

comply with s 130(4)(b) before service cannot be judicially condoned – a credit provider cannot enforce a credit guarantee as cessionary or other transferee for value on credit, unless it was independently registered as a credit provider under s 40(1) when it entered into the underlying credit agreement to which the credit guarantee serves as security – if not, then s 40(4) applies ex lege – just and equitable relief granted under s 89(5) of the NCA.

ORDER

1. The rule 46A application against the First Respondent succeeds with costs on an attorney-client scale (including costs of two counsel where so employed).
2. Pursuant to Uniform Rule 46A, Section 3 in the scheme known as St John's 1 at Sea Point in the City of Cape Town, as shown on Sectional Plan No. SS 232/2018, held by sectional deed of transfer S[...], together with the Exclusive Use Area in the scheme known as St John's 1, described as Store on Basement Level 2 number SS15, measuring 6 (six) square metres in extent, held by, and more fully described in, the Notarial Cession of Exclusive Use Rights SK 5006/2019 ("the St John's property"), is declared specially executable.
3. The Registrar of this Court is authorised to issue a writ for the attachment and sale of the St John's property to recover the debt owed to the Applicant by the First Respondent in terms of a default judgment granted on 25 January 2024 in case no. 15602/2022, including interest and attorney-client costs.

4. The Sheriff of this Court in whose jurisdiction the St John's property is situate is authorised and directed to execute any writ issued pursuant to 3 above, and to take all such steps as may be necessary to sell the property by public auction.
5. The Sheriff envisaged in 4 above is authorised and directed to pay the full proceeds of the sale in execution of the St John's property into the trust account of the Applicant's attorneys of record at the time of the Sheriff's public auction.
6. The main application against the Second Respondent is dismissed with costs.
7. The Applicant shall pay the Second Respondent's costs in relation to the main application on an attorney and client scale, such costs to include the costs of two counsel where so employed.
8. The Uniform Rule 28(4) application is dismissed with costs in favour of the Second Respondent on a party-party scale, such costs to be on tariff scale B.
9. In accordance with s 40(4) read with s 89(5) of the National Credit Act 34 of 2005, the following orders are granted:
 - (a) the credit agreement between the Applicant and the First Respondent relating to the Applicant's loan for the benefit of the First Respondent to settle the latter's indebtedness to Investec Bank is declared unlawful from its inception;
 - (b) the Applicant has no enforceable claim vis-à-vis the Second Respondent under the credit guarantee dated 31 May 2019, nor under the mortgage bond registered over erf 2[...] Noordhoek in the City of Cape Town (B[...]);

(c) the Applicant shall at its expense, within 30 days, take all necessary steps to cancel the mortgage bond over erf 2[...] Noordhoek (bond no. B[...]) and restore its original title deed no. T[...] to the Second Respondent.

JUDGMENT

Moosa AJ

Introduction

[1] This judgment concerns two opposed applications in terms of Uniform Rule 46A against the respondents (“the main application”). This judgment also deals with an amendment application in terms of Uniform Rule 28(4) (“the amendment application”).

[2] The Applicant, in its Notice of Motion dated 15 November 2024, seeks orders declaring specially executable immovable properties owned separately by the respondents, coupled with the usual prayers for authorisations to the sheriff and registrar of this Court, and for costs. In relation to the First Respondent, the property sought to be sold in execution is Section 3, in the scheme known as St John’s 1 at Sea Point in the City of Cape Town, and held under sectional deed of transfer S[...], together with the Exclusive Use Area in the scheme known as St John’s 1 described as Store on Basement Level 2 number SS15, measuring 6 (six) square metres, and held under the Notarial Cession of Exclusive Use Rights SK 5006/2019 (“the St John’s property”). In relation to the Second Respondent, the property sought to be sold in execution is described as erf 2[...] Noordhoek in the City of Cape Town, and held by deed of transfer number T[...] (“the Noordhoek property”). The respondents oppose the petitions so far as it pertains to their respective property.

[3] The Applicant launched the amendment application on 29 July 2025. It exclusively affects the Second Respondent. The Applicant seeks an order authorising an amendment to its aforementioned Notice of Motion by the insertion of the following:

‘A1 That judgment be entered against the second respondent in favour of the applicant for payment of the sum of R4, 550, 000 and the additional sum of R910, 000 as provided for in the Guarantee and Indemnity dated 31 May 2019 and the continuing covering mortgage bond registered over the immovable property described in paragraph 1.2 below on 1 July 2019.’

[4] At the hearing, the Applicant was represented by Mr A M Smalberger SC (with Ms H Bevis-Challinor); while Ms F Syria and Mr I Veerasamy appeared for the First and Second Respondent respectively. I am grateful to counsel for their insightful submissions on various questions of law which had considerable complexity, both in their heads of argument and during our engagement at the hearing.

[5] The factual matrix pertaining to the applications concerning the First and Second Respondent have key differences. I will commence by narrating the facts germane to their adjudication. The facts highlighted below are distilled from the pleadings viewed in their entirety. Unless indicated otherwise, the facts are common cause (or, at the very least, not significantly disputed) in the papers before me.

Relevant background facts

[6] The Applicant carries on a business as a merchant factor and financier. On 17 May 2019, it concluded a written factoring agreement with Radsmec Enterprise (Pty) Ltd (“Radsmec”). From 17 May 2019 to 6 July 2022, the Applicant advanced funds to Radsmec, pursuant to the latter ceding its book debts to the Applicant as security.

[7] On 31 May 2019, the Applicant and Radsmec executed an excess facility agreement. In accordance with its terms (read with the factoring agreement), the Applicant advanced substantial sums to Radsmec as a current account facility on its factoring ledger. As at 6 July 2022, Radsmec owed R23 157 991,71 to the Applicant, being the aggregate of all monies advanced to Radsmec (with interest) as a facility.

[8] The Applicant executed two loan agreements with Radsmec in July 2018 and May 2019, respectively. In accordance with their respective terms, the Applicant lent and advanced to Radsmec substantial sums. As at 6 July 2022, Radsmec owed R19,867, 601 to the Applicant, being the aggregate of all loans received (plus interest).

[9] The First Respondent signed a deed of cross-suretyship on 31 March 2021 in which he bound himself as surety and co-principal debtor in solidum with Radsmec in respect of all the latter's indebtedness to the Applicant from whatsoever cause, including for interest, legal costs, collection fees, and tracing agent fees.

[10] The Applicant instituted an action on 16 September 2022 as a result of Radsmec's failure to fulfil its payment obligations to the Applicant under the factoring agreement, coupled with the excess facility agreement, and the two loan agreements.

[11] The Applicant, in her capacity as plaintiff, caused a combined summons to be issued out of this Court under case no. 15602/2022. The Applicant sued Radsmec and twelve others, including the First Respondent. The latter was sued on the basis of his accessory liability as surety. The Second Respondent was not cited in the summons.

[12] On 1 November 2023, the summons was re-served on the First Respondent by being delivered at his domicilium address in Sea Point. The summons was served on a person identified as 'Mr Sizwe'. On 20 November 2024, the Uniform Rule 46A papers was served on the First Respondent by being left at the same domicilium address. None of the defendants filed a notice to defend the action in case no. 15602/2022. The Applicant, as the plaintiff, thereafter filed an application for default judgment.

[13] On 25 January 2024, Acting Justice Joubert granted judgment by default against the defendants, including the First Respondent. In terms of the order, the judgment debtors are jointly and severally liable to the Applicant, the one paying the other absolved, for the aggregate sum of R43 025 592,70, being arrear capital and interest, as well as further interest at the agreed rate, and costs ("the judgment debt").

[14] Since the Applicant's efforts to recover the judgment debt had limited success, it launched the present application in November 2024 pursuant to Uniform Rule 46A. In May/June 2025, the First respondent filed his answering affidavit. The main ground of opposition is the contention that the default judgment falls to be set aside. A rescission application was launched, belatedly so, at the hearing before me.

[15] The First Respondent asserts in his application that he is entitled to rescission due to a defective service of the summons. He also avers that the default judgment ought to be rescinded because it was allegedly fraudulently obtained. Ms Syria applied for a postponement of the main application, pending the outcome of the rescission. Mr Smalberger SC opposed this indulgence that was sought from the bar. After hearing argument, I refused the postponement utilising the principles

enunciated in *Myburgh Transport v Botha t/a S.A. Truck Bodies* 1991 (3) SA 310 (NmS) at 314 - 315 and *Shilubana and Others v Nwamitwa* 2007 (5) SA 620 (CC) paras 6 - 19.

[16] The Applicant's case against the Second Respondent stands on a completely different footing. Her opposition to it is also based on substantive grounds entirely distinct from those advanced by the First Respondent. I deal with these aspects now.

[17] On 31 May 2019, Investec Bank ("Investec") and the First Respondent concluded an agreement of loan ("the Investec loan agreement"). In accordance with its terms, Investec lent and advanced to the First Respondent the sum of R4 553 450, subject to a bond being registered over the Noordhoek property as security.

[18] The following are common cause facts in the pleadings: (i) the Investec loan agreement is a secured loan regulated by the National Credit Act 34 of 2005 ("the NCA"); and (ii) when the Investec loan agreement was concluded, Investec, as lender, was registered as a credit provider under the NCA with registration number NCRCP9.

[19] The Investec credit is secured by: (i) a mortgage bond over the Noordhoek property with the Second Respondent's consent ("the mortgage bond"); (ii) on 31 May 2019, the Second Respondent signed a Guarantee and Indemnity agreement in which she stood guarantor for payment to Investec ("the Guarantee agreement").

[20] In terms of the Guarantee agreement, the Second Respondent guarantees, as a principal (not accessory), the timely payment of all monies that the First Respondent may owe to Investec (or its assigns) in connection with the Investec

loan agreement. The guarantee is limited to a maximum of R4 550 000,00, a further sum of R910 000,00, as well as interest and attorney-client costs).

[21] It is common cause that the Guarantee agreement is a 'credit guarantee' (as defined in s 8(5) of the NCA) and that the mortgage bond held by Investec over the Noordhoek property is a 'credit transaction' (as defined in s 8(4) of the NCA).

[22] The Second Respondent renounced the benefits of excussion and division in the Guarantee agreement. She also agreed that if Investec cedes, delegates, or transfers all or any of its rights against the First Respondent arising out of the Investec loan agreement, then Investec will have the right to also cede, delegate, or transfer any of its rights against the Second Respondent under the Guarantee agreement.

[23] The First Respondent defaulted on his obligations to Investec in the sum of R14 563 639,50. On 8 September 2021, in case no. 15432/2021, Investec applied for the First Respondent's sequestration. This Court issued a provisional sequestration order on 17 September 2021. On 29 March 2022, the sequestration proceeding was settled in terms of a tri-partite agreement concluded by the Applicant, Investec, and the First Respondent ("the tripartite agreement"). It was made an order of this Court.

[24] The tripartite agreement provided that the First Respondent's debt to Investec of R14 563 639,50 would be extinguished as follows: (i) the First Respondent's provisional trustees would pay a provisional dividend to Investec from the R10m yielded on the sale and transfer of the First Respondent's property, being G[...], The Estate, 5[...] S[...] Road, Sea Point; and (ii) the Applicant would settle the full

balance owing to Investec as a purchase price after the agreed provisional dividend was paid. The Applicant agreed to purchase the full balance of Investec's claim. Against receipt of the purchase price, Investec agreed that it would out-and-out cede to the Applicant all the security which it (Investec) held for the First Respondent's debt to it. This tripartite agreement culminated in the Applicant and Investec, on 14 September 2022, concluding a sale and cession agreement ("the sale and cession agreement").

[25] In accordance with the terms and conditions of the sale and cession agreement, the Applicant paid the full balance of Investec's claim as recorded in a Certificate of Balance. As a result of Investec's claim being extinguished (as was agreed), the final sequestration of the First Respondent's estate was successfully averted.

[26] The sale and cession agreement incorporated an out-an-out cession. In terms thereof, Investec ceded to the Applicant all its rights, title, and interest in the security held by it in connection with the First Respondent's indebtedness to Investec. This comprised both the Second Respondent's Guarantee and Indemnity, as well as the mortgage bond registered over the Noordhoek property. The cession of rights under the mortgage bond was registered at the Deeds Office on 1 December 2022. All the security ceded by Investec now serve as the Applicant's security for its claim against the First Respondent arising from the Applicant settling the balance of Investec's claim.

[27] It is common cause that the Applicant is not registered as a credit provider at any time material to the applications before me, and has never been so registered.

[28] The Applicant's case against both the respondents in terms of Uniform Rule 46A is predicated on the following core averments appearing in its founding papers:

- '45. Summons was served on the first respondent on 20 January 2023. Due to the delay in pursuing its application for default judgment, the applicant caused the summons to be re-served on the first respondent on 1 November 2023. ...
- 46. ... the applicant secured default judgment against the first respondent ... in the sums set out in paragraphs 34.1 to 34.3 above (refer to FA4).
- 47. On the same day, the applicant also secured two further default judgments against the first respondent under case numbers 15601/2022 and 15616/2022 in the amounts of **R54, 886, 831.55** (with interest and costs) and **R5, 994, 856.24** (with interest and costs) respectively. ...
- 48. The first respondent's indebtedness to the applicant therefore totals **R103, 907, 280.49** (R43, 025, 592.70 + R54, 886, 831.55 + R5, 994, 856.24 = R103 907 280.49). This application, however, only pertains to the judgement debt under case no. 15602/2022.
- 49. On 26 February 2024, this Court issued a writ of execution against the first respondent's movable property. ...
- 52. Despite the applicant's best efforts, it has not been able to locate the first respondent and/or his current residential address at which it could attempt to execute the writ of execution.
- 53. Consequently, the first respondent remains indebted to the applicant for the sum of R43, 025, 592.70 (excluding the sum of R54, 886, 831.55 and R5, 994, 856.24), together with interest and costs. By virtue of the terms of the Guarantee and Indemnity the second respondent concluded with Investec Bank and the cession thereof to the applicant as set out more fully hereinabove, the second respondent is also indebted to the applicant, though only to the extent of R5, 460, 000.00 (and not as surety but as primary debtor with principal obligations, and not as accessory obligations)
- 54. The applicant is therefore necessitated to attach and sell the immovable properties owned by the respondents.
- 55. I confirm that no payments have been made towards settling the judgment debt by any party.
- 56. In addition to the aforesaid, I confirm that the Mortgage Bond registered over the Noordhoek-Property secured the obligations of the first respondent under the loan agreement (attached as FA8.1) as well as any other agreement concluded with the applicant (by virtue of the fact that Investec ceded,

assigned and transferred to the applicant all of its rights, title and interest in and to the guarantee claims). Accordingly, no monthly instalments in terms of the Mortgage Bond are or were payable to the applicant by the second respondent with the result that the full sum of R5, 460, 000 remains secured in terms of the Mortgage Bond (the sum of R5, 460, 000 being the total extent of the second respondent's capital liability towards the applicant by virtue of the limitation recorded in clause 5 of the Guarantee and Indemnity – refer to FA8.2).'

[29] In her affidavit opposing the petition under Uniform Rule 46A, which affidavit was delivered early in June 2025, the Second Respondent adopted a three-pronged attack. First, she pointed to the common cause fact that the default judgment granted on 25 January 2024, and on which the Applicant relies for relief in casu, does not operate against her. She averred that the main application is unsustainable against her in law because she is not a 'judgment debtor' as envisaged by Uniform Rule 46A.

[30] Secondly, the Second Respondent averred that the Applicant was obliged to serve a pre-litigation notice under s 129(1)(a) of the NCA due to the fact that the Guarantee agreement fell under the NCA's umbrella. This is common cause. The notice under s 129(1) was not delivered before the main application was launched. The Second Respondent contends that this omission is fatal to the Applicant's case.

[31] A third string in the Second Respondent's bow is her defence that the Guarantee agreement only applies to the debt incurred when the First Respondent purchased the Noordhoek property with funds loaned from Investec. She avers that to the extent that the Guarantee agreement does not reflect that intention, its provisions stand to be rectified owing to an alleged material error common to the parties thereto.

[32] The Applicant admits that its case suffers from the deficiencies constituting the grounds of opposition outlined in paragraphs [29] and [30] above. Consequently, on 2 July 2025, the Applicant took certain steps that were aimed at remedying the problems which it faced.

[33] The following steps were taken by the Applicant:

- (a) First, as regards the legal hurdle in paragraph [29], the Applicant gave notice under Uniform Rule 28(1) of an intention to amend its Notice of Motion by inserting a prayer that seeks judgment against the Second Respondent. The contents of the intended amendment appear in paragraph [3] above; and
- (b) Secondly, as regards the legal hurdle mentioned in paragraph [30], the Applicant caused a notice contemplated by s 129(1)(a) of the NCA to be served on the Second Respondent and her attorney of record.

[34] On 11 July 2025, the Applicant delivered its replying affidavit. In it, Mr G Connor traversed the answering affidavits delivered by the First and the Second Respondent. For present purposes, I deem it necessary to mention some contents in Mr Connor's seriatim reply, but also only so far as it concerns the Second Respondent.

[35] With regards to the absence of any judgment recorded in the Applicant's favour against the Second Respondent, Mr Connor averred in reply as follows:

'131. At the time of preparing the notice of motion, the applicant's legal representatives omitted to include a prayer seeking a money judgment against the second respondent. The prayer for a money judgment against the second respondent should have been prayer 1 and the remaining prayers in the notice of motion should have followed thereon. That is evident from a proper consideration of

the founding affidavit, which contains the necessary averments to sustain a money judgment against the second respondent.' (my underlining for emphasis)

[36] As regards the purpose for joining the Second Respondent and seeking relief against her, Mr Connor said in reply as follows:

'140. The second respondent is joined in these proceedings because the first respondent has failed to satisfy the judgment debt under the aforesaid case number. At the time when the main action was issued, it was not necessary for the applicant to have joined the second respondent as a party to the proceedings because the applicant did not, at the time, intend to call up the security it enjoys over the Noordhoek property. It has now become necessary to do so because the first respondent does not have sufficient assets to satisfy the judgment debt. The applicant is entitled to do this.'
(my underlining for emphasis)

[37] In replying to the allegation that the Guarantee agreement does not apply to the First Respondent's indebtedness to the Applicant arising from its cross-suretyship which forms the basis of the judgment debt, Mr Connor averred in reply as follows:

'143. The Guarantee was not intended by the parties to apply only to the purchase of the Noordhoek property.

144. In signing the Guarantee, the second respondent affirmed that she understood that:

144.1 the Guarantee would secure "*not only one transaction but also any and all future transactions entered into between [the first respondent] and Investec as provided for in [the] Guarantee and Indemnity, unless clause 3 indicates that the Guarantee expressly applies only in respect of the obligations of [the first respondent] under or in connection with a specific Loan Agreement*" ...

144.2 her liability, in terms of the Guarantee, "*will be continuous until all [the first respondent's] existing and future obligations under the Loan Agreement have been met as provided for in [the] Guarantee*" ...

145. Clause 3 of the Guarantee ... provides as follows:

“3. ... The [second respondent] hereby unconditionally and irrevocably guarantees, as a principal obligation ...

3.1 the due and punctual payment of all and any monies which the [first respondent] ... may now or from time to time in future owe to Investec from whatsoever cause and howsoever arising, including any judgment debt against the [first respondent];

3.2 the due and punctual performance and discharge by the [first respondent] of each of the [first respondent's] obligations to Investec under or arising from or in connection with the Loan Agreement.”

146. Clause 6 of the Guarantee ... provides as follows:

“The [second respondent] hereby unconditionally and irrevocably undertakes that should it receive a written demand from Investec for payment of any amount contemplated in clause 3.1 or 3.2 ..., the [second respondent] shall immediately pay such amounts demanded to Investec in cash without deduction or set off counterclaim or any other deduction whatsoever ...”

147. A demand in terms of section 129 of the National Credit Act was delivered to the second respondent on 2 July 2025, calling on the second respondent to settle the judgment debt owing by the first respondent ...

148. It is also apparent from annexure FA8.3 (being the Mortgage Bond registered over the Noordhoek property), FA8.4 (being the settlement agreement concluded between applicant and Investec) and FA8.5 (being the sale and cession agreement concluded between the applicant and Investec) to the founding affidavit that the Guarantee was to serve as security for the first respondent's future liabilities arising after the conclusion of the Guarantee and registration of the Mortgage Bond.

149. Clause 3.1 of the Guarantee clearly was not included in error.’
(my underlining for emphasis)

[38] As regards the defence concerning the s 129(1) notice, Mr Connor said in reply:

‘168. The applicant omitted to deliver to the second respondent a notice in terms of Section 129 of the National Credit Act. As I have explained, the applicant has rectified this omission by delivering a notice to the second respondent. ...

170. The second respondent is a primary debtor of the applicant with principal obligations as appears from the Guarantee and Mortgage Bond.
171. Judgement was granted against the first respondent, with the result that, in terms of clauses 3.1, 5 and 6 of the Guarantee, the second respondent is required to pay to the applicant the sum of R4, 550, 000 (and the additional sum), in cash without setoff, counterclaim or any deduction whatsoever.
172. A demand was made to the second respondent to pay the applicant the sum of R4, 550, 000 (and the additional sum) when the Section-129 letter was delivered to her. ...
173. The applicant is therefore entitled to judgment against the second respondent for payment of the sum of R4, 550, 000 and the additional sum as provided for in the Guarantee and Indemnity dated 31 May 2019 and to an order declaring the Noordhoek Property specially executable.' (my underlining for emphasis)

[39] On 16 July 2025, the Second Respondent's attorneys served a notice under Uniform Rule 28(3). It outlined the grounds of objection to the proposed amendment (see paragraph [33]). By reason of the common cause fact that the Applicant is not a credit provider registered pursuant to s 40(1) of the NCA, the Second Respondent objected to the proposed amendment on the basis, inter alia, that the founding papers in the Uniform Rule 46A application do not disclose a cause of action which can sustain the relief sought in the proposed amendment. Apart from seeking to amend its Notice of Motion, the Applicant did not amend, nor seek to amend, its founding affidavit.

[40] As a result of the objection, the Applicant launched the amendment application on 29 July 2025 in terms of Uniform Rule 28(4). On 29 August 2025, the Second Respondent delivered her Notice of Opposition and answering affidavit.

[41] In the founding affidavit deposed by Attorney R B Gootkin, the Second Respondent's grounds of objection are traversed. The undermentioned salient extracts appearing in Mr Gootkin's affidavit highlight a critical dispute on a point of

law which impacts the issue whether a proper case is made on the papers for a money judgment against the Second Respondent. Although the founding affidavit in the Uniform Rule 28(4) petition for an amendment cannot bolster the Applicant's case for relief sought in the main application, the extracts below are, to my mind, useful when examining the factual and legal basis for the relief sought in the main application.

'The objection is bad in law

11. I respectfully say that the second respondent's interpretation of sections 40 and 89 of the National Credit Act is wrong, and the objection is bad in law.
12. The credit agreement upon which the applicant relies to invoke the provisions of the guarantee and indemnity, and to call up the security it enjoys under the continuing covering mortgage bond, is an agreement of loan concluded between Investec Bank and the first respondent.
13. The agreement of loan was concluded on 31 May 2019 (a copy is attached as annexure FA8.1 to the founding affidavit in the main application). It appears *ex facie* the agreement of loan that Investec Bank was registered as a credit provider under registration number NCRCP9 at the time when the agreement of loan was concluded ...
14. On 31 May 2019, pursuant to the agreement of loan having been concluded, the second respondent executed a guarantee and indemnity (a copy is attached as annexure FA8.2 to the founding affidavit in the main application). It appears *ex facie* the guarantee and indemnity that Investec Bank was registered as a credit provider under registration number NCRCP at the time when the agreement of loan was concluded ... The continuing covering mortgage bond was registered over the property owned by the second respondent on 7 July 2019 pursuant to the execution of the guarantee and indemnity (a copy is attached as annexure FA8.3 to the founding affidavit in the main application).
15. Therefore, "*at the time*" when the credit agreements were "*made*", Investec Bank was registered as required in terms of section 40 of the National Credit Act read with section 89(2)(d). This appears *ex facie* the documents attached to the founding affidavit in the main application as FA8.1 and FA8.2.
16. On 14 September 2022, the applicant and Investec Bank entered into a sale and cession agreement. The applicant took cession of Investec Bank's claims

against the first and second respondents arising out of the credit agreement referred to above (a copy is attached as annexure FA8.5 to the founding affidavit in the main application). The cession did not alter any of the terms of the agreement of loan or the guarantee and indemnity.

17. Although the cession agreement relates to the agreement of loan or the guarantee and indemnity, it is not a credit agreement as contemplated in section 8 of the National Credit Act.
18. Because the cession agreement was concluded:
 - 18.1 between the applicant and Investec Bank which the respondents are not privy to;
 - 18.2 approximately three years after the credit agreements were “made”, the applicant was not required to be registered as a credit provider at the time it took cession of the credit agreements. Nor was the applicant required to have alleged in its affidavits in this application that it was registered as a credit provider at the time it took cession of the credit agreements. A claimant is only required to make such allegations if it is the claimant who concluded the credit agreements who seek to enforce same. That this is so is evident from a proper interpretation of section 40 and 89 of the National Credit Act which require the claimant to have been registered as a credit provider “at the time the agreement was made”.
19. The material contained in the founding affidavit and its annexures clearly disclose that the credit provider (i.e. Investec Bank) with whom the respondents “made” the credit agreements was registered as a credit provider “*at the time*” when the agreements were “made”. The applicant’s status as registered credit provider at the time when it took cession of the claims arising from the credit agreements is therefore irrelevant for purposes of constituting a cause of action to secure a money judgment, and an order in terms of Rule 46A, against the second respondent.”

Issues for adjudication

[42] With regards to the First Respondent, the application raises a crisp factual issue, namely, whether the Applicant is entitled to an order declaring the St John’s property specially executable. If yes, then the terms of the order are to be determined.

[43] As regards the Second Respondent, the application is more complex. It raises for determination factual and substantive questions of law. These are:

- (a) Whether the Applicant complied with s 129(1) read with s 130(4) of the NCA;
- (b) Whether the Applicant's claim secured by the Guarantee agreement and mortgage bond registered over the Noordhoek property is unlawful and void as contemplated by s 40(4) of the NCA (read with s 89 thereof);
- (c) If the answer to (b) is 'yes', then the question arises as to the nature of the just and equitable relief to be granted under s 89(5) of the NCA;
- (d) Whether the Applicant has made out a proper case for a money judgment to be granted against the Second Respondent for the sum of R4 550 000 on the basis of the cause of action pleaded in its papers filed of record;
- (e) If the answer to (d) is 'yes', then whether the amendment of the Notice of Motion ought to be authorised and, if so, then on what terms? and
- (f) If the answers to the issues raised in (a) to (e) favour the Applicant, then the question arises whether it has made out a proper case for relief under Uniform Rule 46A. If 'yes, then on what terms?

Rule 46A application against the First Respondent

[44] Short shrift can be made of the First Respondent's opposition to the main application against him under Uniform Rule 46A. As recorded earlier, I refused a postponement of the main application, pending the outcome of the rescission sought in relation to the default judgment granted on 25 January 2024. As recorded in my ex tempore judgment, the First Respondent can pursue the rescission application and he may, if necessary, seek a stay of the auction as regards the St John's property.

[45] The First Respondent's opposition to the main application is unmeritorious. The grounds of opposition pleaded over and above those pertaining to the rescission application are meritless, even possibly spurious. Indeed, at the hearing, Ms Syria elected not to make any submissions in relation to the case pleaded by her client. As such, Mr Smalberger SC's submissions at the hearing are, essentially, uncontested.

[46] I am satisfied that the Applicant has made out a proper case for relief it seeks under Uniform Rule 46A against the First Respondent. The judgment debt owed to the Applicant arising from the default judgment granted on 25 January 2024 by Acting Justice Joubert in case no. 15602/2022 remains unpaid. The St John's property is not occupied by the First Respondent as his primary home. Its sale will not render him homeless. Therefore, the St John's property may be declared specially executable, and without a reserve price. An order to this effect is justified on the facts in this case.

[47] I am satisfied that, in addition to this relief sought by the Applicant against the First Respondent in prayer 1.1 of its Notice of Motion, the Applicant is entitled to the consequential and/or ancillary relief sought in prayers 2, 3, and 4 of its Notice of Motion against the First Respondent, as well as an order awarding it costs of the application on an attorney-client scale. Orders to these effects will be granted.

[48] At this juncture, it bears recording that during the preparation of this judgment, I called on the Applicant and the First Respondent's counsel to file a note on a legal issue that was not addressed at the hearing, nor in the papers before me, but which I considered may have a bearing on the outcome of the main application.

[49] It is common cause that (i) a pre-litigation notice under s 129(1) of the NCA was required to be served for purposes of the Applicant prosecuting its claim against

the Second Respondent; and (ii) a notice under s 129(1) of the NCA was served on her, albeit after the launch of the main application. It is further common cause that a notice under s 129(1) was not delivered at any time on the First Respondent. Consequently, I called on counsel to make submissions on whether, as a matter of law, the failure to deliver a notice under s 129(1) on the First Respondent serves as a bar to the relief sought against him in the main application. I am satisfied that it does not.

[50] The relief sought in the main application is based on the default judgment against the First Respondent as co-surety for Radsmec's debt to the Applicant. In his post-hearing heads, Mr Smalberger SC argued (at paras 8 - 10), correctly, that, under s 4(2)(c) of the NCA, the accessory liability of the First Respondent falls outside the NCA's remit because the principal debt underlying the suretyship is not regulated by the NCA. Also, see *Ribeiro v Slip Knot Investments 777 (Pty) Ltd* 2011 (1) SA 575 (SCA) para 8 and 12; *Shaw v Mackintosh* 2019 (1) SA 398 (SCA) para 8 and 12.

Rule 46A and Rule 28(4) applications against the Second Respondent

[51] Under this rubric, I deal with the issues as formulated in paragraph [43] (a) to (f) above. The answer to each issue will become evident from this part of my judgment.

(a) *Have the procedural prescripts of s 129(1) and s 130(4) of the NCA been met?*

[52] At the hearing, Mr Smalberger SC advanced the Applicant's position contained in its reply as seen in paragraph [38] above. He conceded that the claim sought to be enforced against the Second Respondent stems from a credit agreement regulated by the NCA and that the pre-litigation debt enforcement

procedures in s 129(1)(a) needed to be met before the main application was launched.¹ He admitted that it was not.

[53] However, citing *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) para 53 and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), Mr Smalberger SC hypothesised that non-compliance with s 129(1)(a) before the main application commenced is not fatal because s 129(1)(b) only imposes a dilatory bar to proceedings. Thus, so he reasoned, the Applicant cannot be non-suited. He contended that the Applicant was entitled to cure the procedural defect by serving the relevant notice on 2 July 2025, which notice performed its warning function and afforded the Second Respondent the statutory period to consider her options. He argued further that the Applicant was entitled to deal with the procedural defects in its reply.

[54] Mr Veerasamy for the Second Respondent relied on s 130(4)(b) of the NCA. Citing *Wesbank v Ralushe* 2022 (2) SA 626 (ECG) paras 15 - 30, he argued that the Applicant's non-compliance with s 129(1) prior to the launch of the main application was not cured in a way valid in law. Citing *First National Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors* 2021 (1) SA 225 (GJ) para 47, he submitted that the Applicant was required first to approach this Court for the issuance of orders

¹ Section 129(1) of the NCA reads:
'Required procedures before debt enforcement.—(1) If the consumer is in default under a credit agreement, the credit provider—
(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before—
(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and
(ii) meeting any further requirements set out in section 130.'

under s 130(4)(b) which orders, if granted, would regulate the further conduct of the litigation.² I agree. *Ralushe supra* and *Synka Liquors supra* are directly on point.

[55] Section 129(1)(a) spells out mandatory, rather than elective, duties that creditors must fulfil before enforcing a credit agreement. See *Amardien and Others v Registrar of Deeds and Others* 2019 (3) SA 341 (CC) paras 43, 56, 58. Although s 129(1)(b) is framed in wide and prohibitive terms ('may not commence any legal proceedings'), failure to comply with the procedure prescribed in s 129(1)(a), which serves as a gateway for access to court, does not render the proceedings void. They remain extant, but irregular. The taint of such irregularity must be cured. But how?

[56] For the reasons advanced below, I align myself with the conclusions reached in *Ralushe supra* paras 29 - 30 (per Lowe J) and *Synka Liquors supra* para 47 (per De Villiers AJ) that *Benson and Another v Standard Bank of South Africa Ltd and Others* 2019 (5) SA 152 (GJ) (and any case aligning with its reasoning) was wrongly decided. Non-compliance with s 129(1) can only be remedied via the procedure in s 130(4)(b).

[57] Sections 129 and 130 establish jurisdictional pre-requisites for litigation. When a creditor contravenes s 129(1)(b) (i.e., by commencing litigation without giving prior notice under s 129(1)(a)), then the mechanism in s 130(4)(b) must be invoked to remedy the irregularity. A court 'must' adjourn the case in terms of s 130(4)(b)(i). A

² Section 130(4)(b) of the NCA reads:

'In any proceedings contemplated in this section, if the court determines that— ...

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must—

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed; ...' (underlining my emphasis)

creditor can resume the case only after complying with the steps determined by the court in terms of s 130(4)(b)(ii). This position aligns with *Sebola* supra para 53.

[58] The adjournment of a proceeding under s 130(4)(b)(i) pending compliance with s 129(1) accords with the legal position that s 129 and s 130 are intertwined. Proof of compliance with both sections is obligatory before a court can permit a credit agreement to be enforced. This was expressed in *Amardien* supra para 59 as follows:

'When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129. The application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled.'

(my underlining for emphasis)

[59] When the Applicant conceded (see paragraphs [30], [32], [33] above) that it breached s 129(1)(a), it was imperative that it immediately halt the litigation and bring its non-compliance to this Court's attention to procure relief envisaged by s 130(4)(b). It did not do so. The Applicant caused the s 129(1) notice to be delivered to the Second Respondent, both personally via the sheriff and by service on her attorney. The Applicant now contends that this cured its non-compliance with the NCA. I disagree.

[60] The notice requirement in s 129(1)(a) is designed to protect consumers of credit. See *Amardien* supra paras 42, 56. Credit providers are obliged to take steps which purposefully slows down the debt recovery process. Litigation is delayed until

the consumer has been afforded an opportunity to consider alternatives to litigation. In cases of non-compliance with s 129(1)(a), as in casu, s 130(4)(b) applies. It aims to regularise proceedings that are otherwise irregular. This must occur consistently with both the letter and the spirit of the NCA. Therefore, Parliament directed that courts 'must' postpone ('adjourn') pending proceedings while steps are taken to remove the taint of irregularity. Adjournment, therefore, is a categorical imperative.

[61] Section 130(4)(b) is part of a network of provisions in the NCA catering for judicial oversight. This sub-section establishes a framework for the regularisation of a legal proceeding which a court, whether *mero motu* or on application, finds to be irregular for want of proper compliance with the NCA. Section 130(4)(b)(i) envisages a mandatory freezing of a proceeding while the steps imposed under s 130(4)(b)(ii) are being completed. Statutorily, the steps are set as judicial preconditions. Only when they are fulfilled is the suspension (i.e., the adjournment) lifted, then 'the matter may be resumed'. The reference to a resumption of the litigation is a clear indication that a complete pause is intended while the taint is being removed and the consumer is afforded an opportunity to manage the debt by rectifying the default and avert litigation.

[62] Section 130(4)(b) does not permit two parallel processes running concurrently, namely, court proceedings and compliance with the NCA. See *Synka Liquors* supra para 47.4. Litigation is barred at a time when non-compliance is being remedied. This shows that although the legislature does not invalidate a proceeding for want of compliance with s 129(1), it also does not view the continuation of proceedings in the face of non-compliance to be permissible. This is logical because

continuing legal proceedings undermines achievement of the goals set for the benefit of debtors.

[63] There has not been proper compliance with the NCA in casu. Section 130(4)(b) envisages that while the Applicant took steps to remedy its non-compliance, there should have been a hiatus through a formal suspension by court order. Service of the s 129(1) notice did not bring about the pause contemplated by s 130(4)(b)(i). The Applicant pressed ahead with its case. See paragraphs [32], [33], [34] and [40] above.

[64] The Applicant's conduct in this regard underscores the significance of the legislature requiring judicial oversight when non-compliance with the NCA is being remedied by a creditor who breached the NCA. Self-correction by a litigant without judicial regulation and oversight is improper. Such a process is inconsistent with the import and effect of s 130(4)(b) (and the network of related provisions in the NCA).

[65] Courts are dutybound to uphold and apply the law. See *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) para 68. Courts must ensure proper compliance with s 129(1)(a). Doing so is not a mechanical exercise. It involves more than a court merely verifying a track and trace report; more than confirming that the warning notice envisaged by s 129(1)(a) has been dispatched in accordance with the method agreed upon by the consumer; and more than determining whether the consumer had actual or probable knowledge of the relevant notice.

[66] What more is required? When compliance with s 129(1) occurs during litigation itself, then a court is required to establish as a fact (at least): first, that service of the s 129(1)(a) notice occurred in accordance with an order issued under

the aegis of s 130(4)(b)(ii); secondly, that the litigation was stayed while service was effected; and, thirdly, that the stay remained in place throughout the period afforded to the debtor (consumer) to consider the options open to him/her under s 129(1)(a). This is the kind of judicial supervision which, in my view, underpins s 130(4)(b) of the NCA.

[67] Mr Smalberger SC invited me to adopt what he termed a 'robust approach'. He posited that courts have discretion to condone service of notice under s 129(1)(a) *ex post facto* without compliance with s 130(4)(b). I disagree. First, a consideration militating against the so-called robust approach is that the remedy in s 130(4)(b) benefits creditors who fail to comply with the prescripts of, for e.g., s 129(1). The remedy permits an interpretation that non-compliance with s 129(1)(b) does not lead to a proceeding being void owing to non-compliance with a vital procedural stipulation.

[68] Secondly, to the extent that *Benson supra* recognises judicial discretion in the present context, I hold that it was wrongly decided. To this end, I align myself with *Ralushe supra* para 29 and *Synka Liquors supra* para 47.1 that no discretion exists. This is clear from the strict introductory words used in s 130(3), as well as from the peremptory texture and tone of s 130(4)(b). Also, when the legislature intends to confer judicial discretion, it says so expressly. Compare, for e.g., ss 130(4)(c) and (d).

[69] Section 130(3)(a)³ makes it clear that when a credit provider seeks to enforce a credit agreement to which the NCA applies, then 'the court may determine the

³ Section 130(3)(a) of the NCA reads:
'Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—

matter only if the court is satisfied that' the gateway for access to court is met. The word 'only' in the introductory words to s 130(3) indicates that strict adherence by courts to this provision is required. Put differently, courts have no discretion to adjudicate cases in the face of non-compliance with the prescripts of the NCA. This point is reinforced by s 130(4)(b) (discussed earlier) being couched in peremptory terms. Judicial discretion in this setting would have to be impermissibly winked out of contextual crevices.

[70] The robust approach contended for by counsel is, in my view, incongruous with the aims sought to be achieved by the edifice of s 130(3)(a) read with s 130(4)(b). It allows non-compliance with the NCA; it circumvents judicial oversight at a crucial point in the debt recovery process; and it weakens the protections accorded to consumers. For all these reasons, I reject the approach contended for by the Applicant's counsel.

[71] There was considerable debate before me on whether the Applicant's use of its replying affidavit to deal with its *ex post facto* compliance with s 129(1) is valid (as was contended by Mr Smalberger SC), or whether the Applicant ought to have addressed this issue in a supplementary founding affidavit (as was contended by Mr Veerasamy). This is a matter of law requiring an answer for the purposes of the case with which I am seized. A similar legal issue arose, but was left open, in *Synka Liquors* supra para 47.8 and in *Ralushe* supra para 29. I cannot do so in this case. I must resolve it.

[72] It is a foundational principle of our law of credit that a credit provider must, as part of its cause of action, allege compliance with s 129(1) of the NCA. See *Synka*

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with; ...' (underlining for emphasis)

Liquors supra para 47.8. It is equally trite that, in our law of civil procedure, the affidavits filed in motion proceedings stand as both the pleadings and the evidence. See *Minister of Land Affairs and Agriculture v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 43. Petitioners stand or fall by the case made out in the founding papers. All essential averments upon which a case is built must be made in a founding affidavit. As a general rule, new matter or essential allegations should not be made in a petitioner's reply. See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 338.

[73] Applying these first principles, a litigant who seeks to recover a debt through the enforcement of a credit agreement regulated by the NCA must, in the founding papers, allege and prove compliance with s 129(1). This is an essential part of a cause of action which must be pleaded upfront and not as an afterthought in a reply. However, where compliance with s 129(1) occurs after the commencement of a proceeding, then a different legal position ensues. Failure to deal with s 129(1) in the founding papers will not be fatal, provided s 130(4)(b) is invoked and its provisions are complied with.

[74] In my view, the filing of a supplementary founding affidavit is an unnecessary step to cure the defect in the founding papers of a petitioner who delivered a notice envisaged by s 129(1) after the commencement of a legal proceeding. The cure lies squarely in the mechanism discretely crafted by the legislature in s 130(4)(b) itself.

[75] When a litigant obtains court orders under s 130(4)(b) and completes the steps determined judicially, then that process brings regularity to an otherwise irregular proceeding. All that would then be required of a petitioner is a compliance

affidavit which explains how the court's orders were carried out. The necessary proofs must be enclosed. A supplementary founding affidavit dealing with s 129(1) seems superfluous.

[76] Even if, in law, a discretion does exist to approve service under s 129(1)(a) *ex post facto*, I would not have been inclined to exercise it in the Applicant's favour. Doing so in the present circumstances would be injudicious. First, the Applicant kept the Second Respondent 'under the pump' (so to speak), even after delivering the notice contemplated by s 129(1)(a). The litigation continued unabated; pleadings were filed; and at no point was there a pause that might have afforded the Second Respondent a fair opportunity to consider her alternatives to litigation. She had no other option but to litigate. This approach is contrary to the NCA's spirit (and its black letter law).

[77] Paragraphs [32], [34] and [40] above record, in chronological order, the steps taken by the Applicant after the Second Respondent served her answering affidavit in the main application. In sum: on 2 July 2025, the Applicant served notices under s 129(1)(a) of the NCA and Uniform Rule 28(1); on 11 July 2025, the Applicant delivered a replying affidavit; on 29 July 2025, it launched the amendment application.

[78] The Applicant took steps to advance its litigation against the Second Respondent even during the period afforded to her in the s 129(1)(a) notice to consider how she intends to deal with the debt allegedly owed to the Applicant. Section 129(1) read with s 130(4)(b) envisages a moratorium on litigation during the statutorily ordained period granted unto a consumer to weigh his/her options. This did not occur.

[79] If the Applicant had approached this Court for relief under s 130(4)(b), as it was obliged to do, then this Court would have adjourned the litigation. Doing so would have precluded the Applicant from taking the steps it did in terms of Uniform Rule 28 at the time those steps were taken. Thus, I hold that the steps taken were improper.

[80] The steps taken pursuant to Uniform Rule 28 are designed to enforce a credit agreement that is regulated by the NCA. On 2 July 2025, the Applicant served a notice of its intention to insert a prayer in its Notice of Motion which would allow for the issuance of a money judgment against the Second Respondent. The intended amendment is vital. Without it, the Applicant would not be entitled to obtain a judgment in the main application. The domino effect of this is that the Applicant would not be entitled to the relief sought under Uniform Rule 46A as regards the attachment and sale of the Noordhoek property. In the amendment application, the Applicant avers that it would suffer greater prejudice if the amendment were not granted than would be suffered by the Second Respondent if the amendment were to be granted.

[81] All this underscores the significance of the amendment in the context of this case. The amendment is a catalyst for the Applicant to seek and obtain, first, a money judgment in terms of its ceded rights under the Guarantee agreement. If granted, the Applicant can then seek, and possibly obtain, an order under Uniform Rule 46A.

[82] A second reason why I would not have exercised my discretion, if it existed in law, in the Applicant's favour is that the notice it delivered to the Second Respondent failed, for the reasons adduced below, to satisfy the legal requirements for validity.

Therefore, the notice is itself improper and cannot be utilised for litigation purposes. In these circumstances, s 130(3)(a) precludes me from enforcing the credit agreement.

[83] Section 129(1)(a) requires that notice of 'the default' must be drawn to the attention of 'the consumer' who is in default under a credit agreement. For a notice to be valid, it must satisfy various requirements. These include reference in the notice to, inter alia, (i) identification of the relevant credit agreement; (ii) the nature of the consumer's default; (iii) the amount of the default; and (iv) the options available to a consumer in financial distress, and who is unable to purge the debt, to manage it going forward (such as, to possibly refer the credit agreement to a debt counsellor, or to a dispute resolution agent, or to the ombudsman). See *Amardien* supra paras 56 - 65. The Applicant's notice under s 129(1) failed to comply with at least (i), (ii), and (iii).

[84] In the Applicant's amendment application (see paragraph [40] above), its attorney stated that the credit agreement sought to be enforced against the Second Respondent is the loan agreement concluded on 31 May 2019 between Investec and the First Respondent (see paragraphs [17] to [19] above). It is common cause that the Investec loan was secured by the Guarantee agreement and a mortgage bond registered over the Noordhoek property (see paragraphs [20] to [22] above).

[85] However, the balance of the debt arising from the Investec loan which was settled by the Applicant and acquired by it (see paragraphs [23] to [26] above), is not the debt mentioned in the s 129(1) notice as being that which the Second Respondent is 'in default'. The debt claimed in the notice is that arising from certain default judgments granted against the First Respondent during January 2024.

[86] The salient paragraphs distilled from the Applicant's s 129(1) notice are:

'INDEBTEDNESS & DEMAND

15. On 25 January 2024, judgment was granted against *inter alia* Mr Valecic in the Western Cape Division of the High Court, Cape Town under case numbers 15601/2022, 15602/2022 and 15616/2022 in our client's favour in the sum of R54 886 831.55; R43 025 592.70 and R5 994 856.24 respectively.
...
16. The judgment debt owing as aforesaid remains due, owing and payable. Our client is therefore entitled to call up the security it enjoys in terms of the Guarantee and Indemnity and the Mortgage Bond as aforesaid.
17. In the circumstances, our client hereby calls up the security it enjoys in terms of the Guarantee and Indemnity and the Mortgage Bond.
18. We are instructed to demand from you, as we hereby do, payment to our client of the sum of R4 550 000.00 and the additional sum of R910 000.00 (being the maximum amount you are liable for in terms of the Guarantee and Indemnity and the Mortgage Bond). ...
21. In terms of Section 129(1) of the NCA, you may refer this Guarantee and Indemnity and the Mortgage Bond to a debt counsellor alternatively a dispute resolution agent, consumer court or ambud with jurisdiction ...' (my emphasis)

[87] This notice records that the Second Respondent is indebted to the Applicant for judgment debts which are due, owing, and payable by the First Respondent. None of those judgments stem from the First Respondent's indebtedness to the Applicant pursuant to the latter's payment to Investec in accordance with the terms and conditions of the sale and cession agreement with Investec (see paragraphs [24] to [26] above), which payment is secured by the Guarantee agreement and the

mortgage bond over the Noordhoek property. The Applicant's pleaded position is that the Second Respondent is only liable for the default judgment granted in case no. 15602/2022.

[88] As discussed in paragraphs [6] to [9] above, the Applicant's cause of action against the First Respondent in case no. 15602/2022 is a cross-suretyship which the latter signed for the benefit of Radsmec, a company which was indebted to the Applicant for monies advanced in terms of a factoring agreement. That judgment debt is secured neither by the Second Respondent's Guarantee agreement, nor by the bond registered over her immovable property, being the Noordhoek property.

[89] The judgment debt against the First Respondent in case no. 15602/2022 does not fall in the ambit of clause 3.1 of the Guarantee agreement as quoted in paragraph [37] above. Clause 3.1 extends only to a judgment obtained by Investec (or its assigns) against the First Respondent arising from the loan agreement between the latter and Investec. Properly interpreted, the Guarantee agreement does not secure any debt arising from the cross-suretyship signed by the First Respondent for Radsmec's benefit in the Applicant's favour. For these reasons, the main application must fail on its merits. These reasons are in addition to any other grounds supporting the same conclusion as discussed elsewhere in this judgment.

[90] For the reasons discussed in paragraphs [83] to [89], I hold that the s 129(1) warning notification served on the Second Respondent is defective. It failed to give proper notice of a debt which was in arrears by the First Respondent to the Applicant arising from the credit agreement concluded between the latter and the former.

[91] Consequently, the Applicant failed to give notice of the actual sum that the First Respondent owed it under the credit (loan) agreement concluded between

them, which debt was secured by the Guarantee agreement and the registered mortgage bond. Owing to the Applicant failed to give proper notice to the Second Respondent of both (i) 'the default' and (ii) the reasons why she was 'in default' for purposes of s 129(1) of the NCA, I reached my conclusions delineated in paragraph [82] above.

(b) Is the Applicant, as a credit provider, obliged to register as such for purposes of any credit agreement concluded with the First and/or the Second Respondent?

[92] Under s 40(1) of the NCA, a person 'must apply' to register as a credit provider if the total principal debt owed to that person under all outstanding credit agreements, except incidental credit agreements, exceeds the legal threshold in s 42(1). Anyone who is obliged to register but fails to do so 'must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things' (s 40(3)). Section 40(6)(b) provides that when determining if a person is obliged to register under s 40(1), 'any credit guarantee to which a credit provider is a party is to be disregarded'.

[93] Mr Smalberger SC argued that the Applicant was not at any time germane to this application obligated to register as a credit provider. Consequently, so he posited, the credit agreements on which the Applicant relies for its claim against the Second Respondent is/are valid and, as such, enforceable in a court of law.

[94] Mr Veerasamy pointed out that the Applicant is a credit provider under credit agreements with the respondents respectively. These are regulated by the NCA. He argued that since the Applicant seeks to enforce its credit agreements against the Second Respondent, logic dictates that it must be independently registered as a

credit provider, which it is not. This, he hypothesised, should be fatal to the main application.

[95] This dispute involves a novel legal issue, namely, whether a transferee of rights under a credit agreement, who gave value for the transfer to a consumer on credit, can rely on the registration status of the transferor for purposes of s 40(1). I hold that, when the NCA is properly interpreted (see below), this question must be answered in the negative. In cases of non-compliance, the consequences in s 40(4) must ensue.

[96] There are three credit agreements at stake in casu. First, there is the loan agreement between the Applicant and the First Respondent; second, there is the Guarantee agreement; and third, there is the mortgage agreement. Since the second and third agreements serve as security for the first, they are all wedded together.

[97] In Attorney Gootkin's affidavit (see paragraph [41] above), he explained why the Applicant need not register as a credit provider. Mr Smalberger SC embraced the same grounds. The following is a synopsis thereof (with reference to the affidavit):

- (i) the credit agreement which forms the basis for the Applicant calling up the security ceded by Investec is an agreement of loan concluded between Investec and the First respondent (para 12 of the affidavit);
- (ii) the Applicant took cession of Investec's claims against both respondents arising out of the credit agreements concerned (para 16 of the affidavit);
- (iii) the cession did not alter the terms of the loan (para 16 of the affidavit);
- (iv) the cession relates to the agreement of loan and the agreements serving as security for the underlying principal debt (para 17 of the affidavit); and

(v) the cession is not a credit agreement and, therefore, the Applicant was not required to register as a credit provider under the NCA when it took cession of both the loan claim against the First Respondent and the security against the Second Respondent (para 18 of the affidavit).

[98] For the reasons given below, this latter submission is incorrect, both in fact and in law. Moreover, it is contradicted by the arguments advanced on the Applicant's behalf (paragraph [50] above) as to why the NCA does not apply to the First Respondent's liability arising from his cross-suretyship in the Applicant's favour.

[99] The contradiction is evident when consideration is given to the fact that the Applicant admits that the NCA applies to the Guarantee agreement and the mortgage agreement pertaining to the Noordhoek property. See paragraph [86] above. Logic dictates that the Applicant must, therefore, be taken to admit that the underlying principal claim is itself regulated by the NCA. If not, then on what legal basis is the security held by the Applicant against the Second Respondent regulated by the NCA?

[100] The debt which arose from the Investec loan agreement is regulated by the NCA. It is in the form of a secured loan. See paragraphs [17] to [21] above. The loan qualifies as a 'credit transaction' contemplated by s 8(4)(d) of the NCA. It is illogical for the Applicant to contend, as it appears to do, that the secured loan ceased to be regulated by the NCA when the balance of that debt was ceded to the Applicant who, in turn, gave value for it in the form of credit extended to the First Respondent.

[101] The Applicant paid monies to Investec for the benefit of the First Respondent. In so doing, the Applicant acquired certain rights from Investec. As explained in paragraphs [108] to [119] below, the underlying causa for that acquisition is a 'credit

agreement' under s 8 of the NCA between the Applicant and the First Respondent. As such, the Applicant was required to be independently registered as a credit provider (i) when it offered credit, and made credit available, to the First Respondent; (ii) when it extended the credit to him; and (iii) when it entered into a credit agreement with him. The Applicant cannot 'piggyback' off Investec's registration status under s 40(1).

[102] The ensuing reasons support my conclusion on this vital question of law. First, the Applicant is a 'credit provider' as defined. The NCA (s 1) defines this term to mean:

“‘credit provider’, in respect of a credit agreement to which this Act applies, means—
...

- (e) the lender under a secured loan; ...
- (h) the party who advances money or credit to another under any other credit agreement; or
- (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into’.

The Applicant is a credit provider in one or more of these categories vis-à-vis the First Respondent who is, thus, a 'consumer' as defined in s 1. For purposes of s 40(1), the Guarantee agreement with the Second Respondent is not considered. See s 40(6)(b).

[103] Secondly, the Applicant settled the First Respondent's debt to Investec as a form of credit provided at arm's length within the contemplation of s 4(1) of the NCA. That credit enabled the First Respondent to exit his debt with Investec and parachute out of the sequestration proceedings in case no. 15432/2021. The credit advanced to the First Respondent is part of the Applicant's daily business as a merchant factor and financier. As is apparent from the pleadings in, and the extensive annexures to,

the main application, the Applicant is heavily engaged in the market of consumer credit.

[104] Thirdly, s 40(1) of the NCA must be interpreted purposively. See *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* 2020 (2) SA 390 (SCA) para 32. Registration as a credit provider facilitates control and regulation of the credit industry, and protects consumers of credit. Among the aims listed in s 3 is the promotion of responsible access to credit; and the fostering of protection to credit consumers. These aims sought to be achieved by the NCA would be undermined if persons providing credit, especially those operating as a business in the credit market space (such as, the Applicant), are absolved of the duty to register as credit providers.

[105] Fourthly, s 40(1) is couched in peremptory language. The SCA, in *De Bruyn NO and Others v Karsten* 2019 (1) SA 403 (SCA), affirmed that, under s 40(1), the number of credit agreements concluded by a credit provider is no longer considered when determining if a duty exists to register as a credit provider; nor is it considered whether a person operates regularly in the credit market. While these factors are no longer determinative of whether a duty to register exists (contra *Friend v Sendal* 2015 (1) SA 395 (GP)), I view the Applicant's business activities in the credit industry, and its continual provision of credit, as reinforcing my view that it was, under s 40(3), barred from offering credit, making credit available, and extending credit to the First Respondent. It was obliged to be registered as a credit provider when it concluded a credit agreement with him. Alternatively, under s 89(4), it should, within 30 days of entering into the credit agreement, have applied for registration. The Applicant failed to do so. I find that this omission is fatal to the twin petitions in casu and to its claims.

[106] Fifthly, in *De Bruyn NO v Karsten* supra para 21, the SCA held that the amount of credit advanced is presently the sole determinant as to whether a provider of credit is obliged to register under s 40(1). The SCA held that 'the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached' (para 28). For present purposes, that threshold, as determined in accordance with s 42(1) of the NCA by the Cabinet Minister responsible for consumer credit matters, is nil rand (R 0,00). See GN 513 in GG 39981 dated 11 May 2016.

[107] The exact sum owed by the First Respondent to the Applicant arising from their credit agreement is not disclosed in the pleadings. Whatever its capital value, clause 1.2.13 of the sale and cession agreement records that it included R700 000,00 plus 15% VAT. Accordingly, the Applicant was obliged to comply with s 40(1) of the NCA.

[108] Before dealing with the consequences of the Applicant's failure to register as a credit provider, it is necessary that I clarify the basis for my rejection of the assertion that the debtor-creditor relationship between the Applicant and the First Respondent is regulated exclusively by the sale and cession agreement and not by a credit agreement under the NCA entered into by the Applicant with the First Respondent.

[109] When determining if the NCA applies to any agreement, its underlying causa must be considered. See *Absa Bank Ltd v Serfontein and Another* 2025 (3) SA 345 (SCA) para 24. The sale and cession agreement was not concluded in a vacuum. It has its genesis in the tripartite agreement which, in turn, has its origins in the First Respondent's financial woes that culminated in his estate being placed under

provisional sequestration pursuant to an application by Investec. In terms of clause 3.4.1 of the tripartite agreement, the Applicant agreed to purchase the remaining nett balance of Investec's claim against the First Respondent (after certain deductions).

[110] The terms and conditions of that purchase are in the sale and cession agreement. Clause 2.6 thereof records that the Applicant agreed to purchase Investec's 'Remaining Claim' (defined in clause 1.2.24) and to take cession of the 'Guarantee Claims' (defined in clause 1.2.10) and the 'Mortgage Bond (Noordhoek property)' so that 'the Purchaser is to be placed in the same secured position as that of the Lender [Investec] prior to the conclusion of this Agreement'. Clause 2.6 and 2.7 records the intention that the sale and cession will occur 'on the terms and conditions set out in this Agreement'. Whereas clause 3 records the assets sold, clause 5 records the assets ceded. Nowhere in the agreement does it record the terms of the credit given to the First Respondent through settlement of his Investec debt (for e.g., loan period, repayment instalments, interest rate, and so on). Where are they recorded?

[111] In his affidavit, Attorney Gootkin stated that the terms of the cession did not alter the terms of the loan agreement with Investec. The sale and cession agreement is silent on the terms and conditions of the Investec loan agreement. It also does not record that their provisions will apply to the credit extended to the First Respondent when the Applicant bailed him out of the Investec debt and averted final sequestration.

[112] Even if the sale and cession agreement foreshadowed that the terms and conditions of the Investec loan agreement would regulate the debtor-creditor relationship between the Applicant and the First Respondent, they would still, under

the NCA, have to conclude a credit agreement which incorporates their agreed terms.

[113] To avoid reckless credit, s 92 is to the effect that credit providers are obligated to provide prospective consumers of credit with pre-agreement disclosure information. Under s 93, credit providers must furnish consumers with a copy of the credit agreement incorporating the agreed terms and conditions for the extension of credit.

[114] As a fair, responsible credit provider, the Applicant would have concluded a credit agreement with the First Respondent in a form determined by it. Without such an agreement in place, it would also make no commercial sense for the Applicant to execute the sale and cession agreement, nor pay the purchase price to Investec for the First Respondent's benefit at a time when he was under provisional sequestration.

[115] By virtue of s 3(c) read with s 80(1) and s 81 of the NCA, the provision of credit responsibly obliged the Applicant to approve credit for the First Respondent only once it was satisfied that he qualified for a loan of several million rand in casu, and that he had the ability to repay the loan on terms agreed between them. Investec and the Applicant agreed that the latter would vet the First Respondent on his creditworthiness.

[116] The following clauses in the sale and cession agreement are instructive here:

(a) clause 10.1.3: it provides that Investec makes no representation or warranty about the First Respondent's financial condition or creditworthiness;

(b) clause 10.2.1: it affirms that the Applicant 'has made (and shall continue to make) its own independent investigation and assessment of the financial condition and

affairs of the Borrower [the First Respondent] and has not relied on any information provided to it by the Lender in connection with the Settlement Agreement and other agreements in relation thereto’;

(c) clause 10.2.2: it stipulates that the Applicant ‘will continue to make its own independent appraisal of the creditworthiness of the Borrower and its related parties’;

(d) clause 10.3.3: it records that Investec is under no obligation to ‘provide the Purchaser with any credit or other information concerning the affairs, financial condition or business of the Borrower, its related parties or any other party’.

[117] Clause 8.1 of the sale and cession agreement is an important indicator of the existence of a credit agreement concluded between the Applicant and the First Respondent (i.e., separate to the Investec loan agreement). This clause reads:

‘The Parties record that the sale of the Remaining Claim pursuant to this Agreement is the transfer of a “*debt security*” (as defined in Section 2(2)(iii) of the VAT Act) and is accordingly the supply of a financial service and exempt from VAT under Section 12(a) of the VAT Act.’

Section 2(1) of the Value-Added Tax Act 89 of 1991 (“the VAT Act”), to which s 2(2)(iii) relates, states that the supply of a financial service includes the following activity:

‘(f) the provision by any person of credit under an agreement by which money or money’s worth is provided by that person to another person who agrees to pay in the future a sum or sums exceeding in the aggregate the amount of such money or money’s worth’.

[118] The ineluctable conclusion from the foregoing facts is that the Applicant provided a financial service to the First Respondent of the kind envisaged by s 2(1)(f) of the VAT Act. The supply of an agreed financial service involving the provision of money on credit constitutes a credit agreement contemplated by s 8 of the NCA.

[119] Accordingly, although the capital sum owed to the Applicant by the First Respondent is determinable with reference to the sale and cession agreement, the terms of that credit is regulated by a separate credit agreement between the Applicant, as secured lender, and the First Respondent, as borrower. This factual position is consistent with the provisions of the sale and cession agreement.

[120] As there is nothing in the pleadings to the main application indicating that the First Respondent is in breach of his obligations arising under the loan agreement with the Applicant, the latter failed to discharge the onus resting on it to prove that it is entitled to call up the security held by it (i.e., the Guarantee and the mortgage bond). Thus, the main application and the amendment application were doomed ab initio.

Consequences for non-compliance with s 40(1) of the NCA

[121] The Applicant was obliged to register as a credit provider under s 40(1) of the NCA for purposes of the credit agreement with the First Respondent. Failing to do so triggers s 40(4) of the NCA (read with s 89(2)(d) and s 89(5)). Section 40(4) reads:

‘A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.’

[122] In the circumstances, under s 89(2)(d), the principal credit agreement between the Applicant and the First Respondent which gave rise to the latter’s ostensible duty to repay the credit extended to him is unlawful and void from its inception during 2022.

[123] Whenever a credit agreement is found to be unlawful for purposes of the NCA, s 89(5) stipulates that ‘a court must make a just and equitable order’. This

confers a wide, equitable discretion to be exercised judiciously on the facts of each case.

[124] The credit agreement with the First Respondent is wedded to the security held by the Applicant in the form of the Guarantee agreement and mortgage bond over the Noordhoek property. As a matter of juridical logic, the invalidity of the principal credit agreement renders the security given for it to be unlawful and entirely void. Consequently, the ostensible rights transferred to the Applicant under the Guarantee agreement is void from the date of the sale and cession agreement, being 14 September 2022. Orders to this effect are warranted under s 40(4) read with s 89(5).

[125] Finally, owing to the unlawfulness of the security held by the Applicant, I deem it just and equitable to direct that the mortgage bond registered at the Deeds Office, Cape Town over the Noordhoek property (no. B[...]) be cancelled forthwith at the Applicant's expense. It will be ordered to take all necessary steps in this regard and to surrender the original title deed (no. T[...]) to the Second Respondent.

Costs

[126] Concerning costs, the parties' respective counsel argued that costs must follow the result. I agree with them. There is no basis for deviating here from this established practice, and none was advanced by any of the protagonists. Accordingly, as regards the case against the First Respondent, I will award costs, and on a scale as between attorney-client. This accords with the parties' agreement and the circumstances of this case. Also, the First Respondent's opposition was entirely meritless and his attempt to postpone the hearing was disingenuous. He sought to derail the hearing. This conduct warrants a punitive sanction as a means of demonstrating the Court's displeasure.

[127] As for the Second Respondent, she is entitled to her costs in the main application and the amendment application. However, in the judicious exercise of my discretion, I will not award costs on the same scale for both petitions. Whereas the main application had considerable complexity to it, as appears from this judgment, the amendment application, on the other hand, was largely routine. Accordingly, it would be unfair to burden the Applicant with costs in the amendment application at the same scale as that applied to the main application.

[128] The Applicant sought costs in the main application against the Second Respondent on an attorney-client scale. It failed in its application. I have found that the main application was doomed from the beginning. This ought to have become clear to the Applicant after the answering affidavit was filed. Instead, it pressed ahead which resulted in considerable prejudice to the Second Respondent. She was put to unnecessary expense. In the circumstances, I am satisfied that an attorney-client scale of costs is warranted, including cost of two counsel where employed. The Applicant likewise employed two counsel. This is an indication that it too was satisfied that the matter at hand was sufficiently complex to justify two counsel. I agree.

[129] As for the amendment application, the Applicant accepted that it would be liable for the costs occasioned by the amendment application. That petition failed. However, it was not overly complex and was set down for hearing simultaneously with the main application. In the circumstances, I am satisfied that a party and party scale of costs is merited, with counsel's fees to be allowed on tariff scale B.

Order

[130] In the result, the following orders are made:

- (a) The rule 46A application against the First Respondent succeeds with costs on an attorney-client scale (including costs of two counsel where so employed);
- (b) Pursuant to Uniform Rule 46A, the immovable property owned by the First Respondent, being Section 3 in the scheme known as St John's 1 in respect of the land and building or buildings at Sea Point in the City of Cape Town, as shown and more fully described on Sectional Plan No. SS 232/2018, Western Cape Province, of which section the floor area, according to the said sectional plan, measures 121 (one hundred and twenty one) square metres, held by, and more fully described in, sectional deed of transfer No. S[...], together with the Exclusive Use Area in the scheme known as St John's 1, described as Store on Basement Level 2 number SS15, measuring 6 (six) square metres in extent, held by, and more fully described in, the Notarial Cession of Exclusive Use Rights SK 5006/2019 ("the St John's property"), is declared specially executable;
- (c) The Registrar of this Court is authorised and directed to issue a writ for the attachment of the St John's property and its sale by public auction to recover the debt owed to the Applicant by the First Respondent in terms of a default judgment granted by this Court on 25 January 2024 in case no. 15602/2022, including interest and costs on an attorney-client scale;

- (d) The Sheriff of this Court in whose jurisdiction the St John's property is situate is authorised and directed to execute any writ issued pursuant to [130](c) above, and to take all such steps as may be necessary to sell the property by public auction;
- (e) The Sheriff envisaged in [130](d) above is authorised and directed to pay the full proceeds of the sale in execution of the St John's property into the trust account of the Applicant's attorneys of record at the time of the Sheriff's public auction;
- (f) The main application against the Second Respondent is dismissed with costs;
- (g) The Applicant is liable to pay the Second Respondent's costs in relation to the main application on an attorney and client scale, such costs to include the costs of two counsel where so employed;
- (h) The Uniform Rule 28(4) application is dismissed with costs in favour of the Second Respondent on a party-party scale, such costs to be on tariff scale B;
- (i) In terms of s 40(4) read with s 89(5) of the NCA, the following is declared:
- (aa) the credit agreement between the Applicant and the First Respondent relating to the Applicant's loan for the benefit of the First Respondent to settle the latter's indebtedness to Investec Bank is declared unlawful from its inception;

(bb) the Applicant has no enforceable claim vis-à-vis the Second Respondent under the credit guarantee dated 31 May 2019, nor under the registered mortgage bond over erf 2[...] Noordhoek in the City of Cape Town;

(cc) the Applicant shall at its expense, within 30 days, take all necessary steps to cancel the mortgage bond over erf 2[...] Noordhoek (bond no. B[...]) and restore its original title deed no. T[...] to the Second Respondent.

F. MOOSA

ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant: A M Smalberger SC (with H Bevis-Challinor)

Instructed by: Werksmans Attorneys (Mr R Gootkin)

For First Respondent: F Syria

Instructed by: Manoj Haripersad Attorneys (B R Singh)

For Second Respondent: Mr I Veerasamy

(heads of argument by I L Topping SC and I Veerasamy)

Instructed by: Thorpe & Hands Inc (R Topping)