IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Not Reportable

Case No: 19793/2015

In the matter between:

VAUGHAN HENRY ULYATE N.O.	First Plaintiff
VERONICA ULYATE N.O.	Second Plaintiff

and

MAURENE ANNETTE CLASSENS (PREVIOUSLY DAMPIES)	First Defendant
GRANVILLE NEIL DAMPIES	Second Defendant

Coram:	**RALARALA, J**
Heard:	**3 December 2024**
Delivered:	**30 January 2026**

Summary: Claim for money judgment and order of special execution against immovable property to secure a consolidation loan – Judgment creditor not to register as a credit provider in terms of the National Credit Act – credit agreement reckless credit section 80(1) (a) (iii)and (b) (ii) – credit agreement set aside consumers rights and obligations in part-section 83(2)(a).

ORDER

The credit agreement is declared reckless credit and it is set aside in terms of section 83(2)(a).

The Plaintiffs' claim is dismissed with costs on scale B.

The Plaintiffs are directed to cancel the continuing covering bond registered against the first Defendant's immovable property within 90 days from the date of this order.

JUDGMENT

Ralarala, J

INTRODUCTION

[1] The Plaintiffs instituted action against the Defendants for the payment of monies lent and advanced amounting to R430 000 in terms of a mortgage bond together with an order seeking to declare the Defendants' immovable property executable pursuant to the bond. In the alternative, and in the event of the court declaring the bond to be reckless credit an order in terms of section 83(3) of the National Credit Act, 34 of 2005 ("the NCA"). Regarding a further alternative claim and in the event of the court finding that the bond was invalid, an enrichment claim in the sum of R178 675. The Plaintiffs' claims against the Defendants are jointly and severally. Only the first Defendant is defending the action. The first Defendant raised

a defense of reckless credit having been extended by the Plaintiffs and without being registered as a credit provider as envisaged in section 40 of the NCA.

[2] In the particulars of claim, the Plaintiffs alleged the following:

> "In and during May 2012, the Defendants jointly had numerous debt obligations owing to many creditors. The Defendants were desirous to consolidate their debt and settle same. The Defendants sought to reduce the high cost of credit that they were incurring, including fees, charges and interest payable to various creditors. Considering the large number of their creditors the Defendants approached the Trust with the view of concluding a consolidation agreement in terms of which the Trust would pay and settle all the Defendants' existing debts, then due and payable whose particulars and details were provided by the Defendants. The sum paid by the trust to the Defendants' creditors in settlement on behalf of the Defendants would be secured by the Defendants' immovable property and would be repayable to the trust on expiration of a period of eight months after the date of registration of a covering bond, after the said settlement of the Defendant's existing debts and liabilities.
>
> Wherefore the plaintiffs pray for judgment in the following terms:

A. Payment of the amount of R430 000.

B. Interest thereon at a rate of 17,1% per annum monthly in advance, calculated from 1 October 2015 until cancellation of the Bond;

C. An order declaring executable erf 3[...], Kraaifontein, in the City of Cape Town, Western Cape Province;

D. Costs of suit, as taxed on Attorney and Client scale;

In the alternative to prayers A to D

E. In the event of the court declaring the bond to be reckless credit in terms of section 80(1)(b) of the NCA, the plaintiffs pray that the Court, in terms of section 83(3):

(i) consider whether the Defendants are over- indebted; and

(ii) if the court concludes that the Defendants are over-indebted, to make an order it deems just and equitable in terms of section 83(3)(b) of the NCA;

In the alternative to prayer A to E

E. Payment in the amount of R178 675.00;

F. Interest in the above amount at the legal rate a tempore morae;

G. Cost of suit."

[3] The action is defended by the First Defendant only. The First Defendant is represented throughout the duration of the trial proceedings.

[4] The relevant issues in dispute in respect of the main claim is whether the Defendants are indebted to the Plaintiffs to the extent of R430 000 and in respect of the alternative claims are the following:

a) Regarding the first alternative claim, what the appropriate order should be as contemplated by section 83(3) of the NCA; and

b) In respect of the second alternative claim, whether the Defendants were unjustly enriched at the expense of the Plaintiffs in the sum of R178 675.00.

[5] The First Defendant filed a plea to the Plaintiffs' amended particulars of claim.

Issues for determination

[6] The trial concerns whether the Plaintiffs are entitled to the payment of the amount claimed and interest with effect from 1 February 2016. It is common cause that the Plaintiffs advanced a loan amount of R430 000.00. The issues in dispute central to the main claim:

a) The validity of the bond, being, the credit agreement relied upon by the Plaintiffs support of the claim;
b) The terms of the bond;
c) Whether the Plaintiffs were required to be registered as a credit provider in terms of section 40 of the NCA;
d) Whether the bond was granted recklessly as contemplated by section 80(1) of the NCA;
e) Plaintiff's compliance with the terms of the bond;
f) Whether the Defendants breached the terms of the bond;
g) The Plaintiffs' claim amount;
h) Plaintiffs' compliance with section 129 of the NCA;

i) The Plaintiffs' rule 46 A application, which entails the following two issues:

   i. Whether the property should be declared executable; and if so

   ii. What the appropriate reserve price should be.

[7] The First Defendant's defense as set out in her plea reads:

> '6.2 In particular, the First Defendant pleads that during the course of 2012 she, together with her erstwhile husband, the Second Defendant, was in need of financial assistance (loan) for purposes of paying their creditors and at that time could not approach established financial institutions to access such financial assistance.
>
> 6.3 The First and Second Defendants were then informed by some of their colleagues that Elefin Debt Solutions could provide them with the required financial assistance in a form of a loan and that, alternatively, Elefin Debt Solutions could facilitate a process of obtaining a loan with established financial institutions such as banks on the First and Second Defendant's behalf.
>
> 6.4 The First and Second Defendants approached Elefin Debt Solutions and were later introduced to the Vaughan Ulyate Family Trust for purposes which resulted into the trust and the defendants reaching an agreement with the effect that:
>
> 6.4.1 the Trust would make available financial assistance to the Defendants to pay their creditors pending the facilitation in accessing established financial institutions;
>
> 6.4.2 the Trust would assist the Defendants to access financial assistance from one of the established financial institutions;
>
> 6.4.3 the Defendants would provide a list of their creditors to the Trust to enable the latter to settle the Defendants debts; and
>
> 6.4.4 the Defendants would provide the Trust with a title deed in respect of the Defendants immovable property situated at Erf 3[...] Kraaifontein, in the City of Cape Town, to enable the Trust to register a mortgage bond on the immovable property as security of accessing a loan with a bank.
>
> 6.5 On the basis of the above understanding, during the course of May 2012 the Trust prepared and presented a series of documents to the Defendants purporting to regulate their relationship and this culminated into the agreement between the Parties attached hereto "ANNEXURE MAD-01" which formed part of the Plaintiffs' initial Particulars of Claim.
>
> 6.6 However, on a closer scrutiny later it was with shock that the first defendant learnt that the series of documents that were presented to them were meant to be an agreement of sale in terms of which the defendants were selling their immovable property to the Trust.

6.7 The purported agreement of sale (“ANNEXURE MAD-01”) has the following peculiar features which do not make commercial sense in the deed of sale:

6.7.1 The purchase price was the amount of 430 000.00 (FOUR HUNDRED AND THIRTY THOUSAND RAND) which was payable to the defendants creditors;

6.7.2 The agreement was subject to the Trust (as the Purchaser) registering a mortgage bond over the immovable property as security for the purchase price as a first mortgage bond over the property.

6.7.3 The Defendants (as the Sellers) would pay monthly bond instalments to the trust in the amount of R6127.00 (SIX THOUSAND, ONE HUNDRED AND TWENTY-SEVEN RAND);

6.7.4 The Defendants were given period of 8 (eight) months to repay the purchase price and all monies due to the Trust during which period the Trust would do everything to assist the defendants to secure a loan from a registered financial institution;

6.7.5 Should the Defendants not pay any monthly instalment on the due date for payment therefore, the Trust was entitled to immediate transfer of the property; and

6.7.6 In the event that the Trust takes transfer of the property due to the Defendants breach of contract as aforesaid, the Trust would make every effort to sell the property at a market related price and in the event of being sold, the trust would pay from the net proceeds from the sale of the property to the Defendants after deduction all the holding and other costs incurred by the Trust until the date of transfer of the property to the purchaser.

6.8 In addition to the agreement of sale, the Defendants signed other documents including the Power of Attorney to Transfer as well as a Power of Attorney to Pass a Continuing Covering Bond.

6.9 What is apparent from the aforesaid is that the Trust was never to have any real intention of acquiring the immovable property other than having same as security to recover the credit facility advanced and used to pay the Defendants’ creditors.

6.10 The First Defendant further pleads that the Continuing Covering Mortgage Bond was as a result of a grave misrepresentation by the Plaintiffs of their true intention as at all relevant times the Defendants, the First Defendant in particular, had signed the documentation presented to her for the sole purpose of enabling the trust to facilitate a loan from a registered financial institution on behalf of the Defendants.

6.11 Given the fact that the Defendants’ financial circumstances were known to the Trust, it is inconceivable that the Defendants could have been expected to repay the total sum of R430 000.00 within eight (8) months when the Trust had failed to secure the relevant finance for the Defendants.

10.8 The convoluted nature of the transaction(s) concluded with the Trust points to an intention to conceal the true character of the credit agreement and possibly an intention to circumvent the provisions of the National Credit Act

10.9 Consequently, the purported credit agreement entered into between the Parties stands to be declared reckless, invalid and set aside.'

SUMMARY OF THE EVIDENCE

Plaintiffs' Case

Lyle Irwin's evidence

[8] Lyle Irwin ("Irwin") worked as an administrator for Elefin Debt Solutions ("Elefin") in 2012, a company that specializes in debt consolidation. According to him, Elefin's business operations entailed a process of debt consolidation whereby Elefin together with the client would calculate the client's total amount of debt and find a way to extinguish the debt completely. Thereafter, an analysis is done as to what the client can afford to pay in respect of a loan. In the event that there exists enough value in the immovable property, Elefin will procure a loan to the client in order to settle all the client's outstanding debt. The loan is secured by a bond to be registered on the client's immovable property. The funds received from the loan will be channeled to Elefin's attorneys trust account to settle and pay all outstanding debts. Upon settlement of debts, Elefin and its attorneys will take the necessary steps to rescind all judgments and clear the client's credit profile.

[9] Irwin's task was, according to him, to clear the credit record of the client and ensure that all debt has been settled and thereafter facilitate the loan application process to the mainstream banks. This process, and the initial process of securing funding and lending assistance to the client in the bond registration process and settlement of the debt, was at a fee of R40 000. Irwin said that Elefin's success rate in debt consolidation was 96%, at the time. Furthermore, the client was informed that during the eight-month period, the client was not to apply for credit as that would affect the client's credit score and in turn the affordability as the banks would perceive that as a failed consolidation attempt.

[10] Irwin testified about the assessment process. According to him the client assessment would entail the provision of bank statements, pay slips, credit checks on the client and the completion of application forms. In the event that the client qualifies for consolidation, a mandate would be completed along with the power of attorney which will authorize Elefin to communicate with creditors and conduct credit checks. This was followed by the validation of the client information and affordability which is a function that was performed by Mr Graham Clive Clover Sinclair ("Sinclair"). This process involved consideration of client's bank statements, ID, proof of address and all other relevant personal information.

[11] After the validation process, the property would be valuated. The valuation is followed by the affordability assessment, taking into account the income, the deed search and the value of the property and the amount they would be able to afford for repayment. The client will also be requested to provide the latest statements in respect of all their debt. Sinclair would calculate the consolidation costs and present same to the credit committee which is comprised of the investor.

[12] The next step would be to obtain final settlement amounts from the creditors and the presentation of the insurance contract which is a life cover on the property and that of the client. Irwin confirmed that the creditors included the existing bondholder, and the bond was paid or settled and thereafter cancelled. The next step would be the registration of a bond in the deeds office in favour of the investor and a power of attorney or offer to purchase would be signed prior to that. This would serve as a security measure in the event the client defaults on their payments, the property can then be sold to recover the investor's money or act upon the offer to purchase and take transfer of the immovable property. In the present case the investor was the Vaughan Ulyate Family Trust ("the Trust"). Upon registration of the bond, Elefin would facilitate the payment of the creditors by the investor. The clients, in this case the Defendants, would provide the investor with the title deed in respect of their immovable property situated at erf 3[...], Kraaifontein, City of Cape Town, to register a bond as security for the investor in order to settle the debt.

[13] An amount of R6127.00 was payable monthly as an instalment towards the bond. In the event of failure to pay the said instalment, Vaughn Ulyate Family Trust may act upon the offer to purchase and take transfer of the property. This is what he referred to as power of attorney in respect of the sale and this was part of the structure of the transactions utilized by Elefin. Irwin pointed out that in 40 transactions of this nature that he dealt with, that step had never been taken by an investor. According to him, the most important security that the lender had in his transaction was the bond against the property.

[14] He further testified that the collection of monthly occupational rent means that clients pay monthly occupational rent into the attorney's trust account. According to Irwin, the deed of sale was the offer to purchase. A final quotation would then be prepared, reflecting all of the client's outstanding debts, fees and the cancellation of the existing bond. Elefin would pay the funds into the attorneys' trust account, and upon bond registration, the attorneys would make payments to the creditors on behalf of the client. He explained that the bond origination process would begin only after the client's debts had been settled, and that it involves a bond application to commercial banks on behalf of the client. This would be followed by the registration of the bank's bond. Irwin explained that the concept of occupational rent also refers to an instalment amount paid to the lender, and in this case that the amount of R6 127.00 referenced in the offer to purchase was the monthly instalment.

[15] Regarding the Defendants, Irwin confirmed that they also approached Elefin for financial assistance, were introduced to the Trust, and ultimately entered into an agreement for financial assistance. This agreement entailed the Trust providing funds to assist the Defendants in settling their debts, pending the facilitation of a loan with the financial institutions. Both Defendants' monthly financial obligations exceeded their combined income, which was R21 421. Thirty percent thereof was used to calculate the maximum amount the client could afford towards the bond. At the time, the outstanding bond in the Defendants' immovable property was R96 000. After performing calculations in terms of Elefin's Home Equity Plan, Elefin determined that the equity available in the immovable property was R324 000. This led Elefin to conclude that it was possible to proceed with the transaction.

[16] Irwin testified that Elefin conducted an assessment of the Defendants' income and expenses. This process required the Defendants to provide details of their income, expenses, and bank account statements. The Defendants' bank statements could not be presented as evidence in court because they were no longer in their possession, as printed records of their company had been discarded after five years. Regarding their electronically stored files, Irwin testified that what the court understood to be relevant records had been lost due to a virus that infected the Google Drive associated with their computers.

[17] On 31 May 2012, a meeting was convened at the attorneys' offices which was attended by the Defendants, Mr Sinclair, Irwin and the attorney Vaughan Ulyate ("Ulyate") who is also a trustee of the Trust. At this meeting, all the documents and the process that was to follow were explained to the Defendants. An agreement was thereafter reached between the Defendants and the attorneys that credit inquiries in respect of the Defendants would be conducted, and the Defendants undertook to maintain a clean credit record from the date of signature. They further undertook not to enter into any new credit agreements or incur additional liabilities, as this would nullify the resolutive condition. Subsequent to the registration of the covering mortgage bond over the Defendants' property in favour of the Trust, they would assist the Defendants in obtaining a loan from commercial banks in order to repay the Trust.

[18] Upon repayment of the purchase price and all monies advanced to them, the agreement would operate as a resolutive condition, and the sale of the property would become null and void. In the event of a failure to obtain a new bond and to repay the loan amount advanced by the Trust to settle the creditors and consolidate the Defendants' debts, the Trust would be entitled to act upon the offer to purchase. The Defendants then agreed to the payment structure and signed the document, which was commissioned by Ulyate.

[19] The total bond amount was calculated at R430 000 after taking into account the amounts paid to creditors and the bond cancellation fees. The amount of R6 127.00 was also determined to be the monthly instalment on the loan. Irwin

testified that, prior to the conclusion of the process, an affordability assessment had been conducted in respect of both Defendants; however, due to the loss of documents, Elefin no longer had the assessment in its possession. The Defendants' debt repayment history was similarly considered. It was further his evidence that, during the meeting on 31 May 2012, the contents of the documentation were discussed with the Defendants, and it was his impression that they understood the nature of the transaction and the related documentation and signed same. He held this view in light of the fact that, at the meeting, Sinclair and Ulyate took liberty to explain the contents of the documents to the Defendants**.** According to Irwin, it was also explained to the Defendants that, eight months after the date of registration, Elefin would commence with mortgage bond applications in order to settle the R430 000 debt. At no stage did the Defendants indicate that they did not understand the nature of the transaction or that they did not wish to proceed with it.

[20] Irwin confirmed that he prepared payment requests, which he addressed and conveyed to Vaughn Ulyate and Associates. The total sum of the debt owing to, and paid to, the Defendants' creditors was R233 245.33. An additional amount of R95 554.96 was paid for the cancellation of the ABSA bond over the Defendants' immovable property. Pursuant to the payments made from the R430 000, the final balance was R18 822.84.

[21] The second Defendant applied for motor vehicle finance from a bank prior to the commencement of the bond application process, and the bond application was subsequently withdrawn. The Defendants obtained loans in July 2012 and again in March 2013, in violation of the agreement. A further attempt to secure a bond from a bank was unsuccessful due to arrears that had accumulated on the municipal rates account of the Defendants' immovable property. Further delays in the bond application were occasioned due to the Defendants' divorce proceedings, between the end of 2012 and 29 August 2013. In a subsequent bond application the loan amount was increased to R600 000 at first Defendant's instance to cover the Defendants debt incurred after 31 May 2012. The applications submitted to three different banks in 2014 were declined based on affordability constraints and low credit scores.

[22] Irwin also intimated that at no stage did the Defendants indicate that the transaction was in violation of the provisions of the NCA. This only came to his attention subsequent to SA Home Loans declining the first Defendant’s bond application in September 2014.

[23] Under cross-examination, Irwin reiterated that the amount that was repayable was R430 000, and that on 31 May 2012, the content of all documents pertaining to the transaction was explained to the Defendants in his presence.

Graham Clive Clover Sinclair’s evidence

[24] Sinclair was a director at Elefin. He explained that the company conducted a debt consolidation business whereby they assisted individuals in settling all of their debts in order to qualify for a home loan, through which the amount advanced to the client would ultimately be repaid. Sinclair confirmed that he met with the Defendants and explained to them the advantages and disadvantages of the transaction, the procedure to be followed, as well as the time frames involved. According to him, they conducted an affordability assessment in respect of the Defendants. The Defendants completed an assessment form, which was considered with their salary slips and bank statements. Elefin also took into account the Defendants’ additional rental income derived from their immovable property situated in Kraaifontein, as well as the municipal rates and taxes account from the City of Cape Town. The assessment process further involved a consideration of the Defendants’ expenses.

[25] Pursuant to the assessment process, it was determined that the Defendants qualified for the assistance they required from Elefin, as they were in a position to afford the proposed monthly instalments of R6 127. According to Sinclair, he explained to the Defendants when the funds would be made available and indicated that he intended to finalise the process within eight months. He stated that he clearly explained that the Defendants’ accounts with their creditors would be settled within two months, and that the remaining six months would be the period needed before

banks could consider whether they were eligible for a home loan. Sinclair further stated the Defendants were informed that in that eight-month period, no debt should be incurred by the Defendants.

[26] Sinclair confirmed that, using a guideline employed by bond originators to calculate the affordability of the maximum bond amount, he determined that 30% of the Defendants' combined income of R24 421 was R7 326,30, which represents approximately a third of their total income and is permissible for the payment of a covering mortgage bond. However, the monthly instalment was reduced to R6 127.00, leaving the Defendants with R18 000 for their living expenses. Sinclair held the view that the Defendants would be able to live comfortably on that amount. He further stated that, according to his calculations and the Defendants' earnings at that stage, they were eligible to qualify for a home loan of R732 000.

[27] Ultimately, according to their calculation on the home equity plan, the equity on the property value of the Defendants would be an amount of R324 000, which, according to Sinclair, was a positive indication that there is an amount available to assist in the settlement of the debt.

[28] The witness attended the meeting of 31 May 2012 and stated that all the relevant documents pertaining to the transaction with the Defendants were considered. The process for payment of the Defendants' creditors by the Trust, and the process that Elefin would follow to assist the Defendants in applying for a new mortgage bond, was explained. Although the Defendants appeared to be in doubt, they did not indicate to any of the parties at the meeting that they did not understand the nature of the transaction or that they did not want to proceed with it. The Defendants did not raise any concerns regarding the affordability of the monthly payment of R6 127.00; on the contrary, they appeared content with that amount.

[29] Sinclair stated that, at the meeting, they discussed the bond documents and the legal requirements with Ulyate. The list of creditors' documents was compiled by

Sinclair, and at the meeting, it was signed by the Defendants in his presence. Thereafter, Irwin proceeded with the final payment settlements.

[30] Under cross-examination, Sinclair confirmed that the eight-month period was to be calculated from the time the covering bond was registered to the time the new mortgage bond was registered, provided no defaults or new debt were incurred. Sinclair dispelled the notion that not all the debts were consolidated. Augmenting on this, he stated that there were one or two small debts that were less than R3000.00 that the Defendants undertook to settle, which they did. He reiterated that all debts of the Defendants provided to them were settled.

Vaughan Ulyate's evidence ("Ulyate")

[31] Ulyate is an attorney and a trustee of the first Plaintiff, the Trust. Ulyate stated that the Trust invests in property. He agreed to act as an investor in respect of the credit agreement in question upon being approached by Sinclair. This was the first time he engaged with Elefin as an investor. He further explained that, as an attorney, he primarily focused on litigation work and some conveyancing.

[32] Ulyate stated that he knew very little about the NCA, as he had never dealt with it as an attorney. If matters dealing with the NCA arose in his firm of attorneys, he would refer them to professional assistants. He stated that he at least knew that creditors were required to conduct credit assessments before advancing credit to consumers. Ulyate further stated that in 2012 the Trust was not registered as a credit provider, and this remained the case at the time of his testimony. At the time of the transaction with the Defendants, the Trust did not enter into any credit agreements. The transaction with the Defendants was below R500 000, as was the total outstanding book of credit, and no other similar transactions existed at the time; therefore, the Trust did not require registration as a credit provider.

[33] Ulyate explained that Sinclair was referred to him as a litigation expert. He became aware of the business model of Elefin and that they needed investors and

he offered to act as an investor. He stated that Sinclair explained that the investor would furnish the funds for consolidation of the debt of Elefin's clients who were over indebted. The investor would lend money to Elefin's clients to settle all their debts, including bond cancellation and bond registration fees. He understood that for a period of eight months from the registration of the mortgage bond, the clients would have to remain debt-free, during which time applications would be made to banks to obtain a mortgage bond which would then be used to settle the debt of the investor.

[34] Ulyate confirmed that, at the meeting of 31 May 2012, the Defendants understood the nature of the transaction and were asked several times if they understood, to which they responded in the affirmative. He stated that the amount paid by the Defendants to the Trust was R251 325, with the last payment received on 1 February 2016. Ulyate further stated that, according to the certificate of balance dated 9 February 2016, the Defendants were indebted to the Trust in the amount of R430 000, with further interest at 17.1% per annum, calculated monthly in advance from 1 February 2016 and not from 1 October 2015, as prayed in the particulars of claim.

[35] Under cross-examination, Ulyate confirmed that, subsequent to Sinclair's explanation of the transaction, the Defendants were comfortable with the transaction**.** He further stated that the offer to purchase was signed as secondary security for the Plaintiffs in respect of the loan and was subject to the registration of a first mortgage bond over the property. He explained that the registered mortgage bond sets out the terms of the loan agreement. He also stated that the agreement comprises of a number of documents and that the Defendants could settle the loan amount at any time prior to the end of the eight-month period.

FIRST DEFENDANT'S CASE

Maurine Annette Classens ("Classens")

[36] Classens testified that, while employed by the South African Police Service ("SAPS"), she approached Elefin for their debt consolidation services. She and the Second Defendant attended Elefin's offices for a meeting with Irwin. According to

Classens, Irwin explained that Elefin consolidated the debts of clients with existing mortgage bonds on their immovable property. Elefin would calculate all the debts, lend the required amount to the client, and register a bond for the amount so that the client can be able to repay the amount at the end of the eight-month period.

[37] A follow-up meeting was set up and the Defendants were required to provide certain documentation namely, salary slips and three months' bank statements. At the second meeting, Irwin and Sinclair were present, although Sinclair was not in close proximity. On that day, the Defendants signed the power of attorney, as far as her recollection served her. Pursuant to this meeting, they were required to furnish Irwin with a list of their income and expenditure. Irwin informed them that, subsequent to the credit checks, they qualified for an amount of R430 000, with a bond instalment of approximately R6000.00. Their monthly obligations exceeded their joint income by over R10 000.

[38] Prior to the meeting of 31 May 2012, Irwin informed the Defendants, in the presence of Sinclair, that they were about to meet the attorney who had drafted the documents. Based on their prior discussions and the signed power of attorney, the Defendants would merely sign the documents. The Defendants were introduced to the attorney who became known as Ulyate. The documents were presented to the Defendants, and they were required to sign and initial same without provision of any explanation, as everything had been previously discussed.

[39] Classens explained that the discussions prior to the signing of the documents pertained to the R430 000 loan and the eight-month period during which they were to work together and ensure that no new debt was incurred. The Defendants were to inform Elefin if they were struggling financially during the eight-month period.

[40] Claasens understood that Elefin would facilitate the loan amount of R430 000 and pay the settlement figures in respect of the debts owed by the Defendants to their creditors. She further understood that a covering mortgage bond would be registered on their immovable property in favour of the Plaintiffs, and upon the

Defendants being successful with their application for a mortgage bond in any of the financial institutions, they would repay the Plaintiffs the loan amount of R430 000.

[41] Classens stated that the document listing their creditors was signed by the Defendants without completing the details of their creditors. She was not certain when she received the document confirming which creditors had been settled, estimating it could have been between August and October 2012. She indicated that not all the creditors had been paid by the Plaintiffs and she found it difficult to reach Irwin for clarification in this regard. Classens would confirm with their creditors whether the debts were settled, some of whom indicated that they had not been paid or settled by Irwin. After numerous failed attempts to reach Irwin, she ultimately brought the matter to his and Leonore Kotze’s attention (Ulyate’s secretary). The creditors that were not settled were MFC, ABSA MLN, ABSA cheque account, ABSA overdraft facility, Telkom cellphone account and debts that she owed to private individuals. She continued to make monthly payments to the respective creditors. Those payments that were debited from her bank account were reflected in her bank statements that she provided to Irwin monthly.

[42] Classens relocated to Pretoria in subsequent to the conclusion of the credit agreement in 2012 for better employment, incurring additional costs for school aftercare in respect of her two children and R4000,00 per month for rent, while the Second Defendant remained in Cape Town before 2013. According to Classens, their divorce proceedings, which were instituted after the eight-month period, did not cause any delays in the mortgage bond application. She further stated that, contrary to Irwin’s assertions, overcharging of municipal rates and taxes had been resolved in 2012 and thus was not the cause of any delay, and neither was the issue of the additional or fictitious erf.

LEGAL PRINCIPLES AND DISCUSSION

[43] It is the duty of the court to evaluate the evidence with due regard to the probabilities. The evaluation of the competing contentions of the parties involves the process of weighing up the evidence adduced by the Plaintiffs against the evidence

adduced by the Defendant. The court has to look at the evidence holistically and weigh it based on an analysis of the probabilities.

[44] In *Stellenbosch Farmer's Winery Group Ltd and Another v Martell & Cie SA and Others* 2003 (1) SA 11(SCA) para 5:

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[45] The Plaintiffs' counsel argued that the Defendant is required to admit or deny all material facts alleged in the combined summons and to state all material facts on which she/he relies. It is so that evidence not covered by the pleadings will usually

be inadmissible and may only be relied upon where it is not prejudicial to the other litigant.

[46] During her testimony, the First Defendant disputed various aspects of the Plaintiffs' witnesses' evidence, which her counsel had not put to those witnesses during cross-examination. Plaintiffs' counsel submitted that a reasonable inference could be drawn that the first Defendant tailored her version of events as the trial progressed. This inference, counsel further argued, is consistent with the first Defendant raising issues that were never addressed in the pleadings.

[47] For instance, during her testimony, the First Defendant introduced a new version claiming that the Defendants were only obligated to pay the monthly instalments for a period of eight months and speculated as to when this eight-month period commenced. Furthermore, it was never pleaded that Elefin's failure to comply with the obligations forced the Defendants to incur further debts, resulting in the refusal of the bond. In addition, the First Defendant, for the first time, claimed that on 31 May 2012, when concluding the bond with the Plaintiffs, the Defendants signed blank documents.

[48] Counsel for the Plaintiffs highlighted internal contradictions in the first Defendant's evidence. For instance, she testified that she relocated to Pretoria in 2012 but later during cross-examination claimed that the mortgaged property remained her primary residence. She also initially testified that the documents that the Defendants signed at the 31 May 2012 meeting were not explained to them prior to signing; this version was later altered to suggest that some of the documents were in fact explained. During cross-examination, she ultimately reverted to her initial version.

[49] Her initial evidence was that the structure of debt document which recorded her debts and creditors was signed while it was blank, she stated that it only contained a lot of lines, this version was also momentary as she, thereafter, claimed that the document was partially completed when the Defendants signed it.

[50] Plaintiffs' counsel further argued that there were external contradictions in the first Defendant's testimony, when compared to what was pleaded and put to the witnesses on her behalf, he pointed out that the first Defendant's plea in paragraph 6.4.1 specifically pleaded that the Plaintiffs would lend the money to them. During her evidence in chief the first Defendant contradicted this assertion by stating that Elefin would be the entity lending the money to them. The first Defendant clearly in her pleadings directed the Plaintiffs to particular issues only to have her alter same and canvass others at trial, which is impermissible. See *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182A.Ultimately, this is contrary to the whole purpose of pleadings which ought to bring clearly to the other party including the court the issues upon which reliance is to be placed. In essence the parties in their pleadings have to state the issues with precision. See *Imprefed (Pty) Ltd v National Transport Commission* [1993] 2 ALL SA 179 (A) 188-189; 1993 (3) SA 94 (A) at 107 C-H; In *NDPP v Phillips* 2002 (4) SA 60 (W) the court stated as follows:

> 'Pleadings must be lucid, logical and intelligible. A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he heads to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if it's determination may depend on evidence which his opponent has failed to place before the court because he was not sufficiently to its relevance.'

[51] Importantly, this is clearly a case where the first Defendant's *viva voce* evidence contradicts what was initially pleaded, juxtaposed to the case where the parties have widened the issues by agreement whether expressly or impliedly and adduced evidence on those issues fully canvassed by all parties and the court would then pronounce on those specific issues. As this is purely a case of self-contradictory evidence on the part of the first Defendant rather than that of widening of issues at trial, the parties will be kept strictly to their pleadings in avoidance of prejudice and in the promotion of the parties' rights to a fair hearing as guaranteed by section 34 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). See *South African Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC), [2014] 11 BLLR

1025 (CC), 2014 (6) SA 123 (CC) para 202. In my view the acceptance of the above belated versions which materially depart from the pleadings would be to the detriment of the Plaintiffs as they deal with the real issues between the parties. In the premises the first Defendant's evidence in this regard would not be accepted by this court.

Registration as credit provider

[52] It is common cause between the parties that the NCA is applicable in this matter. It is prudent at this stage as a point of departure to determine whether the Trust was obliged to register as a credit provider prior to extending the loan as contended by the First Defendant. The Plaintiffs do not share this view. Section 40 of the NCA regulates registration of credit providers. The relevant portion of the section which was applicable prior to its amendment in 2014 read:

> '(1) A person must apply as a credit provider if-
>
> (a) that person, alone or in conjunction with any associated person, is the credit provider of at least 100 credit agreements, other than incidental credit agreements;
>
> (b) the total principal debt owed to that credit provider under all the outstanding agreements, other than incidental credit agreements, exceeds the threshold prescribed in the terms of section 42(1).
>
> (2) In determining whether a person is required to register as a credit provider-
>
> . . .
>
> (3) A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.
>
> (4) 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.'

[53] In its amended state section 40(1) of Act 19 of 2014 provides:

> 'A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than

incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).

42 (1) On the effective date, and at intervals of not more than five years, the Minister, by notice in the Gazette, must determine a threshold of not less than R500 000 for the purpose of determining whether a credit provider is required to be registered in terms of section 40(1). '

In this regard, Ulyate testified that the Trust's total outstanding credit was below R500 000 as the loan amount under the bond was R430 000. Clearly, the threshold that would be determined by the Minister in terms of section 42(1) would be more than the loan amount extended by the Trust to the Defendants in the current matter. The Plaintiffs had at the time a total outstanding book credit of less than R500 000 and the Trust was a credit provider of one credit agreement which is below the 100 credit agreements required for registration as credit provider. This means that the threshold set out in section 40(1) has not been triggered therefore no obligation was placed on the Trust to register as a credit provider under such circumstances.

Was there reckless credit?

[54] Another question raised by the first Defendant of whether the credit was granted to the Defendants in a reckless manner as pleaded by the first Defendant. The First Defendant relies on both grounds as contemplated on section 80(1)(a) and (b) of the NCA. The onus is on the first Defendant to prove that at the time the credit agreement was entered into no credit assessment was conducted by the Plaintiffs as she contended. Reckless credit is regulated by section 80 and 81 of the NCA. The prevention of reckless credit is provided for in section 80(1). In terms of section 80 (1)(a) in the event that the credit provider fails to conduct an assessment in terms of section 80(2) irrespective of what the outcome would have been; or as envisaged in section 80(1)(b) in the event the credit provider conducted an assessment and the preponderance of information available to the credit provider shows that the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed agreement as contemplated in section 80(1)(b)(i); or as contemplated in section 80(1)(b) (ii) entering into a credit agreement would make the consumer over- indebted.

[55] Another argument raised by the first Defendant's counsel was that the series of documents that constituted the credit agreement resembled the Brusson scam where over indebted persons were deceived into signing away their homes through offers to purchase presented as loans. In *Leta v Bennet and Others* (23639/2015) ZAGPPHC 329 (30 July2019) the court referred to the dictum in *Maize Board v Jackson* 2005 (6) SA 592 (SCA) at 596 in determining the test applicable in the determination of the essence of a contract held:

'The true enquiry in a matter such as this is to establish whether the real nature and the implementation of these particular contracts is (sic) consistent with their ostensible form. In pursuit of that enquiry one must strive to ascertain, from all the relevant circumstances, the actual meaning of the contracting parties. It therefore becomes necessary to examine in greater detail the agreements in question and the manner in which they were implemented.'

[56] In the Brusson scam, the investor and the victim signed a sale agreement in which the victim sells their immovable property to the investor. Immediately the investor resold the immovable property to the victim in terms of a deed of sale wherein the victim undertakes to repay the loan amount in instalments. Money raised by way of a mortgage bond was split between Brusson and the investor and a portion was given to the victim to appease her/him. Brusson received monthly payments from the victim in repayment of the loan, and it guaranteed the obligations of the investor towards the financial institution that provided the loan. The property of the victim is sold for a lesser amount than its market value. The investor pays nothing and stands to lose nothing if anything goes wrong.

[57] This is not the case in casu, in that the investor has provided the Defendants with the consolidation loan amount and settled the Defendant's debts. The property is not sold by the Defendants to the Plaintiffs and resold to the Defendants like in the Brusson scam cases. The Supreme Court of Appeal, in *ABSA Bank Ltd v Moore and another* 2016 (3) SA 97 (SCA), held that the Brusson transactions were not simulated in the normal sense of the word. The victims of the scam were hoodwinked into believing that the true nature of the transaction was such that they

would not lose ownership of their properties, nor did they intend to transfer ownership. The Constitutional Court in determining a further appeal in *ABSA Bank Ltd v Moore and another* [2016] ZACC 34, confirmed that the agreements were invalid not for simulation but for fraud, further that the property owners, when concluding the agreements had no intention to transfer ownership of the property.

[58] In the present matter the first Defendant pleaded at para 6.9 that the Trust was never to have any real intention of acquiring the immovable property other than having same as security to recover the loan amount advanced. This was also the evidence of the Plaintiffs that the Plaintiffs did not have the intention to acquire the property per se, but the offer to purchase was used as a secondary security of the loan amount. Thus, the Brusson scam is in that regard distinguishable from the current matter.

[59] The requirement for credit assessment is embodied in the provisions of section 81(2) of the NCA which requires the credit provider to take reasonable steps to assess the consumer's understanding and appreciation of the risks and costs of such proposed credit; debt repayment history; the existing financial means, prospects and obligations. Not only that, the credit provider is expected to ascertain whether a reasonable basis exists for the conclusion that any commercial purpose may be successful upon the consumer applying for such credit agreement. On behalf of the Plaintiffs, it was submitted that prior to 13 September 2015 there was no prescribed form of assessment or statutory requirements for the credit provider to meet with regards to credit assessments. Meaning that, the credit provider would improvise and devise its own reasonable assessment mechanisms and models to comply with the requirements of section 81. See *Horwood v Firstrand Bank Ltd* (2010/36853) [2011] ZAGPJHC 121 (21 September 2011) para 5.

[60] With the advent of Regulation 23A [Government Notice R202 in Government Gazette 38557, dated 13 March 2015] which got under way on 13 September 2015 the position has since changed as the specific criteria and formula to be used in such assessments is set out therein. Notably, the latter position did not apply to the Plaintiffs at the time of the conclusion of the credit agreement on 31 May 2012, the Plaintiffs were to devise their own assessment mechanisms. The evidence presented

by the Plaintiffs' witnesses is that a credit assessment was conducted by Elefin on the affordability of the Defendants. The model used included an assessment sheet considered with their salary slips, first Defendant's appointment letter, other sources of income (rental income), bank statements and the Defendants' expenses inclusive of the Defendants' debt repayment history and assets.

[61] Evidently the Defendants upon approaching Elefin were over indebted and were unable to meet their monthly financial obligations with the income that they were earning. This is borne by Irwin's and Sinclair's evidence that both Defendant's monthly financial obligations exceeded their combined income which was R24 421.00. Section 79 of the NCA regulates over- indebtedness and provides:

> '(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's –
> (a) financial means, prospects and obligations ;
> (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.
> (2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.'

[62] The process of ensuring affordability requires assessing income, expenses and existing debt obligations to determine if the consumer can reasonably afford new debt, in the context of the present case, the consolidation loan. Evidence shows that the affordability to repay the consolidation loan was based on the ability to incur further debts/securing a further loan in future in order to settle the consolidated loan instead of using the Defendants' current income to assess the affordability at the time of the credit assessment. When the client reveals household income during an affordability assessment, the loan provider must use this income into its evaluative calculations. *Capitec Bank Limited v Mahlangu* (A16/2020)[2021] ZAMPMHC 28(25 October 2021). This case elucidates the extent of credit providers' assessment

responsibilities under section 81 and illustrates that a proper assessment is contingent upon the specific facts and must address the information supplied by the consumer. Evidently the Defendants at the time had no financial means to satisfy their existing debts. In my view the Defendants were over-indebted even prior to the affordability assessment being conducted. Hence, they approached Elefin. In the circumstances it cannot be successfully argued that the Plaintiffs ensured that the Defendants could afford the new debt of R430 000 as required by NCA.

[63] The Plaintiffs took a risk because the assessment process was based on a risky potential of future funding as opposed to the certainty of the Defendants income and assets. Put differently, Plaintiffs had no guarantee that at the time of conducting the credit assessment that the Defendants would certainly without doubt afford to repay the consolidation loan. It is borne by the Plaintiffs' evidence that the Defendants had an adverse credit profile. The Defendants' total debt considered by the Plaintiffs during the credit assessment was R326 742.00, R103 258.00 less than the consolidation loan.

[64] I say this because even after the consolidation loan was advanced to the Defendants, they still remained over indebted because with their own income they were not able to repay the consolidation loan within the eight months period without obtaining a further loan. I am alive to the fact that when determining whether the consumer is over indebted in terms of section 79 regard must be had to her or his financial means and prospects which include assets and liabilities and prospects meaning liquidating assets and improving the consumer's financial position. See *Standard Bank of South Africa v Panayiotts* 2009(3) SA 363 (W) para 9. However, in this instance even the equity in the immovable property which was R324 000 at the time of the assessment and tied in the mortgage bond was less than the loan amount and would not have been able to defray the consolidation loan without obtaining another loan which would amount to perpetual over indebtedness. Section 80(1)(b)(ii) of the NCA. The assessment must be done reasonably not irrationally to promote the responsible credit granting and use and for that purpose to prohibit reckless credit granting. *ABSA Bank Ltd v De Beers and Others* 2016 (3) SA 432 (GP) para 60. Thus, basing affordability on the said equity would also be problematic.

[65] At the time of the assessment, with the existing financial means, prospects and obligations of the Defendants, there was no reasonable basis to conclude that any commercial purpose may prove to be successful, as contemplated in section 80(1)(a) read with 81 (2) (a) (iii) and 81(2) (b). In my view, even after the conclusion of the credit agreement the Defendants remained over indebted to an even greater extent than they were before the conclusion of the credit agreement. The mechanisms and procedure employed by Elefin did not result in a fair and objective assessment as envisaged in section 82(1) of the NCA. Notwithstanding that the character of the transaction in this matter, is distinguishable from the 'Brusson scam' it still fall foul of the NCA. Accordingly, the credit agreement is declared to be reckless. Consequently, the Defendant's interests and obligations under the bond are set aside.

[66] The Plaintiffs in the alternative submitted that in the event the court concludes that the Defendants are over-indebted make an order that is just and equitable in terms of section 83(3)(b) and the amount payable would be R178,675.00 based on enrichment. The first Defendant's counsel submitted that the Defendant's interest and obligation under the bond be set aside in its entirety as contemplated in section 83(1) (2)(a) and (3).

[67] Section 83(2)(a) of the NCA specifically states that when a court deems a credit agreement imprudent, it may issue an order nullifying all or part of the consumer's rights and obligations under that agreement, as the court finds just and reasonable under the circumstances. The statutory language is explicit and unequivocal. Courts have the freedom to propose remedies that correspond with the specifics of each case, including the authority to partially annul obligations instead of entirely. This discretionary authority embodies a sophisticated strategy for consumer protection that reconciles the conflicting aims of curbing irresponsible lending and safeguarding the property rights of credit providers against unjustified infringement. The Constitutional Court's ruling in *National Credit Regulator v Opperman* 2013 (2) SA 1CC determined that the contractual security rights of credit providers qualify as a property under section 25 (1) of the Constitution. At para 63;

“In the circumstances of this case, the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is logical and realistic.”

[68] Any remedy under section 83(2), whether partial or total, entails a deprivation of property that must be justified as non-arbitrary. The practical ramifications of partial versus complete annulment are substantial, especially when performance has already transpired under the agreement. In instances of the restructuring or partial annulment, the consumer shall retain possession while the outstanding debt is settled if this restructured payment plan is fulfilled. This method preserves continuity and circumvents the intricate restitutionary dilemmas that emerge when agreements are wholly annulled following significant performance. In situations when the value has already been exchanged the loan provider having dispersed funds and the consumer having made payments a partial remedy may more precisely and adequately represent the equitable balance between safeguarding consumers and averting unjust enrichment.

[69] In *National Credit Regulator* v K201421715 (South Africa) Ltd t/a Quick Bucks Cash Loans [2025] ZANCT 26, in March 2025, the Tribunal deemed the credit agreements reckless, nullified the consumer’s rights and obligations under this agreements, and mandated refunds agreements that had been fully repaid. This case illustrates that both the courts and the National consumer Tribunal utilise the complete spectrum of remedies permitted under section 83(2), incorporating restitution consideration when applicable. Case law research and academic commentary have delineated the considerations that should inform courts in deciding whether to give partial complete relief. The degree of callousness is a significant factor. The degree of bad faith or turpitude exhibited by the credit provider should be a significant contributing element. In instances where a credit provider has engaged in intentional predatory lending practices or exhibited total neglect of its statutory responsibilities, more extensive redress may be justified. In contrast recklessness stems from incompetence or systemic failings rather than deliberate exploitation partial remedies may be more suitable.

[70] The extent of the performance already executed under the agreement represents another critical consideration. Courts must evaluate whether parties have fulfilled their duties, either partiality or completely, and must design remedies to prevent unjust enrichment for either party. The consumers individual circumstances are also significant in the selection of remedies. The just and reasonable approach articulated in section 83 (2)(a), incorporates all these factors into the court's adjudicative procedure. The remedy must be equitable and appropriate in light of the factors. In the circumstances of this case an order in terms of section 83(2) (a) which nullifies the remainder of the first Defendant's responsibilities under the loan agreement is justified, and the covering bond security, liberating the property from encumbrance and absolving the first Defendant of any further payment obligations. In conclusion, the first Defendants' rights and obligations under the agreement are set aside in part. The Plaintiffs extended the loan to the Defendants while fully aware that the Defendants were over-indebted which was irresponsible. Ostensibly the first Defendant was still over-indebted during the trial proceedings, it surfaced during the trial that the first Defendant is now divorced meaning that there is now one stream of income in her household. An order for payment of the difference of R178, 675.00 from the loan would further perpetuate the first Defendant's over-indebtedness that still persists, after being disregarded by the Plaintiffs when conducting the affordability assessment of the Defendants. The first Defendant is absolved of payments of the remaining payment responsibilities under the loan agreement.

[71] If credit providers could easily reclaim advanced payments via enrichment claims after section 83 nullified contractual obligations, the rehabilitative intent of the reckless credit rules would be considerably compromised the penalties levied against credit providers for risky lending would be rendered ineffective if they could evade statutory consumer protections via legal avenues. This is not disregarding the first Defendant's responsibilities and Plaintiffs' right, but serves as a limitation of the Plaintiffs' right to restitution of the money still owing in view of promoting the objective of justice. The loan extension amounts to irresponsible lending. The public intent of the reckless credit remedies is evident, the NCA explicitly aims to deter irresponsible lending and foster prudent credit issuance, goals that hold considerable socio-economic significance due to the harm that unaffordable loans can inflict on consumers, their families, and the society at large. Notwithstanding, it is my view that

it would be just and reasonable for the Plaintiffs to retain the sum of R251 325.00 already paid by the first Defendant towards the loan extended by the Plaintiffs. In conclusion, the first Defendants' rights and obligations under the agreement are set aside in part.

[72] A court decision in terms of section 83 of the NCA unravels a continuing covering bond on the property. For it has significant and complex legal implications, impacting both personal duties under the credit agreement and the real security rights associated under section 83 of the Act which authorises courts to rectify instances of recklessly granted credit resulting in remedial orders that dismantle the security framework supporting the credit agreement. The continuing covering bond is a mortgage bond that persists as ongoing security for the principal sum, interest, and the supplementary sums despite any interim settlement. *Thomani v Seboka N.O* 2017(1) SA 51(GP). When the requirements of the credit agreement are nullified, the bond forfeits its subject matter.

ORDER

[73] In the result, I make the following order:

[73.1] The credit agreement is declared reckless credit and it is set aside in terms of section 83(2)(a);

[73.2] The Plaintiffs' claim is dismissed with costs on scale B;

[73.3] The Plaintiffs are directed to cancel the continuing covering bond registered against the first Defendant's immovable property within 90 days from the date of this order.

N.E. Ralarala
Judge of the High Court

<u>APPEARANCES</u>

For the Plaintiffs:

JW Jonker instructed by Vaughan Ulyate & Associates

For the First Defendant:

P Mathibela instructed by Sambo-Mlahleki Attorneys