



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**Case No: 13329/2022**

Reportable: NO

Of interest to other Judges: NO

Revised: YES

Signature:

Date: 6/6/25

In the matter between:

**FIRSTRAND BANK LTD**

**Plaintiff**

**(Registration No: 1929/001225/06)**

and

**PAULO JORGE DE SANTOS**

**First Defendant**

**(ID No: 6[...])**

**(Married out of community of property)**

**LIBBY AMELIA DE SANTOS**

**Second Defendant**

**(ID No: 7[...])**

**(Married out of community of property)**

This judgment is issued by the Judge whose name is reflected hereon. This judgment is handed down electronically by circulation to the parties by email and by uploading it to the electronic file of this matter on Case Lines.

The date of this judgment is deemed to be the date upon which it is uploaded onto Case Lines.

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## JUDGMENT

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**GEACH, AJ**

### Introduction

[1] The Plaintiff seeks summary judgment and ancillary relief, jointly and severally against the two Defendants, encompassing a monetary judgment, an order in terms of Rule 46A that the relevant mortgaged immovable property, Erf 1[...] Greenstone Hill Extension 18, the primary residence of the First Defendant, be declared specially executable,<sup>1</sup> together with an order in terms of Rule 46(1), authorizing the issuance by the Registrar of a suitable warrant of execution.<sup>2</sup> Both Defendants are cited as being married out of community of property (presumably to each other<sup>3</sup>).

[2] In this court the application for summary judgment was opposed by the First Defendant, but not by the Second Defendant, although both of them had filed affidavits opposing summary judgment.

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<sup>1</sup> A mortgagee competently claims judgment for the money debt and for executability of the mortgaged property in a single action (*Absa Bank Ltd v Mokebe and related cases* 2018 (6) SA 492 (GJ); *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal en 'n ander* [1975] 4 All SA 655 (T); *Absa Bank Ltd v Sawyer* (2018/17056) [2018] ZAGPJHC 662 (14 December 2018) par 13-16; *FirstRand Bank Ltd t/a First National Bank v Stand 949 Cottage Lane Sundowner (Pty) Ltd and another* (2014/10545) [2014] ZAGPJHC 117 (4 June 2014) par [6]; *Changing Tides 17 (Pty) Ltd NO v Rademeyer and another* (1911/ 2019) [2019] ZAGPPHC 165 (31 May 2019) par [20]).

<sup>2</sup> But the relief in terms of Rule 46A was not pursued by Plaintiff before this court, there being no sign of the promised affidavits in this regard (Affidavit supporting summary judgment against First Defendant par 51; and against Second Defendant par 32). Such relief may be deferred (*Nedbank Ltd v Richardson* (2184/21) [2022] ZAECGHC 96 (12 December 2022) par [4]; *Changing Tides 17 (Pty) Ltd NO v Frasenburgh* [2020] 4 All SA 87 (WCC) par [30]).

<sup>3</sup> It is to be gathered from First Defendant's affidavit opposing summary judgment par 3 and par 31, that they were indeed married to each other, albeit in the throes of a divorce. See also par [1] of the judgment in (36581/2020) Gauteng Division, Johannesburg (21 February 2023) involving all three parties. The default judgment obtained against them records: "*The 1<sup>st</sup> and 2<sup>nd</sup> Defendants married in Community of Property to each other*" (Court Order dated 20 March 2018 per Kubushi, J), not *out of community*.

[3] The object of summary judgment is the time and cost-effective disposal of an action in a matter that is amendable to the procedure and in which a defendant is not able to show that it has a legitimate defence to an action:<sup>4</sup> "if the plaintiff has an unanswerable claim against the defendant and the defendant has no *bona fide* defence to the claim of the plaintiff, and the notice of appearance to defend was filed solely for the purposes of delay, the plaintiff would be entitled to summary judgment. The plaintiff is entitled to a quick remedy rather than to wait for a long period. The waiting period for allocation of a trial date, which takes place after the close of pleadings, is currently not less than eleven months in this division".<sup>5</sup> Rule 32 sets out the procedure regarding summary judgment.<sup>6</sup>

### Cause of action

[4] The Plaintiff's combined summons dated and issued on 3 March 2022, alleges that: "The mortgage bond account held with the Plaintiff is in arrears with the amount of R74,137-87, with monthly instalments currently being R8,819-97, which arrears the Defendants simply fails to settle (*sic*)"<sup>7</sup>; and claims payment of a liquidated amount in money,<sup>8</sup> the sum of R592,106-78, plus interest at the rate of 5.00% nominal per annum calculated daily and compounded monthly from 31 January 2022 to date of payment, together with costs on the attorney and client scale. This claim is supported by a Certificate of Balance dated 23 February 2022 and attached to the particulars of claim.<sup>9</sup> Claims of this nature are customarily dealt with under Rule 32. It is not based upon a liquid document.

[5] According to a further Certificate of Balance dated 18 March 2024 the relevant monthly instalment is R9,565-50, the arrear amount is R205,057-50 and the account

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<sup>4</sup> Capitalbox Green Energy Finance (Pty) Ltd v Baruk Petroleum (Pty) Ltd and others 2024 JDR 4640 (FB) par [7]; FirstRand Bank Ltd v Sayelo (Pty) Ltd 2024 JDR 5351 (GP) par [14]; Basdeo and another v Discovery Life Ltd 2024 JDR 3911 (GP) par [7]-[8]; Standard Bank of SA Ltd v Zada Tech (Pty) Ltd and another 2024 JDR 4932 (FB) par [5]; Majola v Nitro Securitisation 1 (Pty) Ltd 2012 (1) SA 226 (SCA) at 232; Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek JV 2009 (5) SA 1 (SCA) par [29]-[31] at 11; Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 304.

<sup>5</sup> PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tressa Trading 119 (Pty) Ltd (A5005/2005) Witwatersrand Local Division (26 September 2005) Full Court par [3].

<sup>6</sup> Standard Bank of SA Ltd v Luvhomba Financial Services CC 2025 JDR 1933 (GP) par [18].

<sup>7</sup> Plaintiff's particulars of claim par 20.10.

<sup>8</sup> Rich & Others v Lagerwey 1974 (4) SA 748 (A) at 754.

<sup>9</sup> Particulars of Claim par 15 and Annexure 'E'.

balance in the Plaintiff's books at midnight on 17 March 2024 was then R 589,918-89; with interest calculated daily and compounded monthly running at a variable rate of 9.75% nominal per annum from 29 February 2024, calculated daily and compounded monthly. This Certificate of Balance was filed on 19 March 2024.<sup>10</sup>

[6] The Plaintiff alleges that on 7 May 2007 the parties entered into a written Loan Agreement in the form of a Grant of Loan,<sup>11</sup> with interest running at an initial variable rate of 10.00% nominal per annum, calculated daily and compounded monthly.<sup>12</sup> This loan was allegedly secured by a Mortgage Bond registered over the aforesaid immovable property on 29 August 2007.<sup>13</sup> Thereafter as alleged by the Plaintiff:<sup>14</sup> "On or about 27 July 2010, the Plaintiff (duly represented) and the Defendants personally, entered into a further Loan Agreement. A true copy of the aforesaid written Loan Agreement is annexed hereto marked Annexure 'C'."<sup>15</sup> However, Annexure 'C' to the particulars of claim is not a Loan Agreement as such, but merely a Quotation, not signed on behalf of the Plaintiff. This Annexure 'C' stipulated an initial variable rate of 9.00% nominal per annum, calculated daily and compounded monthly.<sup>16</sup> Such alleged further loan was then allegedly secured by a Second Covering Mortgage Bond registered over the same immovable property on 8 December 2010.<sup>17</sup>

[7] Alleging due compliance by the Plaintiff with its obligations in terms of the loan agreements and mortgage bonds and default on the part of the Defendants,<sup>18</sup> the full amount outstanding allegedly became immediately due and payable,<sup>19</sup> with the alleged result that the Defendants are jointly and severally indebted to the Plaintiff as set out above and claimed by the Plaintiff.<sup>20</sup>

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<sup>10</sup> Quite validly so (*Rossouw and another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) par [48] at 454) despite Rule 32(4): *Vukile Property Fund Ltd v Naledi Bakeries CC and others* (2022 - 033617) Gauteng Division, Johannesburg (7 March 2024) par [13].

<sup>11</sup> Plaintiff's particulars of claim par 4-5 and Annexure 'A'.

<sup>12</sup> Plaintiff's particulars of claim Annexure 'A' clause 5.5.

<sup>13</sup> Plaintiff's particulars of claim par 6-7 and Annexure 'B'.

<sup>14</sup> Plaintiff's particulars of claim par 8.

<sup>15</sup> Particulars of Claim par 8-9; Annexure 'C'. Repeated in par 3.1 of Plaintiff's Rule 32(2)(a) affidavits.

<sup>16</sup> Plaintiff's particulars of claim Annexure 'C' clause 9.2.

<sup>17</sup> Plaintiff's particulars of claim par 10-11 and Annexure 'D'.

<sup>18</sup> Plaintiff's particulars of claim par 12-13.

<sup>19</sup> Plaintiff's particulars of claim par 14. 071-4

<sup>20</sup> Plaintiff's particulars of claim par 15.

[8] The Plaintiff alleges compliance with the National Credit Act, strangely enough "in the event of the court finding that the requirements of the Act apply".<sup>21</sup>

[9] On the face of it, this is a simple claim based upon Defendants' default without more. However, as will appear,<sup>22</sup> this is misleading.

#### History of the litigation

[10] Despite having been duly served with the Plaintiff's aforesaid summons on 11 March 2022, together with the Plaintiff's Notice of Opposition to Mediation, the Defendants failed timeously to enter appearance to defend, resulting in a Notice of Application for Default Judgment dated 3 June 2022 being filed on 17 June 2022, supported by an affidavit deposed to by Luqmaan Alli, esquire, on 2 June 2022 and set down for hearing firstly in July 2022, only to be removed by Notice dated 20 June 2022 and enrolled yet again for 4 August 2022. Joined in such Application for Default Judgment were the City of Johannesburg Metropolitan Municipality (as third respondent) and the Waterstone Home Owners Association (as fourth respondent) each of whom was cited allegedly "as a party having an interest herein".<sup>23</sup> Evidently, that is no longer the case.

[11] Belated Notices of Intention to Defend were filed by both the Defendants only towards the end of July 2022. These were filed individually; each Defendant instructing his and her own Attorney of Record: Norman Seppings Attorney of Durban acting for the First Defendant and whose Notice of Intention to Defend was dated 28 July 2022; with L Cirone Attorney at Law of Johannesburg acting for the Second Defendant and whose Notice of Intention to Defend was dated 27 July 2022. As a result, the Application for Default Judgment was removed from the roll.<sup>24</sup> When no plea from either Defendant was forthcoming, Plaintiff was constrained to serve a Notice of Bar on 15 September 2022.

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<sup>21</sup> Plaintiff's particulars of claim par 17.

<sup>22</sup> See par [24](c) below.

<sup>23</sup> Founding Affidavit filed in support of Default Judgment par 5.3 and par 5.4.

<sup>24</sup> Court Order dated 4 August 2022 (per van der Schyff, J).

[12] Pursuant to the above, the Second Defendant served her plea on 22 September 2022 followed by the First Defendant's plea served on 26 September 2022. No objection to the late service of the latter has been raised by the Plaintiff herein.

[13] On 13 October 2022 within 15 (fifteen) days of service of the Defendants' pleas as required by Rule 32(2)(a), the Plaintiff served two Notices of Application for Summary Judgment, one in respect of each Defendant, inasmuch as each had filed a separate plea. Although two separate notices of application for summary judgment both dated 13 October 2022 were served,<sup>25</sup> the Plaintiff has dealt with this as a single matter. Plaintiff's applications for summary judgment, were each supported by an affidavit purportedly in terms of Rule 32(2)(a), by Roy Gomes, "employed by the Plaintiff as Manager".<sup>26</sup> However, the Commissioner of Oaths, despite initialling each page, omitted to sign her certificate at the bottom of the purported affidavit in respect of the Second Defendant. Her official stamp is no substitute for such missing signature.

[14] The First Defendant's Notice opposing Summary Judgment was served on 20 October 2022 and the similar Notice from Second Defendant is likewise dated 20 October 2022. However, the Second Defendant subsequently withdrew her opposition to summary judgment by way of a notice dated and served on 11 August 2023.<sup>27</sup> These applications were set down as one (as indeed, is still the situation) for hearing on 21 November 2022. Literally at the eleventh hour on 21 November 2022, the First Defendant's affidavit opposing summary judgment was served and was accompanied by a substantive application for condonation for the late filing thereof. The application for summary judgment was removed from the roll, with First Defendant being ordered to pay the wasted costs occasioned by such removal.<sup>28</sup>

[15] The Plaintiff having on 2 July 2023 served heads of argument, a practice note, a chronology and a list of authorities in respect of the now opposed application for summary judgment, on 16 October 2023 served an application to compel the First

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<sup>25</sup> Plaintiffs Practice Note par 6. Plaintiff's Heads of Argument par 2.4.

<sup>26</sup> Plaintiff's Rule 32(2)(a) Affidavits par 1.1.

<sup>27</sup> Affidavit by Riana van den Burg in support of Application to Compel par 3.1 and Annexure 'RB1'.

<sup>28</sup> Court Order dated 21 November 2022 (per Nichols, AJ) par 1-2.

Defendant to do the same, which application was supported by an affidavit deposed to by Riana van den Burg on 11 September 2023 and was set down for hearing on 7 December 2023. What happened on 7 December 2023 is not disclosed; and what became of this application to compel is unknown. It was only on 11 March 2024 that the First Defendant's heads of argument and practice note both dated 10 March 2024 were filed; and thereafter on 15 March 2024 the First Defendant unilaterally filed a so-called "Joint Practice Note".

[16] In a flurry on 11 March 2024 the following additional documents had also been filed by the First Defendant together with his aforesaid heads of argument and practice note, viz an application dated 11 March 2024 to file a supplementary affidavit in respect of the Plaintiff's application for summary judgment for 18 March 2024 (which was uploaded twice); the following collection of documents:- a judgment by Makume J plus its service e-mail dated 11 March 2024, a Filing Sheet in respect of a supplementary affidavit dated 11 March 2023 (i.e., a year earlier) and a Supplementary Affidavit together with its annexures (annexures 'A' to 'K') deposed to by the First Defendant on 12 December 2022; all in respect of Case No: 36581/20 in the Gauteng Local Division, Johannesburg, "in the application in terms of the *actio communi dividundo*" brought by Second Defendant against both the First Defendant and the Plaintiff (although that Filing Sheet dated 11 March 2023 is under the wrong Case Number 13329/2020<sup>29</sup>). These additional documents were accompanied on 11 March 2024 by an affidavit from First Defendant's Attorney in support of condonation, deposed to on 11 March 2024, seeking not only condonation for the late filing of First Defendant's heads of argument and practice note in order to resist summary judgment,<sup>30</sup> but also, simultaneously, condonation for the late filing of that supplementary application, the supplementary affidavit with annexures; and the judgment.<sup>31</sup> (Although the First Defendant's Attorney refers to a "supplementary affidavit" deposed to by the First Defendant "that was submitted in that application<sup>32</sup> on 21 November 2022",<sup>33</sup> same is nowhere to be found<sup>34</sup>).

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<sup>29</sup> The Case Number herein (in Pretoria).

<sup>30</sup> Affidavit by First Defendant's Attorney dated 11 March 2024 par 3.

<sup>31</sup> Affidavit by First Defendant's Attorney dated 11 March 2024 par 12.

<sup>32</sup> Possibly the one in Johannesburg?

<sup>33</sup> Affidavit by First Defendant's Attorney dated 11 March 2024 par 8 (allegedly as annexure 'C' thereto).

<sup>34</sup> Perhaps the description "supplementary affidavit" is inaccurate and should have read "opposing".

[17] An application for a date for the hearing of Plaintiff's Summary Judgment on this Opposed Roll seems to have been made on 30 November 2023 although no Notice of Set Down for 18 March 2024 can be located. Nevertheless, First Defendant's Attorney states that he "discovered that this application is set down for the 18 March 2024".<sup>35</sup> It is accepted that it was indeed properly set down.<sup>36</sup>

## Condonation

[18] Plaintiff seeks condonation for the failure of the Commissioner of Oaths to have signed her certificate on the affidavit by Roy Gomes in support of the Plaintiff's application for summary judgment against the Second Defendant.<sup>37</sup> Although this defect was raised by the Second Defendant in her opposing affidavit,<sup>38</sup> such relief is not opposed. The necessity of meticulous compliance by a plaintiff with Rule 32(2)(a) is emphasised.<sup>39</sup> Nonetheless, in her affidavit the Commissioner, Barbara Seimenis, adequately explains this oversight.<sup>40</sup> In the circumstances of the present case, such condonation is apposite, with the result that Roy Gomes' supporting affidavit tendered by the Plaintiff in respect of the Second Defendant, be accepted as an affidavit properly commissioned. The Plaintiff's application for summary judgment against the Second Defendant will then be properly supported by an affidavit.

[19] It was argued on behalf of the Plaintiff with regard to the several applications for condonation brought herein by the First Defendant, that this court ought to reject the First Defendant's abovementioned supplementary affidavit and other documents as impermissible.<sup>41</sup> "An applicant for condonation must fully explain the delay, which must cover the entire period and which explanation must be reasonable [van Wyk v Unitas Hospital and another 2008 (2) SA 472 (CC) par [22] at 477]" (*FirstRand Bank*

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<sup>35</sup> Affidavit by First Defendant's Attorney deposed to on 11 March 2024 par 6.

<sup>36</sup> As suggested by the 'widely shared note' on Case Lines by Kubushi, J dated 29 February 2024.

<sup>37</sup> Plaintiff's Practice Note par 10.2.

<sup>38</sup> Second Defendant's affidavit opposing summary judgment par 5 to par 12.

<sup>39</sup> Pareto (Pty) Ltd and another v Theron and another (9804/2023) (2024) ZAWCHC 138 (6 September 2024); 2024 JDR 3832 (WCC) par 11 and par 14; Absa Bank Ltd v Botha NO and others 2013 (5) SA 563 (GNP) par [5]-[8] at 565-7; Absa Bank Ltd v van der Walt (8817/2022) [2023] ZAGPJHC 680 (9 June 2023) par 27.

<sup>40</sup> Supplementary Affidavit dated 21 June 2023. Plaintiff's Heads of Argument par 13.

<sup>41</sup> Despite Plaintiff itself having attached documents to its affidavits (Annexures 'SJ1-6' in respect of the First Defendant; and Annexures 'SJ1-2' in respect of the Second Defendant).



*Ltd v Signature Bakery (Pty) Ltd and another 2025 JDR 1458 (GJ) par [15]*). "The explanation must be reasonable in the sense that it must not show that his default was wilful or was due to gross negligence on his part. If the explanation passes that test, then the Court will consider all the circumstances of the case, including the explanation, and will then decide whether it is a proper case for the grant of indulgence (*Kajee and others v G & G Investment and Finance Corporation (Pty) Ltd 1962 (1) SA 575 (N) at 577*)" (*Alexandra Forbes v Luvu Cingo (A94/2022) Gauteng Division, Pretoria (24 October 2023) Full Court par [16]-[17]*). In the present matter, the First Defendant's failures are *prima facie* satisfactorily explained;<sup>42</sup> and no wilfulness on the part of the First Defendant is apparent.<sup>43</sup> The matters raised in these additional papers were indeed referenced in First Defendant's Plea.<sup>44</sup> Since the filing of First Defendant's affidavit opposing summary judgment, developments germane to the issues herein have occurred in the relationship between all three parties. No prejudice to the Plaintiff in receiving these additional documents was raised by the Plaintiff; nor can this court conceive of any.<sup>45</sup> On the contrary, it was argued on behalf of the Plaintiff that these documents do, in any event, disclose no defence whatsoever. Furthermore, Plaintiff did not seek an opportunity of addressing any unfairness by way of supplementing its affidavit in support of summary judgment against the First Defendant, as it could have done.<sup>46</sup> Given all these considerations, the various condonations sought by the First Defendant are also apposite. It is in the interest of justice that condonation be granted;<sup>47</sup> and for all the issues pertaining to

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<sup>42</sup> Affidavit in support of condonation par 4-5.

<sup>43</sup> Affidavit in support of condonation par 7.

<sup>44</sup> *AC-DC Dynamics (Pty) Ltd v Elucidation Pro (Pty) Ltd and others 2024 JDR 4151; 2024 JDR 4319 (GP) par 17-8; Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd 2020 JDR 1742 (GP) Nedbank Ltd v Uphuliso Investments and Projects (Pty) Ltd [2022] 4 All SA 827 (GJ) par 37; FirstRand Bank Ltd v Sayelo (Pty) Ltd 2024 JDR 5351 (GP) par [27]; AHMR Hospitality (Pty) Ltd v Winelands Venue v DA Silva 2024 (3) SA 100 (WCC) par [14] at 105; Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd 2022 JDR 0051 (GJ) par [67]; FirstRand Mortgage Co (RF) (Pty) Ltd v Pretorius 2025 JDR 1052 (WCC) par 43; Compensation Solutions (Pty) Ltd v Compensation Commissioner and others (56219/21; 49156/21) Gauteng Division, Pretoria (17 July 2023) par [6].*

<sup>45</sup> Affidavit in support of condonation par 7 and par 9.

<sup>46</sup> *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd (sic) and another 2022 (3) SA 458 (GJ); Compensation Solutions (Pty) Ltd v Compensation Commissioner and others (56219/2021; 49156/2021) Gauteng Division, Pretoria (17 July 2023) par (23)-(24); Idwala Industrial Holdings (Pty) Ltd v JB Lime Distributors (Pty) Ltd 2025 JDR 1236 (FB) par [17]; FirstRand Bank Ltd v Sayelo (Pty) Ltd 2024 JDR 5351 (GP) par [32]; FirstRand Bank Ltd v Signature Bakery (Pty) Ltd and another 2025 JDR 1458 (GJ) par [16].*

<sup>47</sup> "It is settled law that the standard for considering an application for condonation is the interest of justice (*Brummer v Gorfil Brothers Investments (Pty) Ltd and others 2000 (2) SA 837 (CC) par 3 at 830*)" (*FirstRand Bank Limited t/a Wesbank and Suzuki Mobility Finance v Farrar (19950/2022) [2023] ZAGPJHC 954 (25 August 2023) par [14]*).

First Defendant's defence to be ventilated. The additional papers will accordingly be incorporated into First Defendant's opposition to summary judgment, forming part and parcel thereof.

#### First Defendant's Plea

[20] The First Defendant's Plea to Plaintiff's Particulars of Claim reads as follows:

(a) First plea in limine: 1. The summons under case number 13329/22 has not been signed by the Registrar of the High Court (Gauteng Division, Pretoria) and in the premises the combined summons is fatally defective and stands to be dismissed with costs.

(b) Second plea in limine: 2. The Plaintiff has failed to comply with Rule 41A read with Rule 41A(2)(a) in that the Plaintiff has failed to serve on the Defendants a notice regarding mediation. 3. In the premises the Plaintiff's combined summons is premature and stands to be dismissed with costs.

(c) Third plea in limine: 4. Plaintiff issued a summons under case number 2499/18 in the above Honourable Court for the same cause of action based on the same written agreements. 5. In the premises the First Defendant raises a special plea of *res judicata* as you [*sic*] cannot have two summonses based on the same action and written agreements at the same time. 6. The Plaintiff with the First and Second Defendants entered into a written settlement agreement in respect of case number 2499/18 in order to settle the arrears which was done. The First Defendant pleads: "*This agreement is considered a novation to any prior agreements concluded between the parties.*"

(d) As far as the merits of Plaintiff's claim are concerned, the First Defendant in his Main Plea (paragraph 7) "pleas [*sic*] to the particulars of claim as follows":

(1) The citation of the Plaintiff:<sup>48</sup> "The averments are unknown to the First Defendant and they are not admitted".<sup>49</sup>

(2) The citations of both Defendants are admitted,<sup>50</sup> save that insofar as the alleged chosen *domicilia* of First Defendant are concerned, the First

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<sup>48</sup> Plaintiff's Particulars of Claim par 1.

<sup>49</sup> First Defendant's Main Plea par 8.

Defendant pleads that the domicile address is used (*sic*) by the Plaintiff are (*sic*) incorrect and not in terms of Annexure D and therefore not the correct domicile address for service for any documents in respect of this action.<sup>51</sup> Nevertheless, jurisdiction of the Gauteng Division, Pretoria, is admitted.<sup>52</sup>

(3) The loans and mortgage bonds, the Plaintiff's compliance with its obligations, the Defendants' alleged breaches of contract, the consequences thereof and Defendants' resultant indebtedness to the Plaintiff, as well as the Certificate of Balance (Annexure 'E'),<sup>53</sup> are all merely "not admitted and the Plaintiff is put to the proof thereof",<sup>54</sup> albeit the First Defendant adds: 13. The First Defendant alleges that the Second Defendant was an employee of the Plaintiff until recently when she resigned and subsequently received the pension pay out in July 2022 of approximately R1 600 000.00 (One Million Six Hundred Thousand) before tax. 14. Given the above the Plaintiff could attach the arrears from this pension pay out to the Second Defendant instead of seeking an order to declare the property executable which has a conservative value of R3 000 000.00 (Three Million) if sold urgently. 15. As (*sic*) the Plaintiff has failed to proceed on movable assets that they are fully aware of as they (*sic*) were the Second Defendants employer. The above pension mentioned in paragraphs 13 and 14 [of the Main Plea] is sufficient to cover the R592 106.78 monetary claim if the bond is cancelled. However the arrears are approximately R143 000.00. 16. The First and Second Defendant are severely prejudice (*sic*) if the immovable property is auctioned when the auction price will in all probability realize the Plaintiff's monetary claim of R592 106.78. 17. The First Defendant pleads that an order in terms of RULE 46A as set out in Plaintiff's pray (*sic*) paragraphs 3 and 4 be dismissed with cost (*sic*) on a (*sic*) attorney client scale.

(4) Regarding Plaintiff's alleged compliance with the provisions of the National Credit Act:<sup>55</sup> The First Defendant pleads as set out in paragraph 9 [of the Main Plea] above that the Plaintiff has not used the correct domicile

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<sup>50</sup> Plaintiff's particulars of claim par 2.1 and par 2.2; First Defendant's Main Plea par 10.

<sup>51</sup> Plaintiff's particulars of claim par 2.1 and Annexure 'D'; First Defendant's Main Plea par 9.

<sup>52</sup> Plaintiff's particulars of claim par 3; First Defendant's Main Plea par 11.

<sup>53</sup> Plaintiff's particulars of claim par 4 to par 15 and Annexures 'A' to 'D'.

<sup>54</sup> First Defendant's Main Plea par 12.

<sup>55</sup> Plaintiff's particulars of claim par 16 to par 18.

address and therefore has not complied with Section 129 of the National Credit Act.<sup>56</sup>

(5) In respect of section 26 of the Constitution<sup>57</sup> and Rule 46(1),<sup>58</sup> the following: 19. First Defendant pleads that the immovable property is the First and Second Defendants only private property for private dwelling and therefore in terms of the Constitution should not be declare (*sic*) executable. 20. The First Defendant draws the above Honourable Courts attention to paragraphs 12 - 17 [of the Main Plea] above that define the First Defendant's defense (*sic*) and prejudice to an order declaring the property executable. 21. The First Defendant will be settling the arrears in respect of this action which the Plaintiff accepted by emailing a settlement agreement that the First Defendant did not sign as yet. 22. Should this action proceed further the First Defendant will provide proof of payment of the arrears in order to resolve this action. 23. The First and Second Defendants are in the process of divorcing with acrimonious proceedings and any compromise has been difficult between the parties. 24. The Second Defendant did pay Plaintiff's bond in this action from the rentals that where (*sic*) received from a tenant Melissa Tied at R8000.00 per month. However the above tenant vacated her flat in March 2021 and the Second Defendant thereafter stopped paying the bond from her salary which was by debit order. 25. The First Defendant notified the Plaintiff that the Second Defendant who is employed by them has deliberately stopped paying the bond and that they should continue to take debit order. This proposal was rejected by the Plaintiff. 26. The First Defendant personally attended home loans department of the Plaintiff to settle the arrears and it was agreed that a debit order would be put in place on his account and only one debit order was taken by the Plaintiff. The First Defendant was able to establish that certain employees of the Plaintiff had interfered with the First Defendant's debit order so it would not continue. 27. The Second Defendant has brought an application in *the Gauteng Local Division in terms of the Latin principle actio communi dividundo to sell the joint [sic] owned property as the Second Defendant wants the divorce to proceed urgently*. This was

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<sup>56</sup> First Defendant's Main Plea par 18.

<sup>57</sup> Plaintiff's particulars of claim par 19.

<sup>58</sup> Plaintiff's particulars of claim par 20.

precipitated by the Second Defendant making it very difficult for the First Defendant to instruct renting agencies as she refused to sign consent for replacement tenants.

## Second Defendant's Plea

[21] The Second Defendant pleaded as follows to the Plaintiff's particulars of claim dated 3 March 2022:

(a) First Special Plea: 1. The Plaintiff instituted an action against the First and Second Defendants, which summons is dated 5 May 2022, wherein the Plaintiff alleges that it has a claim which arose pursuant to the conclusion of written agreements so concluded between the Plaintiff and the First and Second Defendants of which annexures "B" to "D" so annexed to the particulars of claim are purported to be true copies. 2. The Second Defendant specially pleads that the Plaintiff instituted an action against the First and Second Defendants in the above honourable Court, which summons is dated the 16 January 2018, bearing case number 2499/18, wherein the Plaintiff alleges that it has a claim which arose pursuant to the conclusion of the same written agreements so concluded between the Plaintiff and First and Second Defendants which are attached to the Plaintiff (*sic*) current Particulars of Claim being annexures "B" to "D". 3. On the 26<sup>th</sup> March 2018, the Plaintiff obtained a default judgment against the First and second Defendants, the consequences of which was (*sic*) as follows: 3.1 The written agreements concluded between the parties is cancelled; 3.2 The First and second Defendants are ordered to the to the (*sic*) Plaintiff the sum of R820 709.22, jointly and severally, the one paying the other to be absolved; 3.3 The First and second Defendant are ordered to the to the (*sic*) Plaintiff interest on the sum of R820 709.22 calculated at the rate of 8.25% daily and compounded monthly from the 10<sup>th</sup> January 2018 to date of final payment; Costs in the amount of R200.00 together with sheriff's fees in the sum of R1 109.45. 4. Subsequent to obtaining the default judgment, the Plaintiff and the First and Second Defendant concluded a new agreement pertaining to the payment of any amounts owing to the Plaintiff by the First and Second Defendants. 5.

"The Second Defendant accordingly pleads that there was a novation of any prior arrangements concluded between the parties, which substituted the prior agreements entered into by and between the Plaintiff and the First and Second Defendants, being Annexures "B" to "D" of the Plaintiff's particulars of claim". 6. The Second Defendant pleads that the Plaintiff has failed to make out a valid cause of action. 7. The Second Defendant therefore pleads that there is a final judgment between the same parties relating to the same facts and therefore the Plaintiff cannot obtain a further judgment and therefore the matter is *res judicata*.

(b) Second Special Plea: 8. The Second Defendant specially pleads that the Plaintiff has not complied with the provisions of Section 129(1) of the National Credit Act 34 of 2005 in that: 8.1 On the 19<sup>th</sup> August 2021, the Second Defendant sent a written notification to the Plaintiff in which she confirmed that she was no longer resident at the immovable property situate at 1[...] B[...] Crescent, Waterstone Park, Greenstone Hill Ext 18, Edenvale. 8.2 On the 12<sup>th</sup> October 2021 the Second Defendant sent a written notification to the Plaintiff in which she changes her *domicilium citandi et excecutandi* address from 1[...] T[...] Road, Edenglen, Edenvale, to number [...] C[...] Road, Croydon, Kempton Park. 8.3 The Plaintiff alleges that it discharged its obligations in terms of Section 129(1) of the National Credit Act 34 of 2005, and attaches, as Annexure 'F' to its Particulars of Claim, the written notice sent via registered mail to the Second Defendant. 8.4 The Plaintiff sent three registered letters to the Second Defendant as follows: 8.4.1 Letter dated the 8<sup>th</sup> February 2022 addressed to the Second Defendant at: 1[...] E[...] Mews, 6[...] T[...] Road, Edenglen, Edenvale, 1610, posted on the 11<sup>th</sup> February 2022; 8.4.2 Letter dated the 8<sup>th</sup> February 2022 addressed to the Second Defendant at: 1[...] T[...] (T[...]) Road, Edenglen, Edenvale, 1609, posted on the 11<sup>th</sup> February 2022; 8.4.3 Letter dated the 8<sup>th</sup> February 2022 addressed to the Second Defendant at 1[...] B[...] Crescent, Waterstone Park, Greenstone Hill Ext 18, Edenvale, 1609, posted on the 11<sup>th</sup> February 2022; 8.5 Plaintiff failed to give the second Defendant proper notice in terms of section 129(1) to the second Defendant's chosen *domicilium citandi et excecutandi* nor to the Second Defendant's place of residence. 8.6 In terms of Section 129(1)(b)(i)

the Plaintiff did not provide the Second Defendant the required Notice before commencing legal proceedings against her.

(c) Plea over: In the event of Second Defendant's special pleas not being upheld, the Second Defendant pleads as set out hereunder.<sup>59</sup>

(1) The citation of Plaintiff is admitted,<sup>60</sup> as is Second Defendant's name and identity number, plus the fact that she is [or was then] married Out of Community.<sup>61</sup> The remainder of the allegations contained in the citation of the Second Defendant, encompassing it seems, the allegation that she is a major female, are denied as if specifically traversed and the Second Defendant pleads that her *domicilium citando (sic) et executandi* at the time of issuing (sic) the summons is neither of the addresses alleged in this paragraph, and Second Defendant repeats the contents of her first special plea,<sup>62</sup> as set out herein above.<sup>63</sup> Inasmuch as Second Defendant omitted to plead thereto,<sup>64</sup> the citation of First Defendant<sup>65</sup> is deemed to be admitted.<sup>66</sup> The same applies to the allegation,<sup>67</sup> likewise not pleaded to by Second Defendant,<sup>68</sup> that on 7 May 2007 the Plaintiff (duly represented...) and the Defendants personally, entered into a written Loan Agreement in the form of a Grant of Loan, a copy of which is Annexure 'A' to the particulars of claim. Also admitted, is the jurisdiction of the Gauteng Division, Pretoria, herein,<sup>69</sup> notwithstanding the Second Defendant's statement that the most appropriate forum for the sake of convenience of all parties in the action would have been the Johannesburg Division.<sup>70</sup>

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<sup>59</sup> Second Defendant's Plea par 9.

<sup>60</sup> Plaintiff's particulars of claim par 1; Second Defendant's Plea Over par 10.

<sup>61</sup> Plaintiff's particulars of claim par 2.2; Second Defendant's Plea Over par 11.1 and par 11.2. (Note: par 11 of the Second Defendant's Plea erroneously refers to par 2.1 of the Particulars of Claim. A proper interpretation of the plea as a whole {Absa Bank Ltd v I W Blumberg and Wilkinson 1997 (3) SA 669 (SCA) at 673-4} dictates however that it was probably intended to refer to par 2.2 of the particulars of claim which does in fact pertain to the Second Defendant).

<sup>62</sup> Second Defendant's Plea Over par 11.3.

<sup>63</sup> See par [16](a) above.

<sup>64</sup> The reference in Second Defendant's Plea par 11 to par 2.1 of the Particulars of Claim is a misnomer.

<sup>65</sup> Plaintiff's particulars of claim par 2.1.

<sup>66</sup> Rule 22(3).

<sup>67</sup> Embodied in par 4 of the Particulars of Claim.

<sup>68</sup> Par 4 of the Particulars of Claim is nowhere even mentioned in the Second Defendant's Plea.

<sup>69</sup> Plaintiff's particulars of claim par 3; Second Defendant's Plea Over par 12 and 12.1.

<sup>70</sup> Second Defendant's Plea Over par 12.1. However, Plaintiff had the choice of forum.

(2) The remainder of the allegations concerning the content (rather surprisingly) of the admitted Loan Agreement Annexure 'A' to the particulars of claim; as well as the Second Loan Agreement, the mortgage bonds, the Plaintiff's compliance with its obligations, the Defendants' alleged breaches of contract, the consequences of such breaches, Defendants' resultant indebtedness to the Plaintiff and the Certificate of Balance (Annexure 'E'),<sup>71</sup> are all denied as if specifically traversed and the Plaintiff is put to the proof thereof.<sup>72</sup>

(3) Regarding the Plaintiff's alleged compliance with the provisions of the National Credit Act:<sup>73</sup> The Second Defendant pleads as follows:<sup>74</sup> 14.1 The Second Defendant denies that the Plaintiff has complied with the provisions of the National Credit Act and denies that she received notification. 14.2 The Second Defendant repeats the contents of her second special plea as set out herein above.<sup>75</sup> 14.3 The Second Defendant specifically denies the allegations not already dealt with herein and the Plaintiff is put to the proof thereof.

(4) In respect of section 26 of the Constitution,<sup>76</sup> Second Defendant's Plea Over reads simply that Plaintiff's allegations in this regard<sup>77</sup> "are noted",<sup>78</sup> which is tantamount to the admission thereof.<sup>79</sup>

(5) The Plaintiff's allegations in respect of Rule 46(1),<sup>80</sup> are dealt with as follows:<sup>81</sup> 16.1 The Second Defendant denies that she has been given proper notice in terms of the National Credit Act, and puts the Plaintiff to the proof thereof. 16.2 The Second Defendant pleads that attempts have been made to rehabilitate the account, and as such, a payment has already been made to the Plaintiff for these purposes.

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<sup>71</sup> Plaintiff's particulars of claim par 5 to par 15 and Annexures 'B' to 'D'.

<sup>72</sup> Second Defendant's Plea Over par 13.

<sup>73</sup> Plaintiff's particulars of claim par 16 to par 18.

<sup>74</sup> Second Defendant's Plea Over par 14.

<sup>75</sup> See par [16](b) above.

<sup>76</sup> Plaintiff's particulars of claim par 19.

<sup>77</sup> Plaintiff's particulars of claim par 19.1 and par 19.2.

<sup>78</sup> Second Defendant's Plea Over par 15 and 15.1.

<sup>79</sup> *V N Dlamini v RAF and others* (7658/08) Gauteng Division, Pretoria (21 May 2019) par [20]; *FirstRand Bank Ltd v Malesela and others* (11366/2022) [2024] ZAGPPHC 935 (25 September 2024) par 3.

<sup>80</sup> Plaintiff's particulars of claim par 20.

<sup>81</sup> Second Defendant's Plea Over par 16.



[22] The separate plea by each Defendant culminates in a prayer that the Plaintiff's claim is (First Defendant) or be (Second Defendant) dismissed with costs.

#### Basis for summary judgment and the court's analysis

[23] The exact wording of Rule 32(2)(b) requires the affidavit supporting summary judgment referred to in Rule 32(2)(a) in each case to verify the cause of action and the amount claimed (*contra Raumix Aggregates (Pty) Ltd v Richter Sand CC and another (2019/8153) and other cases [2019] ZAGPJHC 386; 2020 (1) SA 623 (GJ) (4 October 2019) Full Court par [15]*), in addition to identifying any point of law relied upon and the facts upon which the plaintiff's claim is based, and to explain briefly why the defence as pleaded does not raise any issue for trial.<sup>82</sup> A plaintiff is required to engage with the content of the defendant's plea in order to substantiate its averments that the defence is not *bona fide* and has been raised merely as a delaying tactic.<sup>83</sup> By virtue of Rule 32(4), no evidence may be adduced by the Plaintiff otherwise than by these affidavits referred to in Rule 32(2).<sup>84</sup> In the case of each Defendant, the Plaintiff relies upon an affidavit deposed to by Roy Gomes who is held out to be "employed by the Plaintiff as Manager" and who in confirming and verifying the cause of action as set out in the particulars of claim as well as the relief claimed against both Defendants, professes to have the requisite personal knowledge thereof.<sup>85</sup> There appears no reason to doubt this;<sup>86</sup> and the correctness thereof is not challenged except with regard to the Certificate of Balance (Annexure 'E'). The attachment of new documents to this affidavit in support of summary judgment is not objectionable in the circumstances of this case.<sup>87</sup> Certainly, these

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<sup>82</sup> Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) par [17]-(23) at 633-5.

<sup>83</sup> Nedbank Ltd v Richardson (2184/2021) (2022) ZAECGHC 96 (12 December 2022) par [7]; Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) par [21] at 634.

<sup>84</sup> FirstRand Bank Ltd v Badenhorst NO and others (2022/5936) [2023] ZAGPJHC 779 (10 July 2023); Rossouw and another v FirstRand Bank Ltd 2010 (6) SA 439 (SCA) par [36] at 451.

<sup>85</sup> In FirstRand Mortgage Co (RF) (Pty) Ltd v Pretorius 2025 JDR 1052 (WCC) par 38-9 the self-same Roy Gomes was held validly to have deposed to such an affidavit in that case (although therein he was then employed as 'manager' in a different entity, viz the Home and Structured Lending Department of FirstRand Mortgage Co (RF) (Pty) Ltd).

<sup>86</sup> FirstRand Mortgage Co (RF) (Pty) Ltd v Pretorius 2025 JDR 1052 (WCC) par 35-41.

<sup>87</sup> FirstRand Bank Ltd v Badenhorst NO and others (2022/5936) [2023] ZAGPJHC 779 (10 July 2023); BC Funding Solution (Pty) Ltd v Estate Agency Affairs Board 2024 JDR 1058 (GJ) par [23]; Nedbank Ltd v Magadla (11517/2021 P) [2023] ZAKZPHC 54 (24 May 2023) par [17]; Absa Bank Ltd v Mali Zabilon Mashinini and another NNO (32016/19; 32014/19) Gauteng Division, Pretoria (22 November 2019 revised 10 December 2019) par 3.5-6.

affidavits in support of summary judgment against the Defendants are each deposed to by a person who it may be accepted can swear positively to the facts and who has verified the amount claimed from each Defendant as well as the Plaintiff's cause of action insofar as it is set out in the particulars of claim.<sup>88</sup>

[24] Against First Defendant, the Plaintiff submits that no issue fit for trial has been raised.<sup>89</sup> Save for one factual or legal dispute, the Plaintiff is correct.

(a) First plea in limine:<sup>90</sup> The original summons was signed by the Registrar L Motau.<sup>91</sup> Even if it had not been, that would have been irrelevant.<sup>92</sup> There is absolutely no merit in this defence.

(b) Second plea in limine:<sup>93</sup> The factual premise of this plea is erroneous. The Rule 41A notice was indeed served at the chosen *domicilium citandi et excecutandi* of the First Respondent,<sup>94</sup> as appears from the Sheriff's return of service dated 11 March 2022.<sup>95</sup> It has been held that non-compliance with Rule 41A and its provisions is not fatal to the proceedings.<sup>96</sup> First Defendant from his side did himself not comply with Rule 41A(2)(b);<sup>97</sup> nor did he file a Rule 30 Notice as he should have done.<sup>98</sup> Despite Rule 41A being couched in peremptory terms,<sup>99</sup> its purpose is to ensure that parties explore alternative dispute resolution at the commencement of their matters in court to avoid

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<sup>88</sup> See: Rule 32(2)(a)-(b). *Standard Bank of SA Ltd v Luvhomba Financial Services CC* 2025 JDR 1933 (GP) par [20.1] and par [20.2].

<sup>89</sup> Affidavit in support of summary judgment against 1st Defendant par 50.

<sup>90</sup> See par [19](b)} above. See, too, par 21 of the First Defendant's affidavit opposing summary judgment.

<sup>91</sup> Affidavit in support of summary judgment against 1st Defendant par 5 and Annexure 'SJ1'.

<sup>92</sup> *Motloutse and another v The Sheriff, Pretoria East and others* 2020 (5) SA 123 (SCA).

<sup>93</sup> See par [19](b) above.

<sup>94</sup> Affidavit in support of summary judgment against 1st Defendant par 8.

<sup>95</sup> Together with Plaintiff's summons. The Sheriff's return does form part of the pleadings bundle herein even though it is not attached to the affidavit in support of summary judgment against First Defendant.

<sup>96</sup> *Absa Bank Ltd v Gaberton Investment (Pty) Ltd* (2359/2020) Limpopo Division, Polokwane (29 October 2024) par [30]; *Sokhani Development & Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality* (1254/2024) [2024] ZAECHC 40 (26 April 2024) and *Growthpoint Properties Ltd v Africa Master Blockchain Co (Pty) Ltd* (2020/43806) [2022] ZAGPJHC 836 (26 October 2022) par 26-27.

<sup>97</sup> *Madikizela v Nkosi and another* (19408/2021) [2023] ZAGPJHC 322 (13 April 2023) par 7; and the defendant's compliance is not dependant on the plaintiff's compliance with Rule 41A(2)(a): *Nomandela and another v Nyandeni Local Municipality and others* 2021 (5) SA 619 (ECM).

<sup>98</sup> *Lamroo (Pty) Ltd and others v Theron and others* (3019/2023) [2024] ZAFSHC 32 (8 February 2024) par [43]; *Absa Bank Ltd v Gaberton Investment (Pty) Ltd* (2359/2020) Limpopo Division, Polokwane (29 October 2024) par [32].

<sup>99</sup> *Small Enterprise Finance Agency SOC Ltd v Fumiel Transport and Projects (Pty) Ltd* (M281/2024) North West Division, Mahikeng (6 September 2024) par [39].

protracted litigation.<sup>100</sup> In *Kalagadi Manganese (Pty) Ltd v IDC of SA Ltd and others* (2020/12468) [2021] ZAGPJHC 127 (22 July 2021), the Court defined the mediation in terms of Rule 41A as a voluntary non-binding prescriptive dispute resolution.<sup>101</sup> There is no provision in Rule 41A to compel any party to submit to mediation; and there is also no sanction provided in the rule for non-compliance.<sup>102</sup> In any event, the First Defendant did ultimately receive a copy of the Plaintiff's Notice of Opposition to Mediation.<sup>103</sup> This is quite indicative of the parties' unsuitability to the mediation process.<sup>104</sup> This second plea *in limine* hardly constitutes a meritorious defence. There is no succour for the First Defendant in putative technical defences of this nature.<sup>105</sup>

(c) Third plea in limine:<sup>106</sup> It transpires that this is clearly not just a simple case of the Defendants having fallen into default. The Plaintiff concedes<sup>107</sup> that it did previously issue summons in this court against both the Defendants under Case Number 2499/18. It appears that default judgment was granted against the Defendants,<sup>108</sup> jointly and severally, for payment of R820 709.72 plus interest thereon at the rate of 8.25% calculated daily and compounded monthly from 10 January 2018 to date of payment.<sup>109</sup> Agreeing with paragraph 6 of the First Defendant's Main Plea, Plaintiff acknowledges that

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<sup>100</sup> Y[...] : M[...] N[...] v Y[...] : J[...] (2024/013982) Gauteng Division, Johannesburg (24 July 2024) par [20]; MD v RJD (053357/2022) [2024] ZAGPPHC 79 (5 February 2024).

<sup>101</sup> Lamroo (Pty) Ltd and others v Theron and others (3019/2023) [2024] ZAFSHC 32 (8 February 2024) par [41].

<sup>102</sup> P v O (21264/2019) [2022] ZAGPJHC 826 (30 September 2022) par [20].

<sup>103</sup> Affidavit in support of summary judgment against 1st Defendant par 11 and Annexure 'SJ2'. Absa Bank Ltd v Gaberton Investment (Pty) Ltd (2359/2020) Limpopo Division, Polokwane (29 October 2024) par [31].

<sup>104</sup> Y[...] : M[...] N[...] v Y[...] : J[...] (2024/013982) Gauteng Division, Johannesburg (24 July 2024) par [20].

<sup>105</sup> AC-DC Dynamics (Pty) Ltd v Elucidation Pro (Pty) Ltd and others 2024 JDR 4151; 2024 JDR 4319 (GP) par 19; Idwala Industrial Holdings (Pty) Ltd v JB Lime Distributors (Pty) Ltd 2025 JDR 1236 (FB) par [13]-[14]. SB Guarantee Co (RF) (Pty) Ltd v Vestgro Capital (Pty) Ltd and another (45317/2021) Gauteng Division, Pretoria (25 June 2024) par [27]; Liberty Group Ltd v Singh and another 2012 (5) SA 526 (KZD) par [43] at 538.

<sup>106</sup> See par [19](c) above.

<sup>107</sup> Affidavit in support of summary judgment against 1st Defendant par 13.

<sup>108</sup> See par [6] of the judgment in (36581/2020) Gauteng Division, Johannesburg (21 February 2023) involving all three parties.

<sup>109</sup> Court Order dated 20 March 2018 granted by Kubushi, J (par 16 of the Second Defendant's affidavit opposing summary judgment) as unambiguously reflected in Annexure 'SJ3' to the Affidavit in support of summary judgment against 1<sup>st</sup> Defendant and Annexure 'SJ1' to the Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant, each of which according to Roy Gomes is "a true copy of the aforesaid Default Judgment Order" (*ibid*). It was not at all granted "by the Registrar on 26 March 2018" as asserted in par 13 of the Affidavit in support of summary judgment against 1<sup>st</sup> Defendant and in par 7 of the Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant, raising a doubt as to the real extent of Roy Gomes' actual knowledge of this case.

the arrears were settled.<sup>110</sup> Remarkably, nothing in this regard appears in the particulars of claim.<sup>111</sup> This was done (according to the Main Plea of First Defendant), once all three parties had "entered into a written settlement agreement".<sup>112</sup> It is by no means improbable that a settlement agreement was reached in this regard. A bald averment of such an agreement is unimpressive.<sup>113</sup> However, the First Defendant does at least contextualize the alleged novation with reference to the prior judgment and the subsequent settlement agreement. There exists a material factual or legal dispute about whether or not this agreement constituted a novation of their prior agreements, as is unequivocally alleged by the First Defendant<sup>114</sup> and simply denied by the Plaintiff,<sup>115</sup> with the terse observation: "Simply put, there was no novation of the credit agreements which agreements have been re-instated by the operation of the law, automatically upon settlement of the previous arrears".<sup>116</sup> However, neither "the well-known Nkata judgement",<sup>117</sup> nor sections 129(3)-(4) of the National Credit Act relied on by the Plaintiff,<sup>118</sup> resolves the dispute regarding the nature and effect of the written settlement agreement concluded between the parties.<sup>119</sup> It is not denied that there was any such agreement whatever. A court is unwilling at the summary judgment stage to determine such disputes relating to the merits of the principal case.<sup>120</sup> Although the

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<sup>110</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 14 and par 15.

<sup>111</sup> Rule 18(4).

<sup>112</sup> First Defendant's Main Plea par 6.

<sup>113</sup> *Nichas & Son (Pty) Ltd v Papenfus* 1969 (2) SA 494 (O) at 496-7.

<sup>114</sup> First Defendant's Main Plea par 6.

<sup>115</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 16.

<sup>116</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 16 and par 14. It may be that in observing: "In essence, the credit agreement was reinstated as the Nkata-judgment explains" (par 27 of the First Defendant's affidavit opposing summary judgment), the First Defendant purports to agree with the Plaintiff's exposition in this regard (par 8.3.2 of the Plaintiff's Heads cites this as an admission thereof), but that is not certain and this seems to be a statement of law on the part of the First Defendant, rather than one of fact. (See par 5 of such opposing affidavit). Furthermore there is some evidence of prevarication on Plaintiff's part regarding such alleged reinstatement in the letter dated 13 October 2021 by the Plaintiff's Attorney: "Kindly do note that even though the arrears were settled in respect of the account, the legal costs were never settled *and resultantly the account has not been reinstated*" (par 20 of Second Defendant's affidavit opposing summary judgment and Annexure 'B' thereto).

<sup>117</sup> Presumably *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) par [104]-[105] at 284.

<sup>118</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 14.

<sup>119</sup> *Absa Bank Ltd v Etsane* 2016 JDR 0142 (GP) par [20]; *Chapmans Peak Hotel v South Peninsula Municipality* 1998 (4) All SA 619 (C) at 634; *van Zyl v Niemann* 1964 (4) SA 661 (A) at 669-70; *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA) par [12] at 436-7; *Mafisa v Road Accident Fund* 2024 (4) SA 426 (CC) par [33] at 436.

<sup>120</sup> *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) par [23] at 634- 5; *Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd* 2022 JDR 0051 (GJ) par [143].

Plaintiff criticises the First Defendant for "regrettably" not attaching this agreement or at least that portion thereof referring to 'novation',<sup>121</sup> conspicuously the Plaintiff itself has not done so either. As a result, this court is at a disadvantage. A defendant is not obliged at this stage to prove its defence in order to ward off summary judgment.<sup>122</sup> The test to be applied in deciding whether or not to grant summary judgment is whether the facts put up opposing summary judgment raise a triable issue and a sustainable defence in the law, deserving of their day in court,<sup>123</sup> and all that a defendant has to do is set out facts which if proven at trial will constitute a good defence to the claim, the prospects of success being irrelevant at this stage (*Cohen NO and others v Deans (Case no 368/2022) [2023] ZASCA 56 (20 April 2023) par [29]-[31]*).<sup>124</sup> "The defendant is not at the stage of summary judgment required to persuade the court of correctness of the facts stated by him or, where the facts are disputed, that there is a preponderance of probabilities in his favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another" (*Liquor Network Agency CC and another v Skylim Beverages CC 2025 (2) SA 507 (GJ) Full Court par [29] at 513-4*). The First Defendant's plea that this settlement agreement is considered a novation to (sic) any prior agreements that were concluded between the parties cannot, even in the face of the Plaintiff's vehement denial, without more be denigrated as unreasonable and *mala fide* or typified, in any sense, as a 'sham defence'.

(d) Main plea:<sup>125</sup>

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<sup>121</sup> Affidavit in support of summary judgment against 1st Defendant par 16, as required by Rule 18(6).

<sup>122</sup> *ZTE Corporation South Africa v Arbiwizn (Pty) Ltd and others* 2024 JDR 4048 (GP) par [31]; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303-4; *The Trustees for the Time Being of the Pieter van der Merwe Trust v 412 Brandfordt CC (A45/2024) Free State Division, Bloemfontein* (2 August 2024) par [8] and par [12]; *Malherbe v Absa Bank Ltd (A202/2013) (2014) ZAFSHC 200* (30 October 2014) par 4. "Rule 32, in its amended form, can never be construed to be a vehicle to resolve genuine disputes of fact" (*Absa Bank Ltd v Mphahlele NO and others (45323/19, 42121/19) [2020] ZAGPPHC 257* (26 March 2020) par [37]).

<sup>123</sup> *Basdeo and another v Discovery Life Ltd* 2024 JDR 3911 (GP) par [11].

<sup>124</sup> *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) par [13] at 632:

"A defendant is not required to show that its defence is likely to prevail [and in this respect] the defendant's prospects of success are irrelevant". See: *Blatew Security (Pty) Ltd v Matjhabeng Local Municipality* 2024 JDR 4509 (FB) par [23].

<sup>125</sup> See par [19](d) above.

(1) The identity of Plaintiff and the fact that it trades as First National Bank appears unequivocally from the documentation. As pointed out by the Plaintiff, the First Defendant on its own version has interacted and engaged with the Plaintiff directly, as is evinced by First Defendant's papers.<sup>126</sup> This bare denial is disharmonious and does not raise any issue fit for trial.<sup>127</sup>

(2) The Plaintiff glibly states that "it should be common cause that the 1st Defendant resides at the property",<sup>128</sup> yet on its own version the Plaintiff knows that the address of the mortgaged property is '1[...] B[...] Crescent, Waterstone Park Estate, Greenstone Hill, Ext 18, Edenvale',<sup>129</sup> which is a different address from the chosen *domicilium* of '1[...] E[...] Mews, 6[...] T[...] Road, Edenglen, Edenvale 1610'<sup>130</sup> and/or '1[...] T[...] Road, Eden glen, Edenvale 1609'.<sup>131</sup> Plaintiff's statement in this respect is unimpressive, to say the least. Be that as it may, it is true that First Defendant, as opposed to the Second Defendant, never formally changed his chosen *domicilium citandi et executandi*.<sup>132</sup>

(4) First Defendant's denial of the loan agreements and mortgage bonds is difficult to reconcile with and indeed contradictory of, his contentions regarding the payment of the arrears,<sup>133</sup> as well as the alleged agreed debit order.<sup>134</sup> This bare denial cannot sustain a defence. As far as the complaint that the Plaintiff ought to have retained or seized a portion of the Second Defendant's pension to cover the arrears, that was simply not a viable option for the Plaintiff.<sup>135</sup>

(5) Plaintiff in fact duly complied with the provisions of section 129 of the National Credit Act insofar as First Defendant is concerned,<sup>136</sup> in accordance with *Sebola and another v Standard Bank of SA Ltd and another* 2012 (5) SA

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<sup>126</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 19.1-2 and par 21.

<sup>127</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 22.

<sup>128</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 23.

<sup>129</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 2.3.

<sup>130</sup> Plaintiff's particulars of claim par 2.1 Annexure 'A'; Annexure 'B' clause 20.

<sup>131</sup> Plaintiff's particulars of claim par 2.1 Annexure 'C' clause 5.31.2.2.

<sup>132</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 23.

<sup>133</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 27 and par 47.

<sup>134</sup> Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd 2022 JDR 0051 (GJ) par [69]: "when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea it cannot in the absence of an explanation for the inconsistency be said to be *bona fide*".

<sup>135</sup> Absa Bank Ltd v Mokebe and Related Cases 2018 (6) SA 492 (GJ); Standard Bank of SA Ltd v Jan Hendricks and another (11294/18) Western Cape Division, Cape Town (14 December 2018) and related cases. Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 29-31.

<sup>136</sup> Affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 36-7 and Annexure 'SJ3(a)'.

142 (CC) as further elaborated on in *Kubyana v Standard Bank of SA Ltd 2014 (3) SA 56 (CC)*.<sup>137</sup> The *domicilium* address used was indeed that chosen by the First Defendant,<sup>138</sup> as set out above; and his denial of compliance with section 129 of the National Credit Act goes no further than that.<sup>139</sup> Plaintiff complied with the dispatching of the section 129 notices as far as First Defendant is concerned and same had reached the destination post offices of the First Defendant. Nothing more is expected of Plaintiff.<sup>140</sup> The accusations pertaining to an irregular interference by some unidentified employees of Plaintiff with the First Defendant's debit order, are not only unhelpfully vague but are also wholly unsubstantiated.<sup>141</sup> It is difficult to conceive of any kind of sustainable defence in this regard.<sup>142</sup> On the First Defendant's own version there has still not been any further settlement reached, inasmuch as he has yet to sign the new agreement.<sup>143</sup> On the other hand, however, Plaintiff itself is deafeningly silent with regard to the then pending *actio communi dividundo*<sup>144</sup> in which matter, it is common cause, the Plaintiff itself was cited as a party; nor has Plaintiff at any stage endeavoured to address this development in its papers. Plaintiff's omission to deal with this *actio communi dividundo* or the resultant judgment dated 21 February 2023, even though it may only have been served on Plaintiff under cover of the filing notice dated 11 March 2024,<sup>145</sup> is significant.

[25] Against Second Defendant, the Plaintiff likewise submits no issue fit for trial has been raised:<sup>146</sup>

(a) First Special Plea: As before,<sup>147</sup> the Plaintiff concedes that it did indeed previously issue summons under Case Number 2499/18 and did in fact obtain

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<sup>137</sup> FirstRand Bank Ltd v Meyer Engelbrecht and another (010183/2022) Gauteng Division, Pretoria (2 March 2025) par 12.

<sup>138</sup> Amcoal Collieries Ltd v Truter 1990 (1) SA 1 (A) at 5-6.

<sup>139</sup> First Defendant's Main Plea par 18.

<sup>140</sup> SB Guarantee Company (RF) (Pty) Ltd v Ramosebi Paul Pule and another (62497/2020) Gauteng Division, Pretoria (17 September 2021) par [32].

<sup>141</sup> See par 34 of First Defendant's affidavit opposing summary judgment.

<sup>142</sup> Affidavit in support of summary judgment against 1st Defendant par 43-4 and par 46.

<sup>143</sup> Affidavit in support of summary judgment against 1st Defendant par 48.

<sup>144</sup> First Defendant's Main Plea par 27.

<sup>145</sup> See par [19] above and par [31] below.

<sup>146</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 31.

what is described as "Monetary Default Judgment" against both First and Second Defendants.<sup>148</sup> Plaintiff avers with reference to the Court Order Annexure 'SJ1': "that the written Agreements were most definitely not cancelled as alleged by the 2<sup>nd</sup> Defendant"<sup>149</sup> and indubitably that Court Order itself nowhere states that the agreements were in fact cancelled. It is silent in this regard. However, that is by no means the final word on whether or not the agreements were cancelled as was pleaded, by way of "the consequence of" such default judgment. For the rest, the Plaintiff repeats its contentions regarding payment of the arrears on First Defendant's version, the automatic reinstatement *ex lege* of the agreements, once more relying upon "*inter alia* the well-known Nkata judgment as well as Section 129(3) of the National Credit Act 34 of 2005",<sup>150</sup> pointing out that the current action is based upon new arrears which accumulated.<sup>151</sup> According to Plaintiff, the result is that the Court Order under Case Number 2499/2018 "has no force and effect" and *res judicata* does not apply.<sup>152</sup> As noted earlier, none of this appears in the Plaintiff's particulars of claim.<sup>153</sup> Regarding the Second Defendant's plea of novation by way of a new agreement subsequent to Plaintiff obtaining default judgment,<sup>154</sup> the Plaintiff, identically with regard to the same plea raised by the First Defendant, once again denies "that there was an agreement which constituted a novation of the credit agreements. Regrettably the 2<sup>nd</sup> Defendant does not attach the alleged written agreement or at least the portion referring to 'novation'.<sup>155</sup> Simply put, there was no novation of the credit agreements which agreements have been re-instated by the operation of the law, automatically upon settlement of the previous arrears".<sup>156</sup> This denial seems carefully crafted. It is to be observed that there is no outright denial of any agreement whatsoever; merely that there was "an agreement which

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<sup>147</sup> See par [22](c) above.

<sup>148</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 7 and Annexure 'SJ1' which *ex facie* the Court Order itself is dated 20 March 2018 and not 26 March 2018 as alleged by Roy Gomes.

<sup>149</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 7 and Annexure 'SJ1'.

<sup>150</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 8.

<sup>151</sup> *ibid*

<sup>152</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 9.

<sup>153</sup> See par [24](c) above.

<sup>154</sup> First Special Plea par 4-5.

<sup>155</sup> Which in terms of Rule 18(6) should have been done upon pain of the plea being deemed irregular in accordance with Rule 18(12).

<sup>156</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 10.



constituted a novation" and "there was no novation" which appears to raise a factual dispute between the parties. "Summary judgement proceedings are not and never have been intended as a forum for the resolution of factual disputes [Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426A]" (*FirstRand Bank Ltd v Tshepori Holdings (Pty) Ltd and another* 2025 JDR 1036 (GJ) par [17]).<sup>157</sup> At the very least, it boils down to a legal enquiry concerning the nature and the effect of such ensuing agreement, a matter which cannot simply be dismissed out of hand on the information currently available to this court. It is indeed noteworthy that both the Defendants independently pleaded novation.

(b) Second Special Plea: Plaintiff denies that the Second Defendant ever did give written notice of her change of *domicilium* from those chosen in the agreements (the existence of most of which agreements she denies) to " [...] C[...] Road, Croyden, Kempton Park". It may perhaps be a bit of a stretch for Roy Gomes to declare, as he does: "The Plaintiff did not receive any written notification of change of *domicilium* address from the 2<sup>nd</sup> Defendant at the aforesaid postal and physical address",<sup>158</sup> or stated email address,<sup>159</sup> as opposed to just 'there being no record of any such receipt'. Be that as it may, this affects solely the efficacy of the Notice in terms of Section 129 of the National Credit Act, which was dispatched to the original *domicilium*,<sup>160</sup> and as stressed by the Plaintiff, not the validity of the summons:<sup>161</sup> and is at best merely a dilatory defence.<sup>162</sup> Nonetheless, if correct, it does constitute a defence to the immediate granting of summary judgment forthwith.<sup>163</sup> There is undeniably uncertainty surrounding the Second Defendant's chosen address.

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<sup>157</sup> Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) par [23] at 634- 5; FirstRand Bank Ltd v McCallum 2024 JDR 4396 (GJ) par [10]. Compare: Blatew Security (Pty) Ltd v Matjhabeng Local Municipality 2024 JDR 4509 (FB) par [22].

<sup>158</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 14 (Third Floor, First Place, Bank City, Johannesburg 2000' and 'PO Box 1065, Johannesburg 2000').

<sup>159</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 14 ('h[...]')

<sup>160</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 13; and Annexure 'F' to the Plaintiff's particulars of claim.

<sup>161</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 18-22.

<sup>162</sup> Benson and another v Standard Bank of South Africa (Pty) Ltd and others 2019 (5) SA 152 (GJ) par [16] at 156; Standard Bank of SA Ltd v Rockhill and another 2010 (5) SA 252 (GSJ) par [17]-[18] at 258; *contra* Standard Bank of SA Ltd v van Vuuren 2009 (5) SA 557 (T) par [11] at 561-2.

<sup>163</sup> Standard Bank of SA Ltd v Rockhill and another 2010 (5) SA 252 (GSJ) par [19] at 258.

Apart from the two initially chosen *domicilia*,<sup>164</sup> the Second Defendant quite obviously did inform the Plaintiff of her move to "1[...] B[...] Crescent, Waterstone Park, Greenstone Hill Ext 18, Edenvale 1609".<sup>165</sup> The probabilities lend credence to her contention of having similarly advised the Plaintiff of her subsequent move. On the other hand, her plea glaringly lacks details in this regard. Nevertheless, such factual dispute is irresolvable on the papers at this stage. Alternatively to simply discounting this plea, which in the face of the said uncertainty regarding her actual *domicilium* address would be imprudent, the Plaintiff seeks, the opportunity of complying with Section 129,<sup>166</sup> by now serving upon the Second Defendant the requisite Section 129 Notice.<sup>167</sup> In the event of non-compliance with section 129, section 130(4) of the National Credit Act would apply,<sup>168</sup> in which case such request would have to be acceded to and granted.<sup>169</sup> However, given the factual dispute concerning the question of whether or not the Second Defendant did indeed as a matter of fact properly advise Plaintiff of the ultimate change of her *domicilium* address after she had left the matrimonial home;<sup>170</sup> as well, consequently, the dispute as to precisely what her relevant *domicilium* is for purposes of section 129 notices, this court cannot be satisfied one way or the other whether or not there was indeed due compliance with section 129(1) of the National Credit Act in respect of the Second Defendant. It is not suggested that Second Defendant ever actually received the requisite notice. At summary judgment stage it is truly simply the right to defend that is in issue;<sup>171</sup> and the adjudication of a summary judgement application does not entail the adjudication of the entire action;<sup>172</sup> nor is a summary judgment application,

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<sup>164</sup> '1[...] T[...] Road Eden glen, Edenvale 1609' and '1[...] E[...] Mews, 6[...] T[...] Road, Edenglen, Edenvale 1610'.

<sup>165</sup> Second Defendant's Second Special Plea par 8.4.3. Annexure 'F' to Plaintiff's particulars of claim.

<sup>166</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 15 and par 23.

<sup>167</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 17.

<sup>168</sup> Affidavit in support of summary judgment against 2<sup>nd</sup> Defendant par 16.

<sup>169</sup> Investec Bank v Olivier Charles Zouzoua (21/44429) Gauteng Division, Johannesburg (7 February 2023) par [13]. See Ryan Williams v Shackleton Credit Management (10771/2020) Western Cape Division, Cape Town (10 November 2023) par [61].

<sup>170</sup> First Defendant's affidavit opposing summary judgment par 11.3.

<sup>171</sup> van Heerden v Samarkand Motion Picture Productions 1979 (3) SA 786 (T) at 789.

<sup>172</sup> FirstRand Bank Ltd v Tshepori Holdings (Pty) Ltd and another 2025 JDR 1036 (GJ) par [16]. See: Mercedes-Benz Financial Services v M Magome Inc 2022 JDR 0219 (GP) par [11]. Compensation Solutions (Pty) Ltd v Compensation Commissioner and others (56219/21; 49156/21) Gauteng Division, Pretoria (17 July 2023) par [32].

some kind of preliminary trial<sup>173</sup> of the issues involved:<sup>174</sup> "the inquiry in summary judgment applications is simply whether the requirements for the grant of summary judgment are present on the papers" (*Something Different Concepts and Shows CC and another v South African Securitisation Programme (RF) Ltd and others (A200/2023) [2024] ZAWCHC 103 (19 April 2024); 2024 JDR 2113 (WCC) par [16]*).

(c) Plea over: The remainder of Second Defendant's Plea (the Plea Over) comprises mere denials,<sup>175</sup> save for the rather contradictory admission of the First Loan Agreement,<sup>176</sup> together with her denial of compliance by Plaintiff with the National Credit Act.<sup>177</sup> The latter plea has already been considered above. The mere denials of Plaintiff's cause of action are in the circumstances of this particular case,<sup>178</sup> insufficient to constitute any *bona fide* defence to Plaintiff's claim.<sup>179</sup> Moreover, such denials are in conflict with the contents of the Second Defendant's Special Pleas regarding her *domicilium*, the default judgment that was obtained by the Plaintiff, the subsequent novating agreement and her discordant admission of the First Loan Agreement. To say the least, the denials in the Second Defendant's Plea Over are implausible. Bare denials typically entitle plaintiff to summary judgment.<sup>180</sup>

## Security

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<sup>173</sup> Or a "mini-trial" with "extensive *facta probantia*" (*Absa Bank Ltd v Mali Zabilon Mashinini and another NNO (32016/2019; 32014/2019) Gauteng Division, Pretoria (22 November 2019 revised 10 December 2019) par 3.11*).

<sup>174</sup> *Absa Bank Ltd v Mphahlele NO and others (45323/19, 42121/19) [2020] ZAGPPHC 257 (26 March 2020) par [36]*.

<sup>175</sup> See par [19](c)(2) above.

<sup>176</sup> See par [19](c)(1) above.

<sup>177</sup> See par [19](c)(3) and (5) above.

<sup>178</sup> Contrast: *FirstRand Bank Ltd v Badenhorst NO and others (2022/5936) [2023] ZAGPJHC 779 (10 July 2023) par 91-3*; *First Rand Bank Ltd v V&N Agencies CC and another 2025 JDR 1131 (GP)*; *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd and others 1978 (1) SA 74 (D) at 77-8*.

<sup>179</sup> *Bragan Chemicals Pty Ltd v Devland Cash and Carry Pty Ltd and Another (11096/20) [2020] ZAGPPHC 397 (5 August 2020) par 10*; *Cellsecure Monitoring and Response (Pty) Ltd and others v SA Securitisation Programme (RF) Ltd 2025 JDR 0594 (GP) Full Court par [26]*; *MJG Logistics (Pty) Ltd v Folyi Construction and Projects CC (2863/2023) Mpumalanga Division - Middelburg Local Seat (10 July 2024) par [11]-[12]*. See: Rule 22(2) read with Rule 18(4).

<sup>180</sup> *Cellsecure Monitoring and Response (Pty) Ltd and others v SA Securitisation Programme (RF) Ltd 2025 JDR 0594 (GP) Full Court par [24]*; *Absa Bank Ltd v Mali Zabilon Mashinini and another NNO (32016/2019; 32014/2019) Gauteng Division, Pretoria (22 November 2019 revised 10 December 2019) par 5.3*.

[26] Neither Defendant put up security in order to defeat summary judgment.<sup>181</sup> Any defendant resisting summary judgment who does not give security, must file an opposing affidavit.<sup>182</sup>

### Opposing affidavits

[27] Both Defendants elected to furnish affidavits in terms of Rule 32(2)(b). Such an opposing affidavit must 'satisfy the court'<sup>183</sup> that the defendant has a *bona fide* defence to the action and fully disclose the nature and grounds of that defence and the material facts relied upon in support thereof.<sup>184</sup> The facts must not be inherently and seriously unconvincing;<sup>185</sup> and, if they are found to be true, must constitute a valid defence.<sup>186</sup> A *bona fide* defence is accordingly one that is good in law, and that is pleaded with sufficient particularity.<sup>187</sup> Incongruous though it might now appear to be, it seems that the defendant is nevertheless nowadays still not expected to formulate the opposition to the claim with the precision that would be required of a plea; nor will the court examine it against the standards of pleading.<sup>188</sup> However, the defendant is nowadays expected to engage with the plaintiff's averments<sup>189</sup> concerning the pleaded defence;<sup>190</sup> but is still "not meant to set out chapter and

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<sup>181</sup> Rule 32(3)(a).

<sup>182</sup> Standard Bank of SA Ltd v Rockhill and another 2010 (5) SA 252 (GSJ) par [17] at 258. Rule 32(3); Something Different Concepts and Shows CC and another v South African Securitisation Programme (RF) Ltd and others (A200/2023) [2024] ZAWCHC 103 (19 April 2024); 2024 JDR 2113 (WCC) par [16].

<sup>183</sup> "'Satisfy' in Rule 32(3)(b) does not mean 'prove'" (FirstRand Bank Ltd v McCallum 2024 JDR 4396 (GJ) par [10]).

<sup>184</sup> Rule 32(2)(b); RSC Avelo (Pty) Ltd v Afrilink Building and Civils (Pty) Ltd and another 2024 JDR 4398 (GJ) par [9]; Lourens v Mathie NO and another 2025 JDR 1505 (GP) Full Court par [16].

<sup>185</sup> IPH Finance (Pty) Ltd v Agrizest (Pty) Ltd (21771/2021) Western Cape Division, Cape Town (28 February 2023) par 1; Standard Bank of SA v Friedman 1999 (2) SA 456 (C) at 461-2; SA Securitisation Programme (RF) Ltd and others v Cellsecure Monitoring and Response (Pty) Ltd and others (21647/2021) [2022] ZAGPPHC 925 (25 November 2022) par [33].

<sup>186</sup> FirstRand Mortgage Company (RF) (Pty) Ltd v Pretorius 2025 JDR 1052 (WCC) par 15; Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 227-8; Standard Bank of SA v Friedman 1999 (2) SA 456 (C) at 461-2.

<sup>187</sup> Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426; IPH Finance (Pty) Ltd v Agrizest (Pty) Ltd (21771/2021) Western Cape Division, Cape Town (28 February 2023) par 2.

<sup>188</sup> Lourens v Mathie NO and another 2025 JDR 1505 (GP) par [16]; Maharaj v Barclays National Bank Ltd 1976(1) SA 418 (A) at 426; Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek JV 2009 (5) SA 1 (SCA) par [32] at 12; Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) par [26]-[27] at 635-6.

<sup>189</sup> "The plea contains *facta probanda*; the affidavit also contains *facta probantia*" (*Vukile Property Fund Ltd v Naledi Bakeries CC and others* (2022 - 033617) Gauteng Division, Johannesburg (7 March 2024) par [3]).

<sup>190</sup> Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) par [24] at 635;

verse of the particulars of the defence" (*Mason NO v Mason and another* (1286/2023) [2025] ZASCA 44 (14 April 2025) par [22]). It is true that opposing affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence and even a tersely stated defence may pass muster in a given case (*Absa Bank Ltd v D C Peacock and another* (1340/2020) Western Cape Provincial Division, Cape Town (26 October 2020); *Koomklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C) at 678). Nonetheless, any defences emerging from the opposing affidavit that are inconsistent with the plea,<sup>191</sup> should not, without more, be regarded as bona fide.<sup>192</sup> Indeed it has been held that a defendant "is confined to the defences raised in the plea already filed" and that "it is irregular for a defendant to raise ... a defence in the answering affidavit resisting summary judgment that was not raised in the plea that was filed".<sup>193</sup>

#### First Defendant's affidavits

[28] In his initial affidavit opposing the granting of summary judgment (especially emphasizing his opposition to those orders sought in terms of prayers 3 to 9 of the particulars of claim<sup>194</sup>), the First Defendant, 55 years old,<sup>195</sup> contradicts the non-admission thereof that is embodied in his Main Plea,<sup>196</sup> by explaining "why these agreements were signed and the context of each agreement".<sup>197</sup> The defence raised in the opposing affidavit should be consistent with the plea.<sup>198</sup> Also, it is First Defendant's unexpected "submission that the Plaintiff is entitled to recover from us the money that is owed over these agreements and two mortgage bonds registered

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and a defendant cannot rely on defences not canvassed in such opposing affidavit (*Petersen and others v Kgopelang Medical Services Inc* 2025 JDR 0988 (GJ) par [14]).

<sup>191</sup> *Standard Bank of SA Ltd v Amra* 2025 JDR 1453 (FB) par [9] and par [11]-[12].

<sup>192</sup> *AHMR Hospitality (Pty) Ltd [t/a Bakenhof] Winelands Venue v da Silva* 2024 (3) SA 100 (WCC) par [14] at 105; *FirstRand Mortgage Co (RF) (Pty) Ltd v Pretorius* 2025 JDR 1052 (WCC) par 42-3. "A deviation in the answering affidavit to [sic] a defence pleaded in [the] filed plea is a manifestation of a lack of bona fides" (*FirstRand Bank Ltd v Sayelo (Pty) Ltd* 2024 JDR 5351 (GP) par [27]).

<sup>193</sup> *FirstRand Bank Ltd v Sayelo (Pty) Ltd* 2024 JDR 5351 (GP) par [27].

<sup>194</sup> First Defendant's Affidavit opposing summary judgment par 9-10.

<sup>195</sup> First Defendant's affidavit opposing summary judgment par 11.1.

<sup>196</sup> First Defendant's Main Plea par 12. See par [19](d)(3) above.

<sup>197</sup> First Defendant's affidavit opposing summary judgment par 11, especially par 11.1 and par 117-8 (par 11.10 to 12.1-2. Summarize the documents set out in Plaintiff's particulars of claim and the terms thereof).

<sup>198</sup> *Standard Bank of SA Ltd v Zada Tech (Pty) Ltd and another* 2024 JDR 4932 (FB) par [9]. Subject to a possible amendment of the plea (*Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) par [20] at 457).

over our home".<sup>199</sup> Apart from a rambling exposition of the nature or contents of the various agreements attached to the particulars of claim,<sup>200</sup> First Defendant raises the following seemingly salient points, none of which, however, upon examination, can be regarded as amounting to any defence defeating the application for summary judgment:

(a) 'The Certificate of Balance (Annexure 'E') is incorrect': First Defendant disputes the amounts claimed,<sup>201</sup> complaining that Plaintiff consolidated<sup>202</sup> into one single account<sup>203</sup> "two bonds",<sup>204</sup> notwithstanding that each has a different interest rate, amount and time periods, rendering it impossible to "determine what is owing in each account and the interest charged in accordance with each agreement".<sup>205</sup> Consequently, according to First Defendant, "Plaintiff has failed to prove our default".<sup>206</sup> The First Defendant does not endeavour to determine what, if anything, the correct amount might be.<sup>207</sup> Moreover, First Defendant has failed to establish an adequate factual basis for doubting the validity or accuracy of this Certificate of Balance Annexure 'E'.<sup>208</sup> "The ever-increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by our courts" (*NPGS Protection and Security Services CC v FirstRand Bank Ltd 2020 (1) SA 494 (SCA) par [14] at 498*). This court is unpersuaded that the First Defendant has in this regard set forth facts which if proved at trial will indicate either that the stated balance is inaccurate; or that the interest rate as contained in the Certificate of Balance is not the correct interest rate.

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<sup>199</sup> First Defendant's affidavit opposing summary judgment par 13.

<sup>200</sup> First Defendant's affidavit opposing summary judgment par 11.10 to par 12.16.

<sup>201</sup> First Defendant's affidavit opposing summary judgment par 13.

<sup>202</sup> As appears from Annexure 'SJ4'

<sup>203</sup> As reflected in Annexure 'SJ4' to the Plaintiff's Affidavit in support of summary judgment against 1st Defendant.

<sup>204</sup> The Particulars of Claim refer to "the account" (par 20.4) and also to: "The mortgage bond account held with the plaintiff" (par 20.10). Annexure 'E' is in respect of the "Home Loans' account balance" under a single account number: 3[...].

<sup>205</sup> First Defendant's affidavit opposing summary judgment par 14 and par 15.

<sup>206</sup> First Defendant's affidavit opposing summary judgment par 16.

<sup>207</sup> "approximately R143 000" (par [20](d)(3) above) does not measure up and relates merely to arrears.

<sup>208</sup> Compare: *F & I Advisors (Edms) Bpk en 'n ander v Eerste Nasionale Bank van SA Bpk 1999 (1) SA 515 (SCA) at 524*.

(b) The First Defendant claims he himself made a payment of R65 000.00 on 14 October 2022 as his share of the arrears as well as paying the monthly instalment amount of R9 350.00,<sup>209</sup> suggesting perhaps that this was not taken into account.<sup>210</sup> That is insufficient to constitute a *bona fide* defence.

(c) In his subsequent affidavit dated 12 December 2022,<sup>211</sup> 1 First Defendant provides ostensible proof that he has made payments in the total amount of R93 050.00 (Ninety-Three Thousand and Fifty Rand) towards the mortgage bond;<sup>212</sup> plus a total payment of R20 000.00 (Twenty Thousand Rand) towards the municipal account (City of Johannesburg);<sup>213</sup> and R17 000.00 (Seventeen Thousand Rand) to repair the floor in the lounge area of one of the flatlets on the property.<sup>214</sup> This however, is all by the way.

(d) The mortgaged property is First Defendant's primary residence.<sup>215</sup> This is not disputed by the Plaintiff, hence the relief sought under Rule 46A.<sup>216</sup>

(e) Their erstwhile matrimonial home is jointly owned by the Defendants and is their major asset.<sup>217</sup> That is of no consequence as far as this application is concerned.

[29] There is no merit in the complaint, related to the non-admission of the Plaintiff's citation,<sup>218</sup> that the Plaintiff has failed to attach the National Credit Regulators Registration Certificate to the particulars of claim.<sup>219</sup> It is superfluous to attach a copy of such registration certificate to the pleadings.<sup>220</sup> In any event, such a certificate would merely serve to prove what is comprehensively alleged in

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<sup>209</sup> First Defendant's affidavit opposing summary judgment par 8.

<sup>210</sup> Lack of knowledge of the amount outstanding constituting no defence (*Petlen Properties (Pty) Ltd v Boland Construction Co (Pty) Ltd* 1973 (4) SA 557 (C) at 560-1; *Western Province Hardware & Timber Co (Pty) Ltd v Frank Fletcher* [1971] 2 PH F77 (C)).

<sup>211</sup> In Johannesburg Case No: 36581/2020, incorporated in the present matter (see par [19] above).

<sup>212</sup> Supplementary Affidavit in Johannesburg Case No: 36581/2020 par 4.2.

<sup>213</sup> Supplementary Affidavit in Johannesburg Case No: 36581/2020 par 4.6.

<sup>214</sup> Supplementary Affidavit in Johannesburg Case No: 36581/2020 par 4.7.

<sup>215</sup> First Defendant's affidavit opposing summary judgment par 29 (see also par 11.2 thereof); par [3] of the judgment in (36581/2020) Gauteng Division, Johannesburg (21 February 2023) involving all three parties.

<sup>216</sup> Plaintiff's affidavit in support of summary judgment against 1<sup>st</sup> Defendant par 52. See par [1] above.

<sup>217</sup> First Defendant's affidavit opposing summary judgment par 7.

<sup>218</sup> See par [20](d){1} above.

<sup>219</sup> First Defendant's affidavit opposing summary judgment par 18.

<sup>220</sup> *Nedbank Ltd v Wiid Group of Companies (Pty) Ltd and others* (4330/2024) [2025] ZAFSHC 97 (19 March 2025) par [12] and par [16].

paragraph 1.3 of the particulars of claim.<sup>221</sup> The further complaint that the relief now sought by way of summary judgment differs from the prayers in the particulars of claim,<sup>222</sup> is misplaced. The relief set out prayers 5, 7 and 8 of the notice of application for summary judgement against First Defendant and regurgitated as paragraphs 2.5, 2.7 and 2.8 of the affidavit in support of the summary judgment against First Defendant, concerns ancillary matters that, at worst, fall under the rubric "further and/or alternative relief" in prayer 6 of the particulars of claim. Their inclusion does not, by any means, constitute a defence derailing Plaintiff's application. The same applies to the point made that Annexure 'C' to the particulars of claim does not authorize a claim for costs on an attorney and client scale.<sup>223</sup>

#### Second Defendant' affidavit

[30] Second Defendant similarly filed an affidavit opposing summary judgment in which she raises by way of defence, in addition to the non-commissioning of the Plaintiff's affidavit in support of summary judgment against her,<sup>224</sup> also the earlier action under Case Number 2499/18 and the default judgment already obtained against the Defendants by the Plaintiff.<sup>225</sup> Second Defendant does not, however, engage with Plaintiff's averments concerning the pleaded defence.<sup>226</sup>

#### *Deus ex machina*

[31] Part of First Defendant's opposition to summary judgment before this court<sup>227</sup> is the judgment in the matter of *DE SANTOS LIBBY AMELIA v DE SANTOS PAULO JORGE* and also *FIRST NATIONAL BANK*<sup>228</sup> (36581/2020) Gauteng Division,

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<sup>221</sup> See: FirstRand Bank Ltd v Bhika and another (3135/2022) [2025] ZAECQBHC 5 (6 February 2025) par [11]. "The cause of action consists of the facts required for judgment, not the evidence" (FirstRand Bank Ltd v Badenhorst NO and others (2022/5936) [2023] ZAGPJHC 779 (10 July 2023) par 7).

<sup>222</sup> First Defendant's affidavit opposing summary judgment par 20.

<sup>223</sup> First Defendant's affidavit opposing summary judgment par 19.

<sup>224</sup> Second Defendant's affidavit opposing summary judgment par 6-12, which was justifiably raised as a legal objection after her plea and which could obviously not have been covered by her preceding plea.

<sup>225</sup> Second Defendant's affidavit opposing summary judgment par 13-20. See par [25](a) above.

<sup>226</sup> Rule 32(2)(b). Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) par [24] at 635; Standard Bank of SA Ltd v Luvhomba Financial Services CC 2025 JDR 1933 (GP) par [20.1] and par [20.3].

<sup>227</sup> See par [19] above.

<sup>228</sup> i.e. the Plaintiff herein.



*Johannesburg (21 February 2023)*, First Defendant arguing,<sup>229</sup> that this court "is bound to consider, and abide by" that judgment. In that judgment the court (per Makume, J) issued an order in the following terms:

1. "The co-ownership of [Second Defendant] and the [First Defendant] in respect of the immovable property situated at 1[...] B[...] Crescent, Waterstone Park, Greenstone Hill, Johannesburg, being Portion E1, Stand 0[...] ('the property') is hereby terminated". Although its description does differ somewhat, this is undoubtedly the mortgaged property of which the Plaintiff is mortgagee.
2. "The property is to be sold on the open market for the amount of not less than R3,200 000.00 (Three Million and Two Hundred Thousand Rand). The advert advertising such sale shall be visible for 3 months from date of this order being served on the [First Defendant]".
3. "The costs relating to or associated with the property (bond, levies, rates, taxes, water and electricity) are to be shared equally between the (Second Defendant] and the [First Defendant] during the first three (3) months that the property is placed on the open market" (emphasis added). Joint liability is, of course, something different from joint and several liability.<sup>230</sup> See, further, paragraphs 9 and 11 of this court order, below.
4. "If after three (3) months [of] the property being on the open market it has not been sold, then the flats on the property must be rented out and the property must remain on the open market for a reduced amount after consideration by attorneys Wilsenach van Wyk Goosen & Bekker in consultation with Estate Agents until the property is in ....". Unfortunately this paragraph of the court order is incomplete. Nonetheless by virtue of paragraph 6 thereof the said attorneys Wilsenach van Wyk Goosen & Bekker are clothed with authority to sell the property (see below).
5. "The net proceeds received in respect of the sale of the property shall be kept in an interest bearing account with Wilsenach van Wyk Goosen & Bekker for the benefit of the [Defendants] pending the final determination of the divorce action between the parties".

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<sup>229</sup> In First Defendant's Heads of Argument dated 10 March 2024 par 1.

<sup>230</sup> *Lloyd v Richards and another* (4892/2022) [2025] ZAWCHC 41 (13 February 2025) par 5.

6. "Messrs Wilsenach van Wyk Goosen & Bekker Attorneys are hereby granted the authority to direct and effect the sale and disposal of the property including the power and authority to solely negotiate and agree on the terms and conditions for the sale of the property".

7. "The [Defendants] shall co-operate fully in respect of the marketing, sale and disposal of the property, by signing all the necessary documents to give effect to the sale of the property and renting out the flats on the property".

8. "Pending registration and transfer of the property into such purchaser's name, that Wilsenach van Wyk Goosen & Bekker Attorneys, are empowered and authorised to administer the property, including the power and authority to let out the property to let out the property on such terms and conditions as it may determine, and to receive the monthly rental income in respect of the flats on the property in its trust account, to distribute the rental income towards the costs of the property (bond, levies, rates and taxes, water and electricity)". [emphasis added].

9. "Any shortfall in respect of the monthly costs associated with the property [see paragraphs 3 and 11 of the court order, above] will be shared equally between the [Defendants] and any surplus in respect of the rental income of the property must be kept on trust at Wilsenach van Wyk Goosen & Bekker Attorneys until the final determination of the divorce action".

10. "The [First Defendant] is to remain in occupation of the main house of the property pending the sale of the property to enable him to continue maintaining the property for the purposes of letting and ensuring that it is retained in a state which would ensure that it may be sold at a realistic price".

11. "[Defendants] are equally responsible for the arrears of the costs associated with the property, being the FNB bond account [held by the Plaintiff], City of Johannesburg account (rates, taxes, water) and Waterstone Park Owners Association account (levies, charges, penalties), taking into account the amounts that the [First Defendant] already paid towards the arrears".

12. "Each party to pay their own costs in respect of this application".

[32] Indubitably some of the relief sought by the Plaintiff in this summary judgment application has been pre-empted by the aforesaid court order of 21 February 2023.

Despite the unavoidable conclusion that events seem to have overtaken this application for summary judgment that was launched during 2022,<sup>231</sup> the Plaintiff has not dealt with this development whatsoever nor with its effect upon the earlier obligations of the Defendants,<sup>232</sup> notwithstanding Plaintiff's obligation "to come to grips with the substantive elements of the pleaded defence and set out why, having regard to those substantive elements, the defence does not constitute a bona fide defence" (*Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd (359/2022) Eastern Cape Division, Gqeberha (8 August 2023) par 25.3*). It is unknown what the present state of play is regarding the sale and disposal of the immovable property and the application of the proceeds thereof, if any; or the fate of the Plaintiff's mortgage bonds (which one would assume would have received preference); or the progress of the Defendants' divorce action with its possible impact on the mortgaged property.

[33] The aforesaid judgment by Makume, J seems effectively to resolve the outcome of this application. This judgment cannot simply be ignored, as Plaintiff would have this court do; and it certainly cannot be held that this judgment is wrong.<sup>233</sup> This judgment affects the position not only of the Plaintiff but also of both the Defendants.

## Discussion

[34] Although this court is not persuaded that any *bona fide* defence has been made out by either Defendant, it is not possible to make a positive finding in this respect, given the paucity of available information and the existence of the abovementioned disputes. The defence of neither Defendant has been set out with clarity or particularity and completeness.<sup>234</sup> By the same token, however, this court is

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<sup>231</sup> Plaintiff's Chronology Table.

<sup>232</sup> Plaintiff's Chronology Table ends in November 2022 with the filing of the respective Defendant's opposing affidavits. The Plaintiff's Heads of Argument although dated 19 June 2023 contain nothing more than a mere passing reference to the "pending application" (*sic*) for division of joint ownership (in par 10.1.2 thereof) whereas that application was finalized already on 21 February 2023..

<sup>233</sup> *Compensation Solutions (Pty) Ltd v Compensation Commissioner and others (56219/21; 49156/21) Gauteng Division, Pretoria (17 July 2023) par [15]-[19] and par [28]; van Rensburg and another NNO v Naidoo and others NNO; Naidoo and others NNO v van Rensburg NO and others 2011 (4) SA 149 (SCA) par [47]-[48] at 161-2.*

<sup>234</sup> *Marsh and another v Standard Bank of SA Ltd 2000 (4) SA 947 (W) par 4 at 949; SB Guarantee Co (RF) (Pty) Ltd v Vestgro Capital (Pty) Ltd and another (45317/2021) Gauteng Division, Pretoria (25 June 2024) par [26].*

surely not convinced that Plaintiff necessarily has an unassailable case; or has properly satisfied every procedural prerequisite for summary judgment.

[35] The Full Court in *Liquor Network Agency CC and another v Skylim Beverages CC 2025 (2) SA 507 (GJ) par [26]-[28] at 512-3* elucidating the proper approach to an application for summary judgment favoured the approach that stresses: "it is only where the Court has no reasonable doubt that the plaintiff is entitled to judgment as prayed, that plaintiff has an unanswerable case, that summary judgment is granted".<sup>235</sup> This approach recognizes that summary judgment, albeit hardly extraordinary,<sup>236</sup> is certainly robust,<sup>237</sup> if not drastic.<sup>238</sup> Clearly, it represents a very stringent remedy,<sup>239</sup> in that it permits a judgment to be given without trial.<sup>240</sup> It closes the doors of the court to the defendant.<sup>241</sup> Summary judgment is not intended to shut a defendant out from defending unless it is very clear indeed that the defendant has no case (*Meek v Kruger 1958 (3) SA 154 (T) at 157*) because "the grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law" (*Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423*).

[36] In addition to all of the above, it may quite justifiably be postulated that the facts of the previous default judgment together with the reinstatement of agreements pursuant to the subsequent agreement and liquidation of the arrears, as alleged by the Plaintiff in support of summary judgment, constitute material facts upon which the Plaintiff relies for this claim and, as such, ought rightly to have been incorporated into the particulars of claim.<sup>242</sup> The first duty of a pleader is to allege the material facts

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<sup>235</sup> See: *Edwards v Menezes 1973 (1) SA 299 (NC) at 304*.

<sup>236</sup> *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek JV 2009 (5) SA 1 (SCA) par [32] at 12*.

<sup>237</sup> *SB Guarantee Company (RF) (Pty) Ltd v Ramosebi Paul Pule and another (62497/2020) Gauteng Division, Pretoria (17 September 2021) par [1]*.

<sup>238</sup> *Something Different Concepts and Shows CC and another v SA Securitisation Programme (RF) Ltd and others (A200/2023) [2024] ZAWCHC 103 (19 April 2024); 2024 JDR 2113 (WCC) par [14]*.

<sup>239</sup> *Nedbank Ltd v Kgobe 2024 JDR 4549 (GJ) par 23*.

<sup>240</sup> *Beyonce Hairpiece Salon and General Merchandiser (Pty) Ltd and another v Bester and another (AR 423/2022) [2023] ZAKZPHC 92 (8 September 2023) par [4]*.

<sup>241</sup> *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd (A5005/2005) Witwatersrand Local Division (26 September 2005) par [1]-[2]; Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959 (3) SA 362 (W) at 366*. See, further: *Basdeo and another v Discovery Life Ltd 2024 JDR 3911 (GP) par [7]*.

<sup>242</sup> Rule 18(4).

upon which reliance is placed.<sup>243</sup> "This must be seen against the background of the further requirements that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise" (*Trope v South African Reserve Bank and another* 1992 3 SA 208 (T) at 210). "It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rule of law and draws conclusions as regards the rights and obligations of the parties and gives judgement" (*Buchner and another v JCI Co Ltd* 1995 (1) SA 215 (T) at 216). The particulars of claim appear to be incomplete in this regard. As a result, the attention of the Defendants was not alerted to such allegations.<sup>244</sup> Absent such legal and factual allegations in the particulars of claim, it can hardly be said that the Plaintiff comprehensively stipulated the points of law relied upon and the facts upon which its claim is based as required by Rule 32(2)(b). After all, the Plaintiff is required to identify any point of law relied upon in relation to the claim upon which summary judgment is sought as well as the facts upon which Plaintiff's claim is based (*Absa Bank Ltd v Mphahlele NO and others* (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020) par [18]). Generally, a plaintiff is not entitled to introduce evidence of facts that do not appear in the particulars of claim or declaration (*Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd* (359/2022) Eastern Cape Division, Gqeberha (8 August 2023) par [20]; *Absa Bank Ltd v Mphahlele N.O. and others* [2020] ZAGPPHC 257 (26 March 2020) at [32]; *Morgan Cargo (Pty) Ltd v Zakharov* (11850/20) [2022] ZAWCHC 132 (4 July 2022) par [20]). Accordingly, Plaintiff's two applications for summary judgment are

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<sup>243</sup> Rule 18(4). *Prinsloo v Woolbrokers Federation Ltd* 1955 (2) SA 298 (N) at 299; *Blos v Minister of Police* (114/2019) [2023] ZANWHC 126 (20 July 2023) par [22].

<sup>244</sup> This action has more to it than an uncomplicated and commonplace case of Defendants defaulting on their loans, which is what it ex facie the particulars of claim purports to be. The rule that parties are limited to their pleading (*Jordaan v Koekemoer* 2009 JDR 0504 (ECG) par (26)) is apposite in these circumstances (*Road Accident Fund v Malatje* 2014 JDR 1248 (GP) Full Court par 40). "Factual issues which form the basis of a party's case must be pleaded and not only raised during the trial" (*Jordaan v Koekemoer* 2009 JDR 0504 (ECG) par (25)). "The object of pleading is to define the issues" (*Robinson v Randfontein Estates Gold Mines Co Ltd* 1925 (AD) 173 at 198). "Generally speaking the issues in civil cases should be raised on the pleadings" (Rule 18(4). *Middleton v Carr* 1949 (2) SA 374 (AI at 386). By neglecting to allege the salient facts relating to the default judgment and subsequent alleged reinstatement of the agreements, issues that are relied upon in support of summary judgment, the Plaintiff in effect is attempting now to canvass an issue which was not pleaded (*Road Accident Fund v Malatje* 2014 JDR 1248 (GP) Full Court par 43)) and to which attention was not directed in the particulars of claim, which is impermissible (*Kali v IGI Ltd* 1976 (2) SA 179 (D) at 182; *Nyandeni v. Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 279; *Shil v Milner* 1937 AD 101 at 106). "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed" (*Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107; *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082).

not entirely procedurally in order,<sup>245</sup> and consequently cannot be said to satisfy that initial requirement under Rule 32.<sup>246</sup> In order for the affidavit in support of summary judgment to comply with Rule 32(2)(b), that affidavit must contain inter alia an identification of any point of law relied upon and an identification of the facts upon which the plaintiff's claim is based; and the court needs to ensure that both of these requirements have been fulfilled before it can hold that there has been proper compliance with Rule 32(2)(b).<sup>247</sup> Summary judgment "calls for strict compliance with the prerequisites as provided for in Rule 32(2)(b)" (*Ummi Properties (Pty) Ltd v Absa Bank Ltd (71053/2016) Gauteng Provincial Division (23 January 2023) par [15]*). The identification of facts upon which the plaintiff's claim is based does not provide for "amplification" in the plaintiff's affidavit of the cause of action as set out in the particulars of claim;<sup>248</sup> and further, the identification of any point of law relied upon, clearly refers to an identification of a point of law relied upon in relation to the claim upon which summary judgment is sought, not in relation to the defence as pleaded by the defendant.<sup>249</sup> The reinstatement of the agreements and the prior default judgment are matters that were not at all raised or foreshadowed in the particulars of claim. Summary judgment is not simply for the taking.<sup>250</sup>

[37] Traditionally "our courts have always been reluctant to deprive a defendant of his right to defend an action and proceed to trial, except where there is a clear case" (*ZTE Corporation South Africa v Arbiwizn (Pty) Ltd and others 2024 JDR 4048 (GP) par [33]*). In the light of all the circumstances of the present matter, the Plaintiff

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<sup>245</sup> Standard Bank of SA Ltd v Luvhomba Financial Services CC 2025 JDR 1933 (GP) par [20.1] and par (20.3).

<sup>246</sup> Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk 1974 (3) SA 788 (NC) at 793; Nedbank Ltd v Kgobe 2024 JDR 4549 (GJ) par 8; Standard Bank of SA Ltd v Zada Tech (Pty) Ltd and another 2024 JDR 4932 (FB) par [5]; "an applicant must properly comply with the requirements of the Rule" (Shackleton Credit Management (Pty) Ltd v Microzone Trading 68- CC and another 2010 (5) SA 112 (KZP) par [26] f22 at 123); Gauteng Refinery (Pty) Ltd v Eloff 2023 (2) SA 223 (GJ) par [10] at 225.

<sup>247</sup> Absa Bank Ltd v Mphahlele NO and others (45323/19, 42121/19) [2020] ZAGPPHC 257 (26 March 2020) par [15].

<sup>248</sup> Absa Bank Ltd v Mali Zabilon Mashinini and another NNO (32016/2019; 32014/2019) Gauteng Division, Pretoria (22 November 2019 revised 10 December 2019) par 3.10; Absa Bank Ltd v Mphahlele NO and others (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020) par [19].

<sup>249</sup> Absa Bank Ltd v Mphahlele NO and others (45323/19, 42121/19) [2020] ZAGPPHC 257 (26 March 2020) par [18]; Standard Bank of SA Ltd and another v Five Strand Media (Pty) Ltd and others (745/20) (2020) ZAECPHC 33 (7 September 2020) par [9]; Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd (53113/19) [2020] ZAGPPHC 808; 2021 (2) SA 587 (GP) (22 September 2020) par [44].

<sup>250</sup> Standard Bank of SA Ltd v Sandile Madolo (23434/2019) Gauteng Division, Johannesburg (12 June 2024) par 5.

cannot be found to have an unassailable case;<sup>251</sup> nor can the doors of the court be shut for the Defendants in view of the unresolved factual or legal dispute between the parties concerning novation.<sup>252</sup> A relatable attempt by a defendant to rely upon compromise was rejected by the court in *Nedbank Ltd v Richardson (2184/21) [2022] ZAECHGHC 96 (12 December 2022) par [16]-[21]* following an exhaustive analysis of the terms thereof. That is not possible here. Each case must be adjudicated on its own merits in deciding whether the matter is ill-suited for summary judgment.<sup>253</sup> Conceivably, there may be merit in the case of the Defendants, but there are also merits in the case of the Plaintiff; and therefore that issue raised would best be dealt with during the trial.<sup>254</sup> Clearly Plaintiff's application for summary judgment cannot succeed against First Defendant.<sup>255</sup> There is also the vexed question of the *domicilium* of the Second Defendant. Summary judgment against the Second Defendant is equally inapt, absent, in her case, clarity regarding due compliance by Plaintiff with sections 129(1) and 130(1)(a) of the National Credit Act,<sup>256</sup> notwithstanding the withdrawal of her opposition.<sup>257</sup> Rule 32(6)(a)(i) is consequently inapplicable.

[38] This is not a matter in which summary judgment can be granted for a part of the Plaintiff's claim.<sup>258</sup>

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<sup>251</sup> BC Funding Solution (Pty) Ltd v Estate Agency Affairs Board 2024 JDR 1058 (GJ) par [24].

<sup>252</sup> Tubular Technical Construction (Pty) Ltd v Lindrew Kontrakteurs CC 2012 JDR 2028 (GNP) par [11].

<sup>253</sup> Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd (9845/2022) Western Cape Division, Cape Town (29 May 2023) par 44.

<sup>254</sup> The Trustees for the Time Being of the Pieter van der Merwe Trust v 412 Brandfordt CC (A45/2024) Free State Division, Bloemfontein (2 August 2024) par [15].

<sup>255</sup> "Naturally, summary judgment cannot be granted where it is clear that some ventilation of evidence is required in order for the Court to come to a decision" (FirstRand Bank Ltd t/a Wesbank v Maenet JA Attorneys Inc (8557/2021) (2021) ZAGPPHC 612 (17 September 2021) par [21]).

<sup>256</sup> Nkata v FirstRand Bank Ltd 2016 (4) SA 257 (CC) par [175] at 299; Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others (National Credit Regulator as Amicus Curiae) 2016 (6) SA 102 (SCA) par [18] at 108; FirstRand Bank Ltd v Reineke and another (A103/2024) (2025) ZAGPPHC 57 (21 January 2025) Full Court. Sec 130(3)(a) of the National Credit Act.

<sup>257</sup> The initial enquiry being whether or not the Plaintiff's cause of action is in order: "Even before a court considers whether the defendant has established a bona fide defence, it is necessary for the court to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in order (*Gulf Steel (Pty) Ltd v Rack-Rite BOP (Pty) Ltd and another 1998 (1) SA 679 (0) at 683J-684A*)" (Standard Bank of SA Ltd v Zada Tech (Pty) Ltd and another 2024 JDR 4932 (FB) par [5]; Standard Bank of SA Ltd v Amra 2025 JDR 1453 (FB) par [71]; and is also factually complete: "It is clear that the cause of action to be verified must be complete" (*du Coudray v Watkins* (AR 613/09) (2010) ZAKZPHC 9 (26 March 2010) par [22]; *Nedbank Ltd v Kgobe* 2024 JDR 4549 (GJ) par 9 and par 11).

<sup>258</sup> Rule 32(6)(b)(ii).

## Discretion

[39] "A court deciding a summary judgment application has an overriding discretion [*Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at paras 10 and 11].<sup>259</sup> What is meant by this is if the court has any doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused" (*South African Securitization Programme (RF) Limited and others v Maxidor SA (Pty) Ltd and others* 2024 JDR 3169 (GJ) par [37]).<sup>260</sup> The court retains this residual discretion to refuse summary judgment, even where the defendant's proffered defence or opposing affidavit fails to measure up fully to the requirements of Rule 32(3)(b),<sup>261</sup> and even if the defence appears weak or insubstantial.<sup>262</sup> "This discretion is not premised on mere conjecture or speculation but must be exercised on the basis of the material before court" (*Absa Bank Ltd v Laduma Foods and others* (3083/2024) Limpopo Division, Polokwane (11 February 2025) par [13]).<sup>263</sup> Obviously such discretion cannot be exercised capriciously, depriving a deserving plaintiff of summary judgment (*FirstRand Bank Ltd v McCallum* 2024 JDR 4396 (GJ) par [11]),<sup>264</sup> but will redound to a defendant's favour if it is reasonably possible that the plaintiff's application is defective;<sup>265</sup> or where the court is not persuaded that the

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<sup>259</sup> Rule 32(5). *FirstRand Mortgage Company (RF) (Pty) Ltd v Pretorius* 2025 JDR 1052 (WCC) par 18- 19; *IPH Finance (Pty) Ltd v Agrizest (Pty) Ltd* (21771/2021) Western Cape Division, Cape Town (28 February 2023) par 4-5; *First National Bank of SA Ltd v Myburgh and another* 2002 (4) SA 176 (C) par [9] at 180; *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304-5. *FirstRand Bank Ltd t/a Wesbank v Maenet JA Attorneys Inc* (8557/2021) [2021] ZAGPPHC 612 (17 September 2021) par [63]-[65]; *Capitalbox Green Energy Finance (Pty) Ltd v Baruk Petroleum (Pty) Ltd and others* 2024 JDR 4640 (FB) par [36]. Such discretion also arises inasmuch as the claim for the accelerated full outstanding balance (par 14-5, prayers 1-2 of the Particulars of Claim), is one for specific performance (*Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782; *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) par [27]).

<sup>260</sup> *Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd* 2022 JDR 0051 (GJ) par [170] and [172]; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; *ZTE Corporation SA v Arbiwizn (Pty) Ltd and others* 2024 JDR 4048 (GP) par [34].

<sup>261</sup> Rule 32(5); *ZTE Corporation SA v Arbiwizn (Pty) Ltd and others* 2024 JDR 4048 (GP) par [39]; *Gruhn v N Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 58; *Tesven CC v Bank of Athens* 2000 (1) SA 268 (SCA) par [25] at 277; *First National Bank of SA Ltd v Myburgh* 2002 (4) SA 176 (C) at 180; *Phillips v Phillips and another* (292/2018) (2018) ZAECGHC 40 (22 May 2018) par (38)-(43); *FirstRand Bank Ltd v McCallum* 2024 JDR 4396 (GJ) par [11]; *IPH Finance (Pty) Ltd v Agrizest (Pty) Ltd* (21771/2021) Western Cape Division, Cape Town (28 February 2023) par 4.

<sup>262</sup> *Pareto (Pty) Ltd and another v Theron and another* 2024 JDR 3832 (WCC) par 12.

<sup>263</sup> *Gilinsky and another v Superb Launderers and Dry Cleaners (Pty) Ltd* 1978 (3) SA 807 (C) at 811.

<sup>264</sup> *FirstRand Mortgage Company (RF) (Pty) Ltd v Pretorius* 2025 JDR 1052 (WCC) par 18-19.

<sup>265</sup> *Liquor Network Agency CC and Another v Skylim Beverages CC* 2025 (2) SA 507 (GJ) Full Court par [30] at 514; *IPH Finance (Pty) Ltd v Agrizest (Pty) Ltd* (21771/2021) Western Cape Division, Cape



plaintiff has an unanswerable case;<sup>266</sup> or where there may be some doubt as to the defendant's liability.<sup>267</sup> In the present case, all of these considerations do apply; and on a conspectus of the full circumstances of this case there exists in the view of this court, a reasonable possibility that an injustice may be done if summary judgment is granted herein against the Defendants. <sup>268</sup>

## Conclusion

[40] Applying these principles and looking at the matter "at the end of the day, on all the documents [properly] before court",<sup>269</sup> this court is not inclined to grant summary judgment against the Defendants, although this is not a case in which Rule 32(7) applies, the Defendants having neither furnished security, nor satisfied the court that they have a *bona fide* defence to the action. As befittingly observed in *Nedbank Ltd v Kgobe 2024 JDR 4549 (GJ) par 23*: "Here the plaintiff's pleaded claim is incomplete and I have grave reservations about the defendant's defences".

[41] "The quest for summary Judgment is based on a trite argument that there are no triable issues of fact and the application is initiated by a plaintiff that contends that all the necessary factual issues are settled and, therefore, need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action there appears to be a triable issue, the outcome which is not clear from the papers and requires to be ventilated at a trial" (*SB Guarantee Company (RF) (Pty) Ltd v Ramosebi Paul Pule and another (62497/2020) Gauteng Division, Pretoria (17 September 2021) par [50]-[51]*).

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Town (28 February 2023) par 5; FirstRand Mortgage Company (RF) (Pty) Ltd v Pretorius 2025 JDR 1052 (WCC) par 19; Arend v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 305.

<sup>266</sup> Tesven CC and another v SA Bank of Athens 2000 (1) SA 268 (SCA) par (26) at 277-8; Shepstone v Shepstone 1974 (2) SA 462 (N) at 467; Jili v FirstRand Bank Ltd t/a Wesbank 2015 (3) SA 586 (SCA) par [13] at 590-1; Gruhn v M. Pupkewitz & Sons (Pty) Ltd 1973 (3) SA 49 (A) at 58; Something Different Concepts and Shows CC and another v South African Securitisation Programme (RF) Ltd and others (A200/2023) [2024] ZAWCHC 103 (19 April 2024) par [15].

<sup>267</sup> Jili v FirstRand Bank Ltd t/a Wesbank 2015 (3) SA 586 (SCA) par [27] at 594; SA Securitisation Programme (RF) Ltd and others v Cellsecure Monitoring and Response (Pty) Ltd and others (21647/21) [2022] ZAGPPHC 925 (25 November 2022) par [33].

<sup>268</sup> FirstRand Mortgage Company (RF) (Pty) Ltd v Pretorius 2025 JDR 1052 (WCC) par 19; First National Bank of South Africa Ltd v Myburgh 2002 (4) SA 176 (C) at 184.

<sup>269</sup> Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423; Absa Bank Ltd v Mali Zabilon Mashinini and another NNO (32016/2019; 32014/2019) Gauteng Division, Pretoria (22 November 2019 revised 10 December 2019) par 6.

[42] In the final analysis this application for summary judgment fails in the exercise of this court's overriding discretion<sup>270</sup> to prevent possible injustice to Defendants and due to perceived incompleteness in the presentation of its case by Plaintiff.

## Costs

[43] Rule 32(9) provides that the court may at the hearing of an application for summary judgment make such order as to costs as may seem just.<sup>271</sup> Of course, this accords with the general rule that the awarding of the costs, unless expressly otherwise enacted, is in the discretion of the court.<sup>272</sup> Furthermore, costs ordinarily follow the result, being awarded to the successful litigant;<sup>273</sup> yet even that rule is subject to the discretion of the court.<sup>274</sup> Unquestionably, such discretion must be exercised judicially.<sup>275</sup> Specifically with regard to applications for summary judgment, costs are often left for determination by the trial court or in the cause,<sup>276</sup> but not necessarily so. In appropriate cases, there has been no order as to costs despite the

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<sup>270</sup> As occurred in *SB Guarantee Company (RF) (Pty) Ltd v Ramosebi Paul Pule and another* (62497/2020) Gauteng Division, Pretoria (17 September 2021) par [53]-[56].

<sup>271</sup> *SA Securitisation Programme (RF) Ltd and others v WBT Auto Wholesalers and others* (1896/2023) Western Cape High Court, Cape Town (5 February 2024) par [17].

<sup>272</sup> *Petersen NO and others v Shoe Warehouse South Africa (Pty) Ltd t/a Shoe Warehouse and another* (2022/8054) [2023] ZAGPJHC 934 (17 August 2023) par [18]; *Kruger Bros & Wasserman v Ruskin* 1918 AD 69; *Graham v Odendaal* 1972 2 SA 611 (A) at 616; *Compensation Solutions (Pty) Ltd v Compensation Commissioner and others* (56219/21; 49156/21) Gauteng Division, Pretoria (17 July 2023) par [41]. Generally, with regard to summary judgment: *SB Guarantee Company (RF) (Pty) Ltd v Ramosebi Paul Pule and another* (62497/2020) Gauteng Division, Pretoria (17 September 2021) par [58].

<sup>273</sup> *Absa Home Loan Guarantee Co (RF) and another v Moodley and another* {33128/2021} [2023] ZAGPJHC (26 July 2023) par [47]; *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

<sup>274</sup> *Ferreira v Levin NO and others; Vryenhoek and Others v Powell NO and others* 1996 (2) SA 621 (CC) par [3] at 624; *Keele v Jansen van Rensburg and others* (042870/2022) [2025] ZAGPPHC 292 (17 March 2025) par [12].

<sup>275</sup> *Compensation Solutions (Pty) Ltd v Compensation Commissioner and others* (56219/21; 49156/21) [2023] ZAGPPHC 572 (18 July 2023) par [41].

<sup>276</sup> *SA Securitisation Programme (RF) Ltd and others v WBT Auto Wholesalers and others* (1896/2023) Western Cape High Court, Cape Town (5 February 2024) par [17] and par 3 of the order; *Petersen NO and others v Shoe Warehouse South Africa (Pty) Ltd t/a Shoe Warehouse and another* (2022/8054) [2023] ZAGPJHC 934 (17 August 2023) par [18]-[19]; *Justice Reichlin Ramsamy v Zuko Mack Michael Nonxuba* (5008/07) Orange Free State Provincial Division (14 February 2008) par [24]; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 428; *The Trustees for the Time Being of the Pieter van der Merwe Trust v 412 Brandfordt CC* {A45/2024} Free State Division Bloemfontein {2 August 2024} par 1.3 of the order as varied; *FirstRand Bank ta Wesbank v McCallum* {2020/5463} [2024] ZAGPJHC 1004 (7 October 2024) par [14](3); *Blatew Security (Pty) Ltd v Matjhabeng Local Municipality* 2024 JDR 4509 (FB) par [24].3; *BC Funding Solution (Pty) Ltd v Estate Agency Affairs Board* 2024 JDR 1058 (GJ) par [50].

dismissal of the application for summary judgment.<sup>277</sup> In one case, the defendant was even ordered to pay the costs notwithstanding refusal of the application for summary judgment.<sup>278</sup> The amended Rule 32 as a whole<sup>279</sup> and the cost sanction in Rule 32(9)(a) in particular,<sup>280</sup> are designed to discourage plaintiffs from bringing speculative or unjustified applications for summary judgment.<sup>281</sup> Conversely, defendants are not permitted to frustrate the plaintiff's claim with spurious defences, playing for time or balking the plaintiff's right to relief by using delaying tactics.<sup>282</sup> In this case all the parties are to blame for the deficient way in which this matter has been placed before this court:<sup>283</sup> given Plaintiff's incomplete particulars of claim and the Defendants' shoddy pleas and opposing affidavits.<sup>284</sup> Fairness to both sides<sup>285</sup> dictates that the appropriate costs order in the circumstances,<sup>286</sup> would be to grant an order that each party pays its own costs,<sup>287</sup> not only with regard to the summary judgment application itself but in the case of both Plaintiff and the First Defendant in respect of condonation as well.

[43] Although the application for summary judgment fails, this court is loath to award costs against the Plaintiff under the prevailing circumstances

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<sup>277</sup> Compensation Solutions (Pty) Ltd v Compensation Commissioner and others (56219/21; 49156/21) [2023] ZAGPPHC 572 (18 July 2023) par [44]; Nedbank Ltd v Kgobe (2023/007205) [2024] ZAGPJHC 1056 (19 October 2024) par 32;

<sup>278</sup> IPH Finance (Pty) Ltd v Agrizest (Pty) Ltd (21771/2021) Western Cape Division, Cape Town (28 February 2023) par 49-50.

<sup>279</sup> *Mfazi v Z & Z Ngogodo Inc Attorneys* 2024 JDR 4292 (GJ) par [23]; *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) par [15] at 632.

<sup>280</sup> *Justice Reichlin Ramsamy v Zuko Mack Michael Nonxuba* (5008/07) Orange Free State Provincial Division (14 February 2008) par [24].

<sup>281</sup> *Absa Bank Ltd (Volkskas Bank Division) v S J Du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 268.

<sup>282</sup> *FirstRand Bank Ltd v Tshepori Holdings (Pty) Ltd and another* 2025 JDR 1036 (GJ) par [13]; *Liquor Network Agency CC and Another v Skylim Beverages CC* 2025 (2) SA 507 (GJ) Full Court par [26] at 513.

<sup>283</sup> Compare: *Lizinex (Pty) Ltd v FPC Solutions (Pty) Ltd and others* (2022/17136) [2023] ZAGPJHC 1261 (3 November 2023) par [43]-(44).

<sup>284</sup> Compare: *Nedbank Ltd v Kgobe* 2024 JDR 4549 (GJ) par 29-30 and *Phillips v Phillips and another* (292/2018) [2018] ZAECHGHC 40 (22 May 2018) par [52]-(53).

<sup>285</sup> *Standard Bank of SA Ltd v Zada Tech (Pty) Ltd and another* 2024 JDR 4932 (FB) par [12]; *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 at 69; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694; *Ward v Sulzer* 1973 (3) SA 701 (A) at 706.

<sup>286</sup> *Tsela Tsweu Consulting Engineers (Pty) Ltd v Mangaung Metropolitan Municipality* 2024 JDR 4544 (FB) par [45]; *Mqocwa v Road Accident Fund* 2024 JDR 3733 (NWM) par [33]; *Daniel Wellington South Africa (Pty) Ltd v Azrapart (Pty) Ltd* 2023 JDR 4414 (GJ) par 73; *Motswako Office Solutions (Pty) Ltd v Luanelle-Yvonne Voigt* (previously van Niekerk) (030796/2022) Gauteng Division, Pretoria (13 January 2025) par [51].

<sup>287</sup> Compare: *Phillips v Phillips and another* (292/2018) [2018] ZAECHGHC 40 (22 May 2018) par [54] and par [55].3; *Compensation Solutions (Pty) Ltd v Compensation Commissioner and others* (56219/21; 49156/21) Gauteng Division, Pretoria (17 July 2023) par (44) and Order par (e).

## Order

[44] In the premises, the following order is granted:

(a) Condonation as sought is hereby granted both to the Plaintiff and to the First Defendant, respectively, with each party to pay its own costs.

(b) The application for summary judgment is dismissed with each party to pay its own costs.

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**BP GEACH**  
**ACTING JUDGE OF THE HIGH COURT**