed right from outset of their business relationship.

[39] The defendant has virtually no hope that the plaintiff might lose the case on the merits if leave to defend is granted and the matter is allowed to go to trial. Certainly he knows very well that he has no defence on the merits. He has no leg to stand on. What he wants is merely to retard the process. The summary judgment procedure was designed to give the plaintiff with an unanswerable claim a speedy remedy. It would be wrong, in my view, to slow down the speedy and due process of summary judgment because, as it was argued, summary judgment is a drastic procedure which shuts the door in the defendant's face. This argument requires some balancing.

[40] Denying the plaintiff whose claim is clearly unassailable the real benefits of a remedial procedure mutually agreed upon in itself is a drastic decision. Where the merits strongly favour the plaintiff considerations of public policy militate against the idea of giving the defendant an opportunity of doing practically nothing meaningful other than delaying the action. The adverse impact of such a futile denial of the remedy must never be ignored.

> "[2] … Elke denkbare vertragingstaktiek is aangewend, aangehelp deur Howe wat telkens nie die aangeleentheid op meriete wou beoordeel nie."

<u>Brisley's</u> case, *supra* para [2]

This is one such case. However, I am not prepared to tolerate undue delays and frustrate the plaintiff.

[41] I am satisfied, on the peculiar facts, that the plaintiff did not invoke the "shrifen" principle with dirty hands or for any ulterior motive for the inequitable purpose of denying the defendant the right to have this dispute decided in a fair public hearing before the court. On the contrary I believe, and it is a very firm belief, that the defendant has no *bona fide* defence. I am convinced that he merely invoked the "shifren" principle for no legitimate purpose of asserting his right to a fair public hearing but rather for the sole ulterior purpose of frustrating the plaintiff's legitimate efforts of speedily vindicating his rights thereby delaying the inevitable day of judgment. Such practically purposeless delay will certainly have financially detrimental impact on the plaintiff and the relaxation of the principle would devalue the mortgage bond as an instrument of hypothecation to the dismay of the commercial world at large.

[42] The crux of the defendant's defence here was that the plaintiff's action was prematurely instituted. Accordingly the defendant put up the defence that the plaintiff's claims had not yet become due and payable at the time the action proceedings commenced on the 14 December 2012. This was also a technical and not a substantive defence. It follows therefore that the defendant does not deny that he is truly and

lawfully indebted to the plaintiff in respect of each claim and that he is in breach in respect of each agreement.

[43] On behalf of the plaintiff it was submitted that the version of the respondent was not only improbable but also untrue. Counsel for the plaintiff argued that it was ridiculous and unthinkable that a bank manager would, after three consecutive crop failures, still give the defendant two more years to repay the debt.

[43] In developing that argument further, counsel critically pointed out that the defendant did not disclose an important aspect as to how he planned to plant or to have his next crops financed in view of his recent natural disasters.

[45] The defendant's defence of verbal variation *pactum* was challenged on two distinct fronts. The first was lack of full disclosure of the material facts relied upon.[6] Where does he hope to get the money from to sustain such costly farming operations if he hardly has any to pay the plaintiff? I now proceed to examine the defendant's opposing affidavit to determine whether it complies with full disclosure requirements.

[46] He did not make any attempt to say that he intended to pay on the next crop harvest. He quickly jumped the gun. He chiefly cultivated maize and sunflower. He did not say whether the plaintiff had undertaken to finance him one more

[6] **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 426A.

time in connection with the planting of the next crops. The prospects of him again receiving finance from the plaintiff realistically appeared to be extremely poor. His financial crisis was, by his own say-so, not something knew. It started three years ago. It was certainly worsening. He has already started accusing the plaintiff for this rapid deterioration of his financial state of affairs. His allegation that the plaintiff was also to blame because, as he claimed, it gave him reckless credit ruined any chance he might have had of successfully applying to the plaintiff for further finalising.

[47] He estimated that his input costs for the current production season 2012/2013 would be approximately R8 million. From the maize harvest and the sunflower harvest he expected to generate an income of R4,8 million and R7,6 million respectively. The expected turn-over for the current production season was thus R12,4 million. Therefore, the defendant expected to make a clean profit of R4,4 million at the end of the current production season.

[48] Now, such a profit margin sounds like a melodious song to the ears. However, the question which remains unanswered is where will the very huge amount required to finance his farming operations come from. This is a crucial aspect of the plaintiff's concern. This is understandable. The recent history of the defendant's farming operations gives the plaintiff reasonable cause to be really apprehensive. Put differently, the defendant requires about R8,0 million loan to finance the planting of the crops this season alone. He failed

to disclose where he reasonably hoped to get such money from.

[49] If the plaintiff were to give a further credit of that huge magnitude, the defendant's indebtedness to the plaintiff, would astronomically rise to a figure well in excess of R12,4 million. That financial crisis of the defendant would certainly get even bleaker if the plaintiff's undisputed second claim of R3,84 million is also taken into account. In such a scenario the defendant would later complain, and rightly so, that the plaintiff had contravened section 81(2) again by giving him a further reckless credit.

[50] If the plaintiff were to give the respondent no such finance the defendant's would find it very difficult, if not impossible, to successfully apply and obtain a substantial loan of R8 million from another credit provider. His creditworthiness has been greatly impaired by the aforesaid catastrophic natural misfortunes. His ability to raise further loans, if he still has any, is now very limited because he has already bonded his three farms to the plaintiff as real security.

[51] To this already desperate financial situation of the defendant, with no immediate prospects of improvement, another unfavourable factor must also be taken into account. He experienced complete failure of crops in three years running. The first and third failures were due to severe drought whereas the second was due to severe flooding. No-one can rule out the possibility of yet another similar natural disaster

this season or the next. Such a possibility would probably not have escaped undetected and unappreciated by a banker asked to give an extension in the circumstance such as these.

[52] As I was drafting this judgment, there were already media reports circulating about the floods in the Eastern Cape. That cannot be treated as a remote possibility bearing in mind the recent disaster the defendant has experienced. Such reports would not sound well to the defendant.

[53] The first loan bears interest at a rate of 9% per annum which is calculated daily and compounded monthly. Suppose the loan generated interest at a simple and not compound rate, the accrued interest from 15 September 2012 until 31 December 2014 would be well over R540 000,00. By then the defendants effective indebtedness to the plaintiff, in respect of the first claim alone, would have increased to over a staggering figure of R3 million. Probabilities aside, these are financial realities of the matter. Show me one naïve banker who would give such a long extension of 27 months to a customer in a financial crisis like the one the defendant faces.

[54] It is so that the defendant was not required to exhaustively deal with the facts and the evidence he relied upon to substantiate them. He was, nonetheless required to adequately disclose his defence and the material facts on which it is premised with sufficient particularity and

completeness to enable me to decide whether his opposing affidavit discloses a *bona fide* defence – **MAHARAJ** *supra*, at 426D.

[55] In my view the averments in the defendant's affidavit were so devoid of sufficient completeness and particularity, so riddled with vagueness and improbabilities and so remote from commercial realities of the banking world, that I have no hesitation to make an adverse finding that he dismally failed to comply with the requirements of the rule. I would, therefore, uphold the plaintiff's first contention. On account of the vagueness of the alleged verbal variation pact, I would find that defendant has failed to satisfy me that he indeed has a *bona fide* defence which is good in law.

* [56] As regards the first ground of objection, the defendant contended that the plaintiff had failed to comply with the peremptory provisions of rule 32(2) Uniform Rules of Court when launching the current application for summary judgment. The objection was raised in *limine.*

[57] The rule provides that the plaintiff can apply for summary judgment on a liquid document or for a liquidated amount in money. The contention of the defendant was that no liquid document supported the plaintiff's claim. In brief rule 32(2) requires, *inter alia,* that where a plaintiff's claim is founded on a liquid document, such document must be attached to an affidavit in support of his application for summary judgment. In practice the deponent would refer to a liquid document in an

affidavit and attached it thereto. Together with the liquid document attached to it, an affidavit is then annexed to a notice of an application. This is but one way of complying with the rule. But it is by no means the only way.

[58] In the case where the manager's certificate or certificate of balance had already been attached to the summons as an annexure to the particulars of claim, the subsequent application for summary judgment cannot be dismissed on the ground that no certificate of balance was physically annexed to it. I am of the view that there would be proper compliance with the rule in such circumstances. It would serve no practically useful purpose to again attach a copy of a liquid document, which is already on court file, to a subsequent application for summary judgment.

[59] The defendant further objected to plaintiff's application for summary judgment because, as he contended, no document labelled "anx c" was attached to the summons. I had occasion to peruse the court record. The perusal thereof indicated that a certificate of balance marked "annexure c" was in fact attached to the plaintiff's particulars of claim – vide page 61 of the record. The defendant did not venture to argue that, according to his perusal of the court record, that particular page was something else and not a certificate of balance, marked "annexure c". Moreover it was not his case that after he had discovered that there was no "annexure c" attached to the copy of the particulars of claim served on him, he ever called upon the plaintiff to provide him with the missing

annexure and that despite that request the plaintiff failed to do so.

[60] The defendant's contention that the copy of the summons served on him did not contain "annexure c" was clearly inconsistent with the sheriff's return. The sheriff indicated precisely what annexures he served on the defendant personally on 28 January 2013. Among those annexures, he specifically referred to "annexure c". Again it was not his argument that he ever pointed out to the sheriff, at any stage, that the copy of the summons served on him was defective.

[61] It was submitted on behalf of the defendant that, at best, the plaintiff's first claim was based on a liquidated claim in money since the continuing covering bond "annexure a" itself did not constitute a liquid document within the meaning of the rule. That the bond document *per se* does not constitute a liquid document is undoubtedly correct.[7] However, the bond document was not the sole basis of the first claim. The bond document (annexure a) was substantially amplified by the certificate of balance (annexure c). The latter, unlike the former, was a perfectly liquid document. It derived its liquid character from clause 9 of "annexure a".

[62] It was an express term upon which the parties had agreed that such a certificate (annexure c) would *prima facie* constitute proof of the defendant's indebtedness to the plaintiff.

[7] **Erasmus – Superior Court Practice, B**1 – 210 (par headed subrule 1(a) read with page B1 – 65 (passage preceding footnote 1). **Nedcor Bank Ltd v Lisimfo 61 Trading (Pty) Ltd** 2005 (2) SA 432 (C) at 435F – 437G.

Therefore, the onus of proving the contrary squarely rested upon the defendant. He unsuccessfully tried to show that the plaintiff had failed to comply with clause 9. Since he has failed to do so, the *prima facie* proof tendered by the plaintiff became conclusive proof, not only of the averments contained in the certificate, but also of the legal nature of the document itself.

[63] It was submitted on behalf of the plaintiff that the defendant's objection was really nothing more than the proverbial storm in a tea cup. I also think so. I am, therefore, persuaded to find that "anx c", on which the plaintiff relied in support of the first claim, was a perfectly valid liquid document and that it was correctly served on the defendant. I would, therefore, dismiss the preliminary objection. In my view the point, raised *in limine*, was not well taken.

[64] The plaintiff relied on the second certificate of balance "anx h" in support of the second claim. In this regard there was no dispute in connection with the sheriff's service of that certificate. The only complaint raised by the defendant here was that "anx h" was not a liquid document and that it was not attached to the summary judgment application. I have already entertained, considered and made findings on both aspects of the defendant's argument in respect of the first claim. By those comments and findings I abide. The objection dismissed.

* [65] As regards the second ground of opposition, the defendant contended that the plaintiff had failed to plead that it had

complied with the peremptory provisions of section 81(2) National Credit Act, 34 of 2005 when it concluded the first loan agreement with the defendant. The plaintiff's failure to comply with such imperative statutory provisions, so contended the defendant, rendered the transaction whereby the loan(s) was given a reckless credit.

[66] Section 81(2), Act No. 34 of 2005 reads:

> "(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection **(1)** as they existed at the time the agreement was made, and without regard for the ability of the consumer to risks, costs or obligations under the proposed credit agreement; or 20*(a)* meet the obligations under that credit agreement; or *(b)* understand or appreciate the risks, costs and obligations under the proposed credit agreement, at the time the determination is being made."

[67] The words or phrase reckless credit are defined in section 1 as follows:

> "(1) **A** credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)- *(a)* the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome **of** such an assessment might have concluded at the time; or *(b)* the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement

> with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-
> (i) the consumer did not generally understand or appreciate the consumer's (ii) entering into that credit agreement would make the consumer over indebted."

[68] Where a court is satisfied that a credit provider has recklessly given credit to a consumer, relief may be granted to such an over-indebted consumer in terms of section 83(2).

- Section 83(2)(a) provides:

> "***83****(2)(a)* setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances;.."

- Section 83(2)(b) provides:

> "***83****(2)(b)* suspending the force and effect of that credit agreement in accordance with 45 subsection (3)(b)(i)."

[69] The defendant's contention was that the plaintiff was prohibited in terms of section 81(2) from concluding a credit agreement with him, as he did, by way of a mortgage bond because, as he contended, the plaintiff did not first take reasonable steps to assess his credit profile in respect of:

- his general understanding and appreciation of the risks as well as the costs of the proposed credit agreement, his rights and obligations under the proposed credit agreement;

- his debt repayment history as a consumer under past credit agreements;
- his existing financial means, projects and obligations.

[70] The defendant alleged that, as far as he could remember, the plaintiff had never asked him to provide any documentary proof of his income before the first credit agreement was concluded.

[71] The defendant's second defence, which was also technical and not substantive in nature, was that in its particulars of claim the plaintiff did not allege that the credit facility given to him, was not reckless credit. The objection was raised to an application for summary judgment. Where a summons is defective, an objection to it is raised by way of an exception. In this instance, however, the defendant did not pertinently allege that the summons was excipiable for want of the necessary averments as one would have expected.

[72] The alleged commercial transaction which the defendant characterised as credit recklessness was premised on the allegation that the plaintiff never verified the defendant's income before credit was given to the defendant. On the one hand the defendant emphatically stated that

> "the applicant never requested me to furnish it with any documentation pertaining to and in support of my income".

On the other hand that emphatic denial was preceded by a doubtful sentence:

> "As far as I can remember…"

[73] Seeing that the defendant himself is obviously uncertain as to the actual facts which immediately preceded the conclusion of the credit agreement, his allegation that the plaintiff never requested him to furnish any written proof of his income seemed rather questionable. The aforesaid doubtful introductory words in my view drastically diminish the substance of his objection based on the alleged credit recklessness.

[74] As if the afore-going down-grading of his own defence was not bad enough, the defendant rounded off his ill-conceived contention by stating:

> "8.2.4 The possibility therefore exists that the relevant mortgage agreement (in any event) amounts to the Applicant's granting of reckless credit, which possibly should be investigated during the trial of the action under discussion;…"

[75] To resist an attack by way of a summary judgment, the respondent was required to aver arguable facts which might constitute plausible defence.[8] In my view the defendant failed to aver arguable facts from which I can determine in terms of section 81(2), National Credit Act, 34 of 2005 that the plaintiff,

---

[8] Van Niekerk *et alie:* "Summary Judgment – A Practical Guide" p 9 – 8 especially par 9.5.1.3.

as a credit provider, neglected to take reasonable steps to make proper assessment of the defendant's creditworthiness and in particular his financial ability to repay the loan in accordance with the criteria as prescribed in the section.

[76] The defendant's contention was grounded on some vague illegations of credit recklessness. The defendant failed to put up a possible defence. I can only grant leave to defend, by virtue of an arguable defence and not a remotely fanciful possibility. In this matter I am not persuaded that the mortgage bond on which the claim is based was tantamount to a credit agreement tainted by credit recklessness.

[77] In the light of the aforegoing conclusion, I would dismiss the defendant's defence of credit recklessness. In the circumstances the defendant is not entitled to any order in terms of section 83(2) National Credit Agreement. Again it must be pointed out that this defence just like the previous defence did not go to the merits of the matter. What is more, it was very poorly articulated in the opposing affidavit. If such averments can be held to constitute an answer to the plaintiff's claim, then the speedy remedy by way of summary judgment may as well be held to be obsolete.

[78] Mere repetition of the factors referred to in the relevant section without elaborating as to how the credit providers violation of each of those factors directly affected the defendant, without disclosing cogent reasons as to precisely when the defendant became aware of the plaintiff's prohibited

conduct and without explaining why the defendant had taken no meaningful practical steps, before the plaintiff instituted these proceedings, to seek the relief he now seeks - only demonstrates, in my view, lack of *bona fides* on the part of the defendant.

[79] Apart from the bold accusations that the plaintiff contravened section 81, he failed to show the extent of his over-indebtedness at the time(s) the plaintiff gave him reckless credit as he alleged. He admittedly received the notice in terms of section 129 in respect of each claim months before the plaintiff instituted these proceedings on 14 December 2013. Notwithstanding such an opportunity, he apparently did not seize the moment to approach a debt counsellor, debt reviewer or onbudsman to complain about the reckless credit given to him.

[80] In the circumstances, I am satisfied that the alleged credit recklessness cannot be successfully relied upon as the basis of the defendant's arguable defence to the action. The defendant's affidavit failed to adequately disclose the nature and grounds of such defence and the material facts relied upon in support thereof. I would, therefore, dismiss the defendant's second ground of opposition.

[81] These then are the reason for the *ex* tempore order I make on 14 March 2013.

M. H. RAMPAI, AJP

On behalf of applicant:	Adv. P. J. Heymans Instructed by: E G Cooper Majiedt Inc BLOEMFONTEIN
On behalf of respondent:	Adv. C. Snyman Instructed by: Graham Attorneys BLOEMFONTEIN

/eb