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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 8491/2022

In the matter between:

LIONS HILL DEVELOPMENT COMPANY (PTY) LIMITED First Applicant
(Reg. no. 2004/001232/07)

**THE TRUSTEES FOR THE TIME BEING OF
THE KSK TRUST** Second Applicant
(Reg. no. IT1947/2007)

STONEHILL PROPERTY GROUP (PTY) LTD Third Applicant
(Reg. no. 1987/001807/07)

SHAUN LOUIS RAI Fourth Applicant

and

INVESTEC BAK LIMITED Respondent
(Reg. no. 1969/004763/06)

JUDGMENT

JANISCH AJ:

Introduction

1. The Applicants, as recipients of loans from the Respondent and security providers, fell into default in respect of their repayment obligations. Following the Respondent's issue of summons against the Applicants (*"the Action"*), the parties entered into a settlement agreement and later an addendum. By agreement, both were made orders of court.
2. The Applicants now seek, as their primary relief, the rescission of these orders which were granted on 6 June 2022 (*"the First Order"*) and 20 December 2022 (*"the Second Order"*) (together *"the Orders"*).
3. In the first alternative, if rescission is refused, the Applicants ask for declaratory relief to the effect that the Orders are not capable of enforcement for purposes of executing against the movable and immovable assets of the Applicants *"until the Respondent has obtained final judgment in the action under case no. 8491/2022 and has successfully taken steps in terms of rules 45, 46 and/or 46A of the Uniform Rules"*.
4. In the second alternative, the Applicants seek the variation of the Orders in the following respects, namely: (i) that the Orders should no longer provide that, upon breach thereof, the settlement agreement (now the Order) operates as a judgment against the Applicants, but should record that, upon breach thereof, the Respondent is entitled to persist with the Action in order to obtain judgment against the Applicants, and (ii) that the paragraphs in the Order that authorize the pursuit of execution steps in the event of breach should apply only upon the Respondent obtaining final judgment.

5. The second alternative relief is sought on two bases, namely: (i) the court's inherent power to amend interlocutory orders, and (ii) the court's power to vary orders in terms of Uniform Rule 42(1)(b).
6. If the Respondents are successful in any of the above respects, they ask to be granted 20 days from the date of the order to file their plea in the Action.
7. The Respondent opposes all the relief sought. As an overarching point, it contends that any right to seek rescission of the Orders is preempted. If that does not dispose of the matter, it contends that the relief is not available on the merits.

The factual matrix

8. It is necessary to set out the factual background in some detail.
9. The First to Third Applicants are all entities associated with the Fourth Applicant whom the Respondent describes, unchallenged, as "*the moving spirit behind the other applicants.*"

The loan agreements and related arrangements

10. The commercial relationship between the Applicants and the Respondent (a bank) commenced in 2018. In the ensuing period the Respondent advanced considerable sums to the Applicants, primarily to enable property investments or developments. The Applicants have also in various ways provided personal and real security for the indebtedness to the Respondent.
11. It is not necessary to describe the various loans and associated security arrangements in great depth. Suffice it to say the following:
 - 11.1. The largest of the loans was advanced to the First Applicant for purposes of a property development in Cape Town. The original loan

was concluded in August 2018, with additional advances being made in 2020 and 2021. As at 26 October 2021 it was agreed that the indebtedness was R216,653,454.97. The Second and Fourth Applicants provided guarantees and indemnities for debts under the loan, limited to R180 million. The First, Second and Fourth Applicants also registered mortgage bonds over immovable properties as security for the indebtedness.

11.2. The Respondent advanced three separate loans to the Second Applicant. The sums advanced were respectively R23,580,365, R10,983,100 and R54,811,000. The repayment period for two of these loans was extended by agreement. The Fourth Applicant provided guarantees and indemnities in favour of the Respondent for the debts of the Second Applicant.

11.3. The Respondent advanced a loan to the Third Applicant in the sum of R3,400,000. The Third Applicant registered a mortgage bond over an immovable property as security for the indebtedness. The Fourth Applicant provided a guarantee and indemnity in favour of the Respondent for the debts of the Third Applicant.

11.4. The Respondent granted the Fourth Applicant a credit facility associated with his private bank account.

11.5. Finally, the Respondent entered into an instalment sale agreement with the Fourth Applicant in respect of the purchase of a motor vehicle (*“the ISA”*). The Respondent took security over the vehicle.

The Action

12. By March 2022, the Applicants were in default in respect of the finance arrangements set out in paragraphs 11.1 to 11.4 above. Although there were discussions regarding further extensions of repayment terms, on 1 April 2022 the Respondent issued summons against the Applicants (the Action).

13. In its particulars of claim, the Respondent set out the terms of the various loan agreements with the Applicants, as well as the associated security arrangements.
14. The Respondent pleaded that the Applicants were in default of their obligations in various respects, and that they were liable for the full amounts outstanding under those agreements. Certificates of balance certifying the amount owed by the Applicants at the time were annexed.
15. The Respondent claimed payment of the certificated amounts, interest at the prime rate, and a declaration that certain immovable properties owned by the different Applicants was specially executable.

The settlement agreement

16. On 4 April 2022, shortly after summons was served in the Action, the parties entered into the settlement agreement.
17. There is no dispute that the settlement agreement was entered into seriously, freely and voluntarily, with all parties having received legal advice.
18. The settlement agreement is a detailed document. It has 16 pages of substantive terms incorporated in 42 paragraphs. Given the nature of the relief sought in this application, it is necessary to address its contents in some detail.
19. The preamble commences with recordals that:
 - 19.1. the Applicants are in breach of their obligations to the Respondent in respect of the various causes of action pleaded in the summons; and
 - 19.2. the Fourth Applicant is also liable to the Respondent in respect of the ISA for an amount of R828,763.87 (*“the ISA Debt”*).

20. It is recorded that the parties had agreed to settle all and any claims which the Respondent may have against the Applicants as set out in the summons and in respect of the ISA, which settlement they wished to record in writing and make an order of Court.
21. Paragraphs 1 to 4 of the settlement agreement fall under the heading “*Acknowledgement*”. In these paragraphs:
- 21.1. The Applicants acknowledge that as at the date of the settlement agreement they are indebted to the Respondent “*as set out in terms of prayers (a) to (x) of the summons*” (these being all the prayers), and are also jointly and severally indebted to the Respondent for a contribution towards its legal costs in the amount of R200,000.00 (together “*the Summons Debt*”).
- 21.2. The Applicants acknowledge that the various immovable properties reflected in the summons and mortgaged to the Respondent serve as security for *inter alia* the Summons Debt and the ISA Debt, and the Respondent is entitled to realise such properties in the event that the Applicants are in breach of their obligations as set out in the settlement agreement.
- 21.3. The Applicants acknowledge that the Summons Debt is currently due, owing and payable to the Respondent and that in order to discharge *inter alia* that debt, certain properties owned by the Applicants must be sold.
22. It is then recorded that the parties wish to enter into the settlement agreement “*to regulate the sale of such properties and the discharge of inter alia the Summons Debt to the [Respondent]*”.
23. Clauses 5 to 7 deal with the ISA. It is recorded that there would be an early termination of this agreement on or before 30 June 2023, whereupon the

settlement value would be paid by the Fourth Applicant to the Respondent. Until that date, the Fourth Applicant would continue to comply with the terms of the ISA, failing which there would be a breach of the ISA and the settlement agreement, triggering the default provisions of paragraph 33 (which I reflect below).

24. Clauses 8 to 10 provide for the Respondent to advance certain additional funding amounting to R19,330,000 to the First and Second Applicants.
25. Clauses 11 to 13 record that the First Applicant owes the Respondent a finance fee of R13,600,000.00 under its loan agreements, and that the Applicants undertake jointly and severally to pay this fee on demand. In the absence of demand, the amount will be payable when the full outstanding loan balance is paid on or before 30 June 2023, as contemplated in a later clause.
26. Clauses 14 to 16 make provision for a “*penalty fee*” in the event of the Applicants being in breach of their obligations to the Respondent under the settlement agreement or the loan agreements. The penalty is calculated on a sliding scale from R4 million to R0 depending on the balance of the debt owing by the First and Second Applicants at the time it becomes payable. The First, Second and Fourth Applicants are jointly and severally liable for the penalty fee which is payable on demand in the event of a breach.
27. Clause 17, which plays a prominent role in the Applicants’ case, provides as follows:

“On condition that the [Applicants] (or any one of them as the case may be) comply timeously and in full with each and every one of their obligations to the [Respondent] in terms of the Settlement Agreement, the [Respondent] will hold over on any further steps in terms of the Summons”.

28. Clauses 18 to 20 provide a revised payment schedule for the settlement of all the amounts owed, being the Summons Debt, the ISA Debt, the additional funding provided and the finance fees (together the “*Consolidated Debt*”). The schedule provides payment milestones, culminating in the payment of the full outstanding balance by 30 June 2023. Amounts arising from the earlier sale of certain properties will be immediately applied to reduce the indebtedness.
29. Clauses 21 to 24 make provision for the Respondent to agree to a further restructuring of the outstanding balance of the consolidated debt if the Applicants are up to date with their repayment obligations as at 30 November 2022.
30. Clauses 25 to 31 regulate special powers of attorney (“*SPOAs*”) authorising the Respondent to dispose of certain properties held by the First and Second Applicants. Some of those *SPOAs* already existed and would remain in place. Another *SPOA* would be executed by the First Applicant in respect of its properties, although this would not be exercised if the Applicants were not in breach of the settlement agreement or the loan agreements.
31. Clause 32 varies the interest rate in respect of the Second Applicant’s loan agreements.
32. Clause 33, which together with clause 34 falls under the heading “*Breach*”, is central to the present dispute.
33. Clause 33 provides that should any one of the Applicants breach any of the terms of the settlement agreement or the terms of the *SPOAs* or attempt to withdraw an *SPOA*, or breach any of the terms of the loan agreements which are currently in existence between them, including the ISA, then the following would occur:
 - 33.1. “[t]he full outstanding balance of the Consolidated Debt shall be immediately due, owing and payable by the [Applicants], jointly and severally where applicable, and subject to the limitations set out in the

Summons as may be applicable, without further notice” (clause 33.1. The “limitations” pertain to restrictions on the amount of indebtedness under the guarantees and indemnities provided by the Second and Fourth Applicants as reflected in paragraph 11.1 above);

33.2. the First, Second and Fourth Applicants would be liable to pay the penalty fee on demand (clause 33.2);

33.3. the Respondent would be entitled to recover any legal costs over and above the agreed contribution of R200,000 from the Applicants jointly and severally (clause 33.3);

33.4. “[t]he settlement agreement, having been made an order of Court, shall operate as a judgment against the [Applicants]“ (clause 33.4);

33.5. “[t]he [Respondent] shall be entitled, at its election, to proceed with recovery procedures and/or execution steps against the [Applicants] (or any one of them) in respect of the full outstanding balance of the Consolidated Debt, the Penalty Fee and further costs” (clause 33.5); and

33.6. “[t]he [Respondent] shall be entitled, at its election and without prejudice to any of its other rights, to exercise any rights and any remedies to which it is entitled under law against the [Applicants] (or any one of them) including but not limited to exercising its rights under the SPOAs, the issue of a writ of attachment and the sale of the properties mortgaged to the [Respondent] and/or the issue of applications for the liquidation/sequestration of one of the [Applicants], as may be applicable” (clause 33.6).

34. In clause 34, it is provided that on condition that the Applicants are not in breach of any of the terms of the loan agreements “for the duration of the implementation of the settlement agreement, full compliance by the [Applicants] with the terms of the Settlement Agreement (including repayment

of the Consolidated Debt), will constitute full and final settlement of the [Applicants'] obligations to the [Respondent] in terms of the Summons, the ISA and the Additional Funding".

35. The final provisions of the settlement agreement, under the heading "General", include the following:

35.1. An arrangement that *"for any purpose in connection with the Settlement Agreement, a certificate of balance signed by any one of the [Respondent's] managers or assistant managers as to the outstanding balance of the Consolidated Debt (or any part thereof) and the Penalty Fee shall be prima facie proof of the [Applicants'] indebtedness to the [Respondent]"* (clause 35).

35.2. An agreement that *"[t]he Settlement Agreement does not constitute a novation of the [Respondent's] causes of action and security as set out in the Summons or the ISA"* (clause 36). I note that the clause contains what both parties accept was a typographical error by referring to the Applicants' causes of action, whereas it should refer to the Respondent's causes of action. My recordal of the term above reflects what was intended.

35.3. Any illegal or unenforceable provision in the settlement agreement is excisable and will not affect the validity or enforceability of the remainder thereof (clause 38).

35.4. *"The Settlement Agreement shall be made an order of Court"* (clause 40).

36. In accordance with the parties' agreement, the settlement agreement was made an order of Court on 20 June 2022 (i.e. the First Order).

Breach and the first addendum

37. The Applicants were unable to meet the revised payment schedule contained in the First Order. Instead of proceeding with enforcement mechanisms under the First Order, the Respondent entered into further negotiations with the Applicants. These culminated in the first addendum to the settlement agreement, which was concluded on 14 November 2022.
38. The addendum makes no significant changes to the core elements of the settlement agreement (i.e. the First Order) which the Applicants impugn in this application. The following aspects however bear highlighting.
39. The preamble records that certain payments have been made pursuant to the settlement agreement, but that the Applicants are nonetheless in breach thereof. The Respondent is accordingly entitled to proceed in terms of clause 33 of the First Order. However, the Respondent is prepared *inter alia* to extend certain payment due dates in clause 18 of the First Order on the terms contained in the first addendum.
40. The first addendum records an agreed increase in the Applicants' contribution to the Respondent's legal costs, the provision of yet further additional funding by the Respondent to the First and Second Applicants (i.e. a further sum of R14,375,000), an additional finance fee, amendments to the penalty fee provisions and adjustments to the payment schedule (including the extension of the date for final payment to 30 November 2023). Certain agreements were reached regarding the marketing and sale of seven properties owned by the Second Applicant.
41. Finally, it was recorded that save as provided for in the addendum, the provisions of the settlement agreement would continue to apply and be binding on the parties, and that the addendum was to be made an order of court.
42. In accordance with the parties' agreement, the first addendum was made an order of court on 20 December 2022 (i.e. the Second Order).

43. The First and Second Orders are accordingly to be read together as a single order.

Further breach and negotiations

44. Despite the further respite provided by the Second Order, the Applicants were unable to meet the revised payment schedule, and once again fell into breach.
45. Even then, the Respondent did not simply turn to enforcement measures. It engaged the Applicants in further negotiations for the conclusion of a second addendum. These negotiations failed. The papers detail the Applicants' difficulties with what the Respondent required to be included in a further settlement. These included restrictions on how the proceeds of the sale of a particular property were to be applied to different items of indebtedness, and the proposed revised payment schedule (which the Fourth Applicant says was not achievable). A significant bone of contention seems to have been the arrangements for the sale of the Fourth Applicant's own properties. Although the draft agreement apparently provided that in the event of a breach the Respondent would not exercise its rights over those properties until certain other properties held by the First and Second Applicants had been sold, the Fourth Applicant wanted an absolute suspension of the marketing and sale of those properties for one year. The Respondent was not prepared to agree to this.
46. On 4 April 2024 the Respondent put the Applicants to terms to sign the second addendum, reiterating that if that were done, there would be no sale of the Fourth Applicant's properties until the other properties had been sold. If the agreement was not signed, the Respondent would however proceed in terms of the default clauses in the settlement agreement.
47. The second addendum was not signed.

48. The Applicants then sought further legal advice. Pursuant to that, on 31 May 2024 they launched the present application. The Respondent had apparently not yet taken any execution steps pursuant to the Applicants' breach.

The application

49. The fundamental averment on which the application is based is that the Orders are invalid and unenforceable. The bases for this, as described in the Applicants' heads of argument, are that the Orders do not:
- 49.1. in all instances "*relate directly or indirectly to an issue or lis between the parties*";
 - 49.2. amount to a final judgment capable of giving the Respondent the right to enforce it by seeking immediate or direct execution. In this regard, they also do not amount to a final judgment capable of allowing the Respondent, at this time, to follow the execution processes set out in rules 45, 46 or 46A;
 - 49.3. constitute orders which are clear and unambiguous;
 - 49.4. provide a formulation in a way that compliance therewith is not left to the discretion of the parties or the Sheriff; and
 - 49.5. give final effect to the judgment which brings the dispute to closure, i.e. it ought to render the issues between the parties *res judicata*.
50. On that basis, the Applicants ask for the rescission of the Orders in their entirety. Such an order would place the Respondent in a position where it would need to press on with the Action (or launch a new action based on the settlement agreement) and take a new judgment against the Applicants.
51. In the alternative, if the Orders are not rescinded, the Applicants seek relief (as described in paragraphs 3 to 5 above) that would nonetheless preclude

the Respondent from enforcing the Orders before it (the Respondent) had taken final judgment under the Action.

52. What the Applicants envisage is that, if the relief sought is granted, they would be entitled to contest the Action on any grounds available to them, in respect of which they seek leave to file a plea within 20 days. They intimate that there are various defences that they would seek to raise. These include “*the validity of the loan agreements, [the Applicants’] liability and the so-called guarantees under the summons*” – in other words, defences to the merits of the claim.
53. The Respondent opposes the application and argues that none of the grounds relied upon to impugn the Orders have substance.
54. As a preliminary ground of opposition, the Respondent however contends that any attempt to have the order rescinded at this stage is preempted. It states that this disposes of all the relief sought by the Applicants. It is therefore appropriate for me to address this aspect first.

Peremption

55. The common law principle of peremption arises most commonly in the context of appeals. It is underpinned by the notion of finality of legal proceedings. Stated in its simplest terms, the principle is that a person who has acquiesced in a judgment cannot appeal against it.
56. Peremption is however not limited to appeals, but applies also to attempts to rescind a judgment or order. In **Zuma v Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector** 2021 (11) BCLR 1263 (CC), Khampepe J said the following (in paragraph [101]):

“It is trite that the doctrine of peremption finds application across our legal landscape. The doctrine tells us that ‘[p]eremption is a waiver of one’s constitutional right to appeal in a way that leads no shred of reasonable

doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against'. The principle that underlies this doctrine is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approve and reprobate'. Notwithstanding this, our law does allow for some flexibility where policy considerations exist that militate against the enforcement of peremption. Although the doctrine has its origin in appeals, the doctrine and its principles do apply equally in the case of rescission." (underlining added)

57. Peremption, being a form of waiver of a right, is not necessarily easily established. The person relying on it bears the *onus* to establish it. As stated in **South African Revenue Service v Commission for Conciliation, Mediation and Arbitration** 2017 (1) SA 549 (CC) in paragraph [26]:

"The onus to establish peremption would be discharged only when the conduct or communication relied on does 'point indubitably and necessarily to the conclusion' that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order."

58. Peremption is therefore based on an evaluation of the aggrieved party's conduct. A range of evidence may be admissible for this purpose. Acquiescence can be inferred from any unequivocal conduct inconsistent with the intention to appeal (**Gentiruco AG v Firestone SA (Pty) Limited** 1972 (1) SA 589 (A) at 600A-B).
59. The question which arises is whether the conduct of the Applicants indeed points "*indubitably and necessarily*" to the conclusion that they acquiesced in the Orders and abandoned any right they may otherwise have had to rescind the order. If so, peremption will have been established.
60. In my view, the evidence points very strongly to unequivocal acquiescence with the Orders; in other words, to the Applicants having conducted themselves over a considerable period of time in a manner inconsistent with

any intention to challenge the validity of the Orders. The primary indications are as follows.

61. First, at the risk of stating the obvious, the Orders are the result not of imposition by a court against the Applicants' will, but of the voluntary entering into of the settlement agreement and the addendum. They are born out of agreement and a willingness on the part of the Applicants to be bound by them from the outset as orders of Court. The Applicants were legally represented in so agreeing. There is no dispute that they entered into the agreements seriously. The Orders were advantageous to them, given the fact that they were indisputably in breach and received more time to pay.
62. Second, there is the passage of time. The first settlement agreement was concluded in April 2022 and became the First Order in June 2022. The first addendum was concluded in November 2022 and became the Second Order in December 2022. The aspects of the Orders on which the Applicants now seek to impugn them were all contained in the First Order. At no stage until the issue of the present application – a period of two full years from the date of the settlement agreement – was there any hint that the Applicants did not regard themselves as bound by the Orders. This is strongly indicative of acquiescence.
63. Third, I assume (in the absence of evidence to the contrary, which the Applicants would clearly have provided had there been any) that the Applicants received the additional finance to which the Respondent committed itself in the Orders. They thereby accepted the benefits of the Orders. This is inconsistent with a contention that they did not acquiesce in the Orders.
64. Fourth, when the Applicants fell into breach under the First Order, they did not seek to challenge the validity of that Order but engaged in negotiations to amend the settlement agreement through the first addendum. The first addendum contained a specific acknowledgement that the Applicants were in breach of the First Order and that the Respondent would be entitled to proceed in terms of clause 33 thereof (i.e. the breach clause, which is a

primary target of the present application). They also agreed that the first settlement agreement, as amended, would continue to apply and be binding on them, and that the first addendum would be made an order of court (as it duly was). The very content of the first addendum therefore unequivocally conveys their acquiescence with the First Order and what are now challenged as being invalid terms thereof.

65. In this respect the judgment in **Jiyana v Absa Bank Limited** [2020] ZASCA 12 is on point. The appellants had sought to set aside a default judgment granted against them following default on a home loan agreement. There was a settlement agreement made an order of court for the payment of the arrears. The appellants defaulted again and another default judgment was granted. Unsuccessful attempts were made to invalidate that default judgment through applications for rescission of the orders. The property was attached. Another settlement agreement was entered into, which was again breached. Applications to interdict the sale in execution failed and the property was sold.
66. The primary question on which the appeal turned was peremption, i.e. whether it was permissible for the appellants to impugn the default judgment given the settlement agreement entered into. Relying on **South African Revenue Service v CCMA** (*supra*) and the authorities referred to above, the court had regard to the terms of the settlement agreement as evidencing the conduct of the appellants. It stated as follows:

“By confirming to (sic) the validity of the default judgment and accepting their liability towards Absa pursuant to that judgment, it was no longer open to the appellants thereafter, to impugn it. As explained by the Constitutional Court in Eke v Parsons 2016 (3) SA 37 (CC) para 31, the result of a settlement agreement made an order of court is that a party is precluded from relying on a course of action or defence that could have been advanced or raised but for the settlement order ... in my view, there could be no clearer conduct pointing to the abandonment of their right to attack the default judgment than clause 1 of the settlement agreement. The

appellants clearly resigned themselves to the consequences of the judgment against them, and committed themselves to fulfilling its terms.”

67. Fifth, once it became clear that the Second Order would also not be complied with, the Applicants, in an attorneys’ letter of 21 September 2023, assured the Respondent of their “*earnest intentions to adhere to the settlement agreement*”. Once again, instead of casting doubt upon the validity of the agreements and Orders, the Applicants entered into settlement negotiations for revised repayment terms.
68. In my view, the conduct of the Applicants reflected above points indubitably and necessarily to the conclusion that they resigned themselves to the Orders and abandoned any right to challenge their legitimacy. The fact that the Applicants applied to rescind the Orders at the last minute, when the negotiations had reached an impasse, cannot reverse a peremption that had already occurred as a matter of fact.
69. The Applicants now contend that they only became aware of the Respondent’s intention to execute on the Orders, and in particular to sell the Fourth Applicant’s personal properties, on 20 March 2024, and that this was what resulted in the application being launched some three weeks thereafter (on 12 April 2024). The argument is that, between those two dates, the Applicants did not acquiesce in the conduct of the Respondent and its intention to sell properties in terms of the Orders. In the replying affidavit it is stated that the Applicants acted expeditiously “*as soon as the difference in interpreting the Court orders became clear between the parties.*”
70. This is not the test in relation to peremption. The question is whether the Applicants acquiesced in the Orders. As shown above, the Applicants had at all times accepted (and even benefited from) the applicability of the Orders, and were aware of the provisions of clause 33 involving a final judgment in the event of breach, and the powers of enforcement or execution flowing from it. This pertained to all the properties referred to in the Action. Even if it is true that the Applicants had a different interpretation of the Orders, a dispute about

their interpretation cannot alter the fact that they submitted to them as binding orders.

71. I therefore agree with the Respondent that the Applicants preempted any right to claim rescission of the Orders.
72. This, however, is not the end of the preemption enquiry. In **Booi v Amathole District Municipality** 2022 (3) BCLR 265 (CC) in para [29], it was held that while preemption serves the important purpose of legal certainty, a court may decline to enforce a preemption if doing so would not advance the broader interests of justice. In other words, preemption may not be enforced where overriding policy considerations militate against this.
73. In **South African Revenue Service v CCMA** (*supra* in paragraph [28]), the Constitutional Court explained that:

“[t]he broader policy considerations that would establish preemption are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interests of the parties and of justice. But, where the enforcement of that choice would not advance the interests of justice, then that overriding constitutional standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal.”

74. One of these circumstances is where the court would be bound, as a result of a mistake of law by a party in deciding not to challenge an order, to what is legally untenable (**Government of the Republic of South Africa v Von Abo** 2011 (5) SA 262 (SCA) at 270 D-H).
75. In my view, this cannot mean that preemption will always be overcome if the order is wrong as a matter of law. If that were so, preemption would largely be a dead letter. The primary good which preemption seeks to protect is finality and legal certainty as between parties. The question will be whether, in the

interests of justice, the case is one in which enabling a party to challenge a perempted order outweighs the resultant loss of finality and certainty.

76. In my view, the present is not such a case. The parties, both legally represented, reached settlements in circumstances where the Applicants were already in breach in respect of significant amounts of money and where the Respondent had every right to pursue its legal remedies. They concluded detailed settlement terms on two successive occasions. These agreements, contrary to what the Applicants now contend, amounted to a compromise. The Respondent was prepared not to pursue the full and immediate enforcement of the indebtedness and to execute on the associated security, on condition that the Applicants met revised payment targets; but it obtained the protection of an acceleration clause with the effect of a final judgment in respect of the outstanding indebtedness if the Applicants breached. The Applicants benefited from receiving additional funding and more time to repay their debt, but had to agree to incorporate within the settlement aspects such as the ISA debt and the penalty fee, and the enforcement terms of clause 33.
77. The rescission application only arose when the Applicants realized, colloquially speaking, that they had “*run out of road*” in seeking to keep the settlement afloat for a further period. They resorted then to attacking the Orders on grounds which do not cast doubt on their fundamental indebtedness to the Respondent. This bears the hallmarks of last-ditch manoeuvring to avoid the adverse consequences of the Orders. The timing of the attacks is opportunistic. Their purpose seems to be solely to delay the Respondent’s ability to recover the funds advanced. This is egregious given the history of the Respondents being prepared to accommodate the Applicants to enable them to comply with their obligations.
78. The fact that the Orders flowed from settlement agreements, rather than being imposed on the Applicants against their will or without their co-operation, is also an important factor in the enquiry into the interests of justice. The common law has always supported the resolution of disputes by agreement. As stated in PY v YL 2013 (6) SA 28 (ECG) in paragraph [22] and cited with

approval by the Constitutional Court in **Eke v Parsons** 2018 (3) SA 37 (CC) in paragraph [22], “[a] compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits.” In such circumstances, there would in my view have to be particularly compelling reasons to permit a litigant that had consciously and seriously agreed to a settlement order, and had implemented and acquiesced in it, to seek to extricate itself from that order. I do not believe that such reasons are present here.

79. Accordingly, even if there were a legal basis to challenge the content of the Orders, a matter that I address below, in the exercise of my discretion I cannot conclude that this is a case in which the court should override the effect of perception in the interests of justice.
80. In any event, I do not think that the rescission application would succeed on its merits. I turn to address that issue.

The merits – rescission

81. There is authority that an order made by agreement pursuant to a settlement may be rescinded where the contractual arrangement on which the order is based is unlawful (**Valor IT v Premier, North West Province** 2021 (1) SA 42 (SCA) in paragraph [55]). This however does not mean that a court must necessarily rescind any order made by agreement merely because it finds that the discretion to make the agreement an order of court was not properly exercised. The minority judgment of the Constitutional Court in **Eke v Parsons** (*supra* in paragraph [75]) concluded that the improper exercise of the discretion does not free parties on whom the order applies from complying with it, to the extent that they may ascertain what it requires them to do. Rescission of an order is therefore a remedy that may be applied if the interests of justice so demand, and each case will turn on its own facts.
82. On the assumption that a rescission power rests with this court even outside Rule 42, I turn to consider the bases upon which the Applicants rely in their

challenge to the Orders. The five main grounds raised in this regard are listed in paragraph 49 above. There is some overlap between them. I will address them in the same order as set out by the Applicants.

83. Before doing so, reference must be made to **Eke v Parsons** (*supra*), which provides valuable guidance in relation to various issues raised by the Applicants.

Eke v Parsons

84. In **Eke v Parsons**, the respondent had applied for summary judgment against the appellant in relation to payment owing under a sale. The application did not proceed because the parties concluded a settlement agreement which was made an order of Court. The appellant breached the terms of the order, whereupon the respondent, as permitted in terms of the order, re-enrolled the summary judgment application. The appellant raised defences which were dismissed, and summary judgment was granted. The appellant sought leave to appeal, which the Constitutional Court ultimately granted on three issues. The first of these was the effect of making a settlement agreement an order of Court.
85. The appellant argued that the settlement agreement was invalid for various reasons. One of these was that the settlement agreement did not constitute a final judgment or order because it provided for the continuation of litigation in the form of a re-enrolled summary judgment application.
86. There were two judgments: the majority judgment of Madlanga J, and the minority judgment of Jafta J.
87. The majority confirmed (in paragraph [8]) that the practice of making settlement agreements orders of Court is well-established in our legal system. It endorsed the statement (already cited above) that the law supports compromises once lawfully struck “*since nothing is more salutary than the settlement of lawsuits*” (paragraph [22]). There are numerous reasons for this,

including the benefit to litigants of avoiding a costly and acrimonious trial, as well as the benefit to the administration of justice by reducing overcrowded court rolls and decreasing the burden on the judicial system.

88. Having endorsed the principle that a court has a discretion whether or not to make a settlement agreement an order of court, and that an important factor is the need to make orders that are readily enforceable, the majority stated that *“[w]hilst ordinarily the purpose served by a settlement order is that, in the event of non-compliance, the party in whose favour it operates should be in a position to enforce it through execution or contempt proceedings, the efficacy of settlement orders cannot be limited to that. A court may choose to be innovative in ensuring adherence to the order. Depending on the nature of the order, it may – for example – first issue a mandamus for compliance. Failing compliance, it may then consider committal for contempt. Both the mandamus and order for committal may be sought by merely supplementing the papers already before court. On the Thutha approach [a reference to **Thutha v Thutha** 2008 (3) SA 494 (TkH)], the terms of the settlement agreement not incorporated by the court in a settlement order can only be enforced by means of a full blown fresh suit. The disadvantages of this need no elaboration”*.
89. The majority went on to confirm (in paragraph [25]) that not everything agreed to by the parties should be made an order of court. *“The order can only be one that is competent and proper. ... For an order to be competent and proper it must, in the first place, ‘relate directly or indirectly to a lis between the parties’. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court.”*
90. In relation to this point, earlier in the judgment (in paragraph [19]) it was stated as follows:

“The Thutha approach is formalistic and takes a narrow view of the efficacy and value of court orders granted as a result of settlement agreements. In certain instances, agreement – or lack of it – on certain terms may mean

the difference between an end to litigation and a protracted trial. Negotiations with a view to settlement may be so wide-ranging as to deal with issues that, although not strictly at issue in the suit, are related to it – whether directly or indirectly – and are of importance to the litigants and require resolution. Short of mere formalism, it does not seem to serve any practical purpose to suggest that such issues should be excised from an agreement that a court sanctions as an order of court.”

91. Secondly, the agreement must not be objectionable, i.e. *“its terms must be capable, both from a legal and practical point of view, of being included in a court order. That means, its terms must accord with both the Constitution and the law. They must not be at odds with public policy.”*
92. Finally, the agreement must *“hold some practical and legitimate advantage”*.
93. The majority stated further (in paragraphs [31] and [32]) that the effect of a settlement order is to change the status of the rights and obligations between the parties:

“Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, “a matter judged”). It changes the terms of the settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus.

Litigation antecedent to enforcement is not necessarily objectionable. That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which –

depending on the nature of the litigation – might have entailed many days of contested hearing.”

94. Further at paragraphs [35] and [36] the following was stated:

“A settlement order that makes provision for payment of a judgment debt by instalments does not become unacceptable only because payment is to be made in instalments. With an order of this nature, proceeding straight to execution may not be practical because what remains owing may have to be quantified. That is what necessitates another approach to court. Is that objectionable? I think not.

In sum, what all this means is that, even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes res judicata. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don’t.”

95. Based on this analysis, the majority held that the order was final in its terms and that the respondent was entitled to approach a court for enforcement of the order in accordance with the procedure set out in it.
96. The minority was critical of the order, finding that because it envisaged the re-enrolment of the matter for another order, it was not final. However, as already mentioned, the mere fact that the court *a quo* had in the view of the minority failed to exercise its discretion properly in making the order did not make a difference:

“But the improper exercise of the discretion does not free parties on whom the order applies from complying with it, to the extent that they may ascertain what it requires them to do.” (paragraph [75]).

The first ground: the inclusion of the ISA in the Orders

97. The Applicants seek to have the Orders set aside and rescinded in their entirety because they do not in all instances “*relate directly or indirectly to an issue or lis between the parties*”.
98. The contents of the Orders on which the Applicants rely, as identified in oral argument, are the ISA, the additional funding, the finance fee and the penalty fee.
99. I have referred to the discussion of the general principle in **Eke v Parsons**. It is correct that a court will decline simply to adopt and make an order an agreement entered into outside the context of litigation. But the Constitutional Court recognised that where there is litigation which the parties have agreed to settle, courts should not adopt a formalistic approach towards what is included in the order. The contents of the order may relate only indirectly to an issue or *lis* between the parties. That includes aspects “*not strictly at issue in the suit*” but related to it, which are of importance to the parties and require resolution.
100. The additional funding was advanced as an integral part of the overall settlement, plainly to assist the First and Second Applicants by allowing them to continue operating with a view to realizing investments and so repaying the main indebtedness. It is therefore a feature that relates directly to the main issue between the parties.
101. Likewise, the penalty fee is a feature of the settlement of the main dispute, acting as an inducement to the Applicants to meet their revised repayment obligations timeously. That, too, relates directly to the main issue in the Action.
102. The finance fee, as is apparent from the settlement agreement, is payable under the main loan to the First Applicant. It is therefore at least indirectly related to the Action (even if not strictly at issue in the suit), and the parties

clearly considered this also to require resolution in the context of a settlement of the outstanding loan. The addendum made provision for a second finance fee pertaining to the advance of the additional funding in the First Order. It is also therefore closely associated with the issues in the Action.

103. The ISA potentially stands on a different footing, not being one of the loans that was the subject of the Action. It however shares with the Action the characteristics of an advance of money by the Respondent to one of the Applicants (the Fourth Applicant in this case) which remained outstanding at the time of the settlement agreement.
104. In each of these cases, including the ISA, the parties regarded the aspects referred to as being sufficiently important to be included in the *omnibus* settlement of the Action. The negotiations were wide-ranging and the parties decided to accommodate all these aspects in one agreement, even though they were not all aspects in respect of which relief was sought in the Action.
105. Moreover, the identified items make up a relatively minor component of the issues that were resolved. By far the bulk of the settlement pertained to the Applicants' indebtedness arising from the loan agreements on which the Action was based. In particular, the ISA indebtedness of below R1 million is relatively insignificant in the scheme of things.
106. In these circumstances, where the parties contracted within the context of litigation, I see nothing objectionable about their incorporating in the commercial settlement the related or additional aspects referred to above, and asking for them to be included in the Orders. It would be an exercise in pointless formalism, inconsistent with the obvious benefits of settlement, to require the excision of these aspects from the Orders. Even less so is it appropriate or desirable effectively to set aside the whole of the Orders (as the Applicants seek) merely because of the presence of terms relating to a peripheral or subsidiary matter that was not part of the *lis*. In keeping with the approach of the minority in **Eke v Parsons**, even if this aspect should not have been included in the Orders, the Orders exist and the parties can still

ascertain what they require them to do in fulfilment of that part of the settlement. There is no reason to invalidate the Orders in their entirety through a rescission.

The second ground: not a final judgment allowing for immediate and direct enforcement

107. The Applicants contend that the Orders are not “*competent and proper*” because they do not amount to a final judgment capable of giving the Respondent the right to enforce it by seeking immediate and direct execution.
108. It is correct that an order should have the character of finality and enforceability. However, finality and enforceability do not necessarily presuppose that no further legal steps are required to give practical effect to such an order.
109. In **Eke v Parsons**, the settlement order did not itself give rise to an immediately enforceable judgment in an amount of money. It regulated the process that would lead to a final judgment in the event of breach: the respondent could re-enrol the summary judgment application, supported by a supplementary affidavit to prove the outstanding balance; and the appellant undertook not to oppose the application.
110. The Orders go substantially further than in **Eke v Parsons**. Clause 33.1 provides that the full balance of the Consolidated Debt (i.e. the Summons Debt, the ISA Debt, the Additional Funding and the Finance Fees) becomes immediately due, owing and payable by the Applicants, jointly and severally where applicable. Clause 33.2 makes the penalty fee payable on demand. Clause 33.3 entitles the Respondent to recover legal costs jointly and severally. Clause 33.4 then provides that the settlement agreement, having been made an order of Court, “*shall operate as a judgment against the Appellants*”.

111. On a proper construction of the Orders, they give rise, in the event of breach, to final judgments against the Applicants in respect of the Consolidated Debt at the time of breach, and for costs. The First, Second and Fourth Applicants' indebtedness for the penalty fee is also established, subject to the Respondent making demand for payment.
112. By agreeing to these Orders, the Applicants abandoned any right to raise substantive defences to the Respondent's claims (such as those that they now intimate they would want to plead) in the event of breach. Liability would be finally established in the event of breach. In that respect at least, the Orders bring finality to the dispute and "*hold a practical and legitimate advantage*".
113. The above is dispositive of the second ground raised by the Applicants.
114. The Applicants nonetheless argue that the Orders lack the quality of finality that would allow them to be immediately executed upon through the issue of a writ of execution. This is because the Orders do not reflect any actual amounts of indebtedness. Relying *inter alia* on **Muniamma v Ramalingam** 1932 NPD 29 at 37, they contend that it is only where the judgment liability is specifically set out and described in an order that a writ can issue, and that the amount for which execution issues cannot be debated before, and judicially determined, by the registrar of the court.
115. The mere fact that a judgment does not include reference to a specific amount of indebtedness does not necessarily mean that a writ cannot be issued on the basis thereof, particularly where the amount is easily ascertainable. It has for example been recognized that a judgment creditor can issue a writ in respect of a category of costs reflected in a maintenance order for which the debtor is responsible by filing an affidavit with the registrar demonstrating the costs so incurred (**Butchart v Butchart** 1997 (4) SA 108 (W) at 115E-I).
116. It has also been held that a writ can be issued in support of a conditional judgment. In other words, where liability under the order is subject to the

occurrence of a particular event, it is not necessary to obtain a further order confirming that the event has occurred before issuing a writ. On ordinary principles, a person issuing a writ does so at their own risk if it is later determined that the condition was not fulfilled and the writ is set aside as a result (**McNutt v Mostert** 1949 (3) SA 253 (T) at 25-256).

117. On the other hand, a writ cannot be sustained where the amount payable under the judgment “*can only be ascertained after a further problem of law has been decided*” (**De Crespigny v De Crespigny** 1959 (1) SA 149 (N) at 150G). In that case the amount payable was £150 per year “*free of English income tax*” and it was therefore necessary for there to be a determination of the English tax position before it could be known what the amount owing was.
118. The Applicants argue that the Orders fall within the principle in **De Crespigny** in that the determination of the Respondent’s *quantum* is an unresolved “*problem of law*”. On that basis they contend that a writ could not be issued on the Orders without more.
119. The parties’ intention was clearly to introduce a mechanism whereby final liability for the then outstanding amount of the Consolidated Debt and the penalty fee would arise immediately on breach. The *quantum* of that liability at the time is objectively ascertainable. If there are inherent difficulties in doing so, I am certain that these would have been raised. I do not see that the mere establishment of the amount owing at the time of breach is a “*problem of law*” that would have to be decided before a writ could be issued.
120. In this context, the Applicants emphasise clause 36 of the First Order which provides that for any purpose in connection with the settlement agreement, a certificate of balance serves as *prima facie* proof of the Applicants’ indebtedness. They argue that this necessarily means that a further judicial determination of the *quantum* is required before the Orders can be executed upon.

121. I do not agree. As stated above, it is competent for a judgment creditor, at its own risk, to cause a writ to be issued in relation to an easily and objectively ascertainable amount in respect of which an order has been made, and may provide an affidavit to the registrar to this effect. The Applicants may of course seek to set aside the writ on the basis that the *quantum* is unjustified. In such a case (which would clearly fall within the ambit of “[f]or any purpose in connection with the Settlement Agreement”), the Respondent may put up a certificate of balance which in terms of clause 36 will stand as *prima facie* proof of the amount of the indebtedness. The Applicants may or may not show the true *quantum* to be otherwise. Clause 36 thus does not necessarily point to the need for a further judicial step in quantifying the amount of the judgment.
122. It may nonetheless be prudent for the Respondent, so as to avoid such disputes arising at a later stage and to mitigate its risks in issuing a writ in a particular amount, to make an application to this Court for a declarator confirming the amount of the established liability of each of the Applicants. If it chooses to do so, once again it can support its application with a certificate of balance, which certificate will have the status of *prima facie* proof under clause 36. The Applicants can oppose the application if they believe they can show that the certificate is wrong.
123. Even if I am wrong in the above conclusion, and if the Applicants are correct that execution cannot proceed until there is a final quantified judicial expression of liability, this does not make the Orders defective on the basis of a lack of finality. The majority in **Eke v Parsons** recognized that even where an order based on a settlement agreement envisages the need for further litigation, which may include a further approach to court to quantify what remains owing, this does not invalidate the order on the grounds that it lacks finality.
124. The debate about the power to issue a writ immediately on the judgment as it appears from the Orders is therefore not determinative of the validity of the Orders *per se*. For the reasons given above, whether or not a further

application to establish the quantum is required, the Orders cannot be impugned on the basis of a lack of finality.

Third ground: the Orders do not constitute orders which are clear and unambiguous

125. The nub of the Applicants' third ground is that the Orders are ambiguous or confusing because they do not adequately clarify the relationship between the Action and the Orders; and therefore that they are not competent and proper.
126. In interpreting the Orders, the ordinary principles to attribute meaning to a written document apply (**Eke v Parsons** (*supra*) in paragraph [29], **Engelbrecht v Senwes Limited** 2007 (3) SA 29 (SCA) in paragraph [6]). Although the Orders started out as settlement agreements, they have now, with the *imprimatur* of the Court, been clothed with a higher status and the settlement agreement has been novated. For purposes of interpretation they must be approached from the direction of the order and not the direction of the agreements they replaced (**Moraitis Investments (Pty) Limited v Montic Dairy (Pty) Limited** 2017 (5) SA 508 (SCA) in paragraph [16]).
127. There is a further principle of interpretation which in my view has resonance when interpreting orders. This is the maxim *ut res magis valeat quam pereat* – namely that the interpretation of a document that allows it to have some operation is preferred over one that gives it no operation (see e.g. **Du Plessis v Nel** 1952 (1) SA 513 (A) at 523).
128. In **Interciti Property Referrals CC v Sage Computing (Pty) Ltd** 1995 (3) SA 723 (W) at 727I to 728F, it was held that an interpretation of an arbitration award which gives it some meaning and scope of operation is to be preferred to one which renders the award meaningless. In discussing this principle, Zulman J (as he then was) endorsed the approach in **Wood v Griffith** (36 ER 291) in regard to interpreting an arbitrator's award, as follows:

“It is extremely clear that every award must be certain and final; but it has, particularly in more modern time, been considered the duty of the Court, in construing an award, to find that it is certain and final; and instead of leaning to a construction, which in effect would destroy nine tenths of the awards made, if possible to put one consistent sense on all the terms. In considering the meaning of this award relative to the sale of the estate, it must be recollected that the business of the arbitrator was to settle the differences between Griffith and Wood; ... in the construction of an award the court is bound, so far as the terms will admit, to give it such a meaning as shall render it conclusive; and not by the construction of one part to defeat another.”

129. In regard to this maxim, Bradfield *Christie’s The Law of Contract in South Africa* (8th Edition) at page 273 states as follows:

“It seems eminently possible to regard this as a contextual consideration, namely that the parties’ purpose in entering into the contract was to create an effective, workable agreement, militating in favour of an interpretation that upholds the contract.”

130. To my mind it remains significant that the Orders constitute a judicial confirmation of the parties’ *bona fide* and intentional resolution of the dispute between them, which they wished to have given judicial support. The Orders must preferably be interpreted in a way that upholds or realizes, rather than destroys, the parties’ common purpose.
131. The core of the Applicants’ argument is that the Orders are ambiguous or uncertain in relation to how they resolve the underlying dispute. The contention is that it is uncertain whether the Orders effectively override the Action or are merely an interlocutory arrangement within the context of the Action.
132. As I understand the argument, the ambiguity of which the Applicants complain arises from a reading of clauses 17, 33 and 36 of the First Order. Clause 17

provides that the Respondent will “[hold] over on any further steps in terms of the summons” on condition that the Applicants comply timeously with their obligations under the agreement. Clause 33.4 provides that the settlement agreement operates as a judgment against the Applicants in the event of breach, while clauses 33.5 and 33.6 allow the Respondent to take recovery procedures or execution steps. Clause 36 then provides that the settlement agreement (i.e. the First Order) does not constitute a novation of the causes of action and security set out in the summons and the ISA. The Applicants, in a nutshell, say that the Orders seek both to preserve and override the Action.

133. In my view, these provisions can comfortably be read together and do not give rise to any significant ambiguity or uncertainty as to their scope of operation.
134. Clause 17 recognises that the Respondent has issued summons against the Applicants (i.e. that the Action exists). It gives the assurance that, for as long as the Applicants are not in breach of the settlement agreement, the Respondent will do nothing further in relation to the Action. Thus the Applicants could be sure that no steps to take judgment under the Action would be taken while there was no default. By definition, while that position existed, there was no judgment pursuant to the Orders (because that only arose on breach). Clause 17 has value for the Applicants during this period as it precludes the Respondent from taking other steps towards judgment in the meantime.
135. Clause 17 does not, in my view, mean that if there is a breach, the Respondent is required to continue with the Action. On the contrary, when that happens, clause 33 comes into operation, giving rise to a final and binding judgment that the Applicants are liable for the outstanding amount of their respective indebtedness. There is no need to resume litigation under the Action as liability has been established by operation of the Orders.
136. Clause 36 provides that the settlement agreement does not constitute a novation of the causes of action on which the Action was based. What this means is that the Orders do not preclude the Respondent from electing to

resume the Action on the underlying cause of action, should it have reason to do so.

137. In this regard, it has been held that a settlement agreement typically has the same effect as *res judicata*, and therefore that an action on the original cause of action is excluded. However, there is an exception where the agreement expressly or by necessary implication provides that in the event of non-compliance, a party may fall back on its original cause of action (**Van Zyl v Niemann** 1964 (4) SA 661 (A) at 669H-670A). Where there is such a provision, the party has an option either to enforce the compromise or to proceed with the original cause of action (**Trust Bank van Afrika Bpk v Eksteen** 1969 (1) SA 276 (A) at 284C).
138. Clause 36 aims to keep the Respondent's options open. The fact that there is such a provision does not mean that the Respondent must necessarily abandon the Orders and revert to the Action in the event of breach.
139. In the circumstances, I do not see that the identified provisions create uncertainty or confusion in the interpretation or application of the Orders, let alone such substantial uncertainty as to invalidate them.

Fourth ground: compliance is left to the discretion of the parties or the Sheriff

140. The Applicants' argument in this regard is that the way the Orders are worded, particularly clauses 33.5 and 33.6, they do not specify how any judgment will be enforced, and hence that it is up to the Respondent (and the sheriff) to decide what the Applicants are required to do under the Orders.
141. I do not agree with this argument. I have already demonstrated that the Orders settle the issue of the Applicants' liability. The Orders do not leave it in the discretion of the Respondent or the sheriff to decide what constitutes compliance with the Orders. Any dispute about *quantum* can be resolved either by the Applicants challenging the validity of a writ or pre-emptively by the Respondents seeking a *declarator* in this regard. The fact that the

Respondent has various options as to how to enforce the Orders (e.g. attaching and realizing movable or immovable property) is nothing unusual in the context of a money judgment.

Fifth basis: bringing the dispute to closure / rendering the issues *res judicata*.

142. The final argument is that the Orders do not finally settle the dispute between the parties and do not render the issues *res judicata*.

143. This is a repackaging of grounds dealt with above. I have already concluded that the Orders do settle any dispute as to the Applicants' liability for the Consolidated Debt, which becomes *res judicata*.

Conclusion on rescission

144. For the above reasons, the Applicants have not established grounds to have the Orders rescinded. Even if the application for rescission had not been perempted, I would therefore not have been inclined to grant that relief.

The alternative relief

145. The alternative relief sought is premised on the Orders not being rescinded. As mentioned above, the first alternative (paragraph 2) is for a declaratory order, while the second and third alternatives (paragraphs 3 and 4) are for the variation of the Orders.

146. The Respondent argues that the dismissal of the rescission relief on the grounds of peremption would also dispose of the entire alternative relief. That is probably true of the second and third alternatives. These seek the variation of aspects of the Orders two years after they were made, in circumstances where the Applicants clearly acquiesced in them in their current form. If a right to rescind an Order can be perempted, it would follow that a right to vary an Order can be perempted too.

147. I do not think that the same conclusion necessarily holds for the first alternative, which is cast in the form of a declaratory order relating to the enforceability of the Orders. A dispute about the interpretation of an order is not a challenge to the validity or content of the order itself.
148. It is however unnecessary to reach a final conclusion on this issue, as I would in any event not be inclined to grant the orders sought on their merits.

The first alternative – declaratory relief (paragraph 2 of the notice of motion)

149. The relief sought in this alternative reads as follows:

“alternatively, it be declared that the Court Orders are not capable of enforcement for purposes of executing against the movable and immovable assets of the Applicants until the Respondent has obtained final judgment in the action under case no. 8491/2022 ... and has successfully taken steps in terms of the rules 45, 46 and/or 46A in the Uniform Rules of Court.”

150. This must be read with paragraph 5 of the notice of motion, which is a prayer for an order, upon the Applicants succeeding in terms *inter alia* of paragraph 2, granting them 20 days to file their plea in response to the particulars of claim.
151. Reading these paragraphs together, it is apparent that the Applicants’ case is that, on a proper interpretation of the Orders, they have no final effect in the event of a breach, and that the Respondent must revert to the Action and take judgment on the merits (after allowing the Applicants to raise whatever defences they wish to by way of a plea).
152. I have already held that the Orders do constitute final judgments in relation to the Applicants’ liability in respect of the Consolidated Debt, costs and the penalty fee (subject to demand). The Respondent may proceed to enforcing these Orders, subject to the comments made above regarding the issue of a writ. If the Applicants’ interpretation is correct, the provisions of clause 33

would essentially be ineffectual. I do not consider that to be a proper construction of the Orders.

153. There is also the further difficulty that, as discussed above, the Orders encompass aspects that are not part of the Action (e.g. the additional finance and the penalty fee). If the Applicants' interpretation were correct, the Orders could not be used as a basis to enforce those debts, and the Respondent would have to commence a new action for judgment in those amounts – which is not a sensible or businesslike construction of Orders that are aimed at bringing litigation to an end.
154. It follows that the fundamental premise of the declarator sought cannot be granted. The second part of that order, which pertains to the practicalities of execution on the final judgment still to be sought in the Action, falls with it.
155. I might in this context however say that as I read the Orders, they already encompass a declaration of the immovable properties listed in the summons as specially executable. Clause 2 of the First Order provides that in the event that the Applicants are in breach of their obligations under the settlement agreement (i.e. the Orders), the Respondent is entitled to realise "*such properties*". The reference to "*such properties*" is to "*the various immovable properties registered in [the Applicants'] names and mortgaged in favour of the [Respondent] as set out in the Summons*". Clause 2, as part of the settlement agreement, is treated as a judgment in terms of clause 33.4.
156. The immovable properties which are pleaded in the summons to be mortgaged to the Respondent (which include the Fourth Applicant's two properties (Erf 3[...] Camps Bay and Erf 2[...] Knysna)) are therefore, under the Orders, effectively declared by the Court to be specially executable.
157. There may be a dispute about whether that order suffices for purposes of compliance with Rule 46A to the extent that the Fourth Applicant contends that one of the properties is his primary residence. This is not an aspect which I need to decide at this stage. If the Respondent seeks to execute against

such a property based on the Orders, it may be that the Fourth Applicant challenges the Respondent's right to do so on, because the Rule 46A process was not followed before the Orders were made. Questions of waiver or public policy regarding the enforcement of the Orders may then arise. Alternatively, the Respondent may decide pre-emptively to remove any such question by making a special Rule 46A application, thus rendering any such dispute moot. In these circumstances, where there is no concrete dispute yet in existence, I do not consider it appropriate to make declaratory orders on this issue.

The second alternative – variation of interlocutory orders (paragraph 3 of the notice of motion)

158. The Applicants' second alternative claim is for a variation of the Orders in a fundamental respect: the deletion of clause 33.4 and its replacement with the words "*The Plaintiff shall be entitled to persist with its action instituted under 8491/2022 in order to obtain judgment against the Defendants.*" Clauses 33.5 and 33.6 would then also be amended to allow for those powers only to be exercised upon that judgment being taken.
159. Given the views already expressed above about the construction of the Orders, it is apparent that any such variation would strike at the heart of the Orders by depriving them of their effect in giving rise to a final judgment against the Applicants.
160. The Applicants seek to justify the variation on the basis that clauses 33.4 to 33.6 are merely interlocutory orders, which a court may in the exercise of its discretion vary. They rely for this proposition on **South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited** 1977 (3) SA 534 (A) at 550H.
161. The full *dictum* in **South Cape** reads as follows (at 550H-551A):

"At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment;

whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is res judicata.”

162. I do not view the Orders (and clause 33.4 in particular) as purely interlocutory. They have substantive effect, and finally resolve the issue of the Applicants' liability in relation to the different items of indebtedness. Those aspects are *res judicata*. The amendment would effectively nullify an existing and substantive judgment under the guise of varying an interlocutory order.

163. It follows that the second alternative lacks merit.

The third alternative: variation under Rule 42(1)(b)

164. Little more need be said about the Applicants' reliance on Rule 42(1)(b).

165. The Rule reads as follows:

“The court may, in addition to any other powers it may have, mero motu rescind or vary an order in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.”

166. For reasons already give above, I do not consider there to be any ambiguity in the Orders. The Applicants also made no case for the presence of an error or omission.

167. I am therefore of the view that Rule 42(1)(b) has no application.

Costs

168. The Respondent has been successful in its opposition to the application, and should therefore have its costs.

169. The matter raised a number of complex issues and both parties sensibly retained senior counsel. In the circumstances I am satisfied that the costs of counsel should be taxed on Scale C as envisaged in Uniform Rule 69(7).

ORDER

170. In the premises, I make the following order:

170.1. The application is dismissed.

170.2. The Applicants are liable for the Respondent's costs, jointly and severally, on a scale as between party and party, including the costs of counsel on Scale C.

M W JANISCH
Acting Judge of the High Court
Western Cape Division

APPEARANCES:

For the Applicant/s: F Sievers SC
 F W Landman

Instructed by: Marlon Shevelew & Associates Inc

For the Respondent: I J Muller SC

Instructed by: Edward Nathan Sonnenbergs Inc

Date of hearing: 13 November 2024

Date of judgment: 26 November 2024 (electronically)