REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 61659/2020

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

20 August 2021
.....
DATE

.....
SIGNATURE

In the matter between:

NEDBANK LIMITED Plaintiff / Applicant

and

ABRAM PETERSEN
(Identity Number: […]) Defendant / Respondent

JUDGMENT

JOUBERT AJ

1. This is an application for summary judgment.

2. The plaintiff / applicant (Nedbank Limited, referred to as "*Nedbank*"), entered into a banking facilities agreement (the subject of Claim A) and a term loan agreement (the subject of Claim B) with Chingara Investments (Pty) Ltd ("*Chingara*", also referred to as the "*principal debtor*").

3. Both the facilities agreement and loan agreement record that the agreement and all transactions arising out of the agreement fall outside of the ambit of the National Credit Act, 34 of 2005 ("*the NCA*").

4. The respondent, Mr Abram Petersen ("*Mr Petersen*") provided a limited suretyship of R1 400 000.00 (one million four hundred thousand rand) (incorporating cession of claims) as partial security for the facilities granted to Chingara. In addition, Mr Petersen also provided security cessions in favour of Nedbank of all life insurance policies with a minimum life cover of R1,400,000.00 (one million four hundred thousand rand).

5. In terms of the suretyship agreement, Mr Petersen bound himself jointly and severally as surety and co-principal debtor for the repayment of all amounts which Chingara "*may now or at any time hereafter owe*" Nedbank. It is further claimed that the suretyship was unconditional.

6. A general notarial bond for the amount of R1,400,000.00 (one million four hundred thousand rand) over all movable assets held at Shop 79, Kwagga Plaza, Kwaggafontein was registered as security for the loan amount.

7. Mr Petersen also concluded a deed of pledge and cession on 12 February 2019 in consideration of any indebtedness incurred or to be incurred by Chingara in future, in favour of Nedbank.

8. Chingara fell in arrears and, despite demand, failed to meet its obligations and filed for liquidation.

9. Nedbank therefore instituted an action for the payment of the 2 (two) separate claim amounts against the defendant, Mr Petersen as surety and co-principal debtor.

10. Nedbank provided a certificate of balance with its summons reflecting the outstanding balance in respect of Claim B as at 14 October 2020 to be R1,016,614.07 (one million and sixteen thousand six hundred and fourteen rand and seven cents) together with interest at 8% (eight percent) per annum, compounded daily and capitalised monthly from 14 October 2020 to the date of final payment.

11. In his plea, Mr Petersen, whilst admitting having signed the written agreements relied upon by Nedbank, raised special pleas in terms of sections 39, 40 and 49(1) of the Consumer Protection Act, 68 of 2008 ("*the CPA*") and further that the plaintiff failed to comply with several provisions of the NCA.

12. He also raised a special plea to the effect that the plaintiff ought to have instituted the claim in the Magistrate's Court. This was, however, abandoned at the hearing in view of the Supreme Court of Appeal's decision in The

Standard Bank of South Africa Ltd and Others v Thobejane and Others and The Standard Bank of SA Ltd v Agirana N.O. and Another [2021] ZASCA 92 (25 June 2021).

13. The remainder of his plea essentially constitutes a repeat of the special pleas and a bare denial of the remainder of the allegations in the particulars of claim.

14. The defendant pleads that Nedbank's non-compliance with the NCA and CPA renders the agreements void, alternatively voidable at the defendant's instance, further alternatively unenforceable.

The application for summary judgment

15. Upon receipt of Mr Petersen's plea, Nedbank applied for summary judgment. The application was supported by an affidavit deposed to by Ms Miriam Pillay ("*Ms Pillay*"), stated to be employed by Nedbank as Manager of the Legal Recoveries Department.

16. Ms Pillay further states that she has "*access to all the Applicant's documents relating to the Respondent's loan accounts held with the Applicant and for which the Respondent is liable for in his personal capacity and in his capacity as surety and co-principal debtor of Chingara Investments (Pty) Ltd, the principal debtor Mr Abram Petersen ("Mr Petersen")*".

17. She also states further that she has "*access to the Applicant's electronic collection system relating to the said accounts*".

18. Ms Pillay then states:

"4. I hereby swear positively to the facts and verify the cause of action that the Respondent is indebted to the Applicant in the amount claimed in the Summons and on the grounds set out herein.

5.

5.1 I furthermore verify that the Respondent is indebted to the Applicant in terms of a Banking Facilities Agreement with account number: 1185230130 in the sum of R350 236.07 plus interest on the sum of R350 236.07 calculated at a rate of 17.50% per annum, compounded daily and capatilised monthly from the 15 October 2020 to date of final payment both days inclusive.

5.2 The Respondent is further indebted to the Applicant in terms of a Term Loan Agreement with account number: 40704840001 in the sum of R1 016 614.07, which includes of R124 027.98 plus interest on the sum of R1 016 614.07 calculated at a rate of 08.00% per annum, compounded daily and capitalised monthly from the 15 October 2020 to date of final payment, both days inclusive, which indebtedness is currently owing, due and payable.

5.3 Both certificates of balance are attached hereto as Annexures "SJ1" and "SJ2" confirming the above."

Affidavit opposing summary judgment application

19. In his affidavit opposing the application for summary judgment, the following points are raised by Mr Petersen:

19.1 the application for summary judgment is "*technically deficient*" and "*fatally defective*" as "*being in breach*" of Uniform Rule 32 (as amended); and

19.2 the plaintiff seeks to prove its cause of action by way of inadmissible, aliunde evidence.

20. Mr Petersen did not seek to repeat his special pleas in his affidavit opposing summary judgment.

21. In argument before me, Ms van den Bergh for Nedbank, pointed out the manner in which the respondent's approach varies from document to document and where each of these documents allege different triable issues:

21.1 the plea alleges non-compliance with the NCA and the CPA, whilst the opposing affidavit does not. The respondent's heads, however, resurrected such reliance;

21.2 the opposing affidavit makes mention of evidence aliunde in his opposing affidavit, but this aspect is not canvassed in the heads filed on behalf of the respondent.

<u>The deponent's personal knowledge</u>

22. Rule 32(2) provides as follows:

"32 ***Summary Judgment***

…..

(2)(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The Plaintiff shall, in the affidavit referred to in subrule 2(a). verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof."

23. The respondent claims that Ms Pillay has no personal knowledge of the conclusion of the various alleged agreements between Nedbank and Chingara. The respondent states that Ms Pillay's "*supposed knowledge is gleaned solely from her access to the electronic records of the Plaintiff.*"

24. It is on this basis that Mr Petersen claims that the application for summary judgment is technically deficient.

25. Ms Lennard (for the respondent) placed reliance on the judgement in Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP). The following is stated in paragraphs [13] – [14] of this judgment:

"[13] It may be that the effect of cases such as these, is as Van Heerden AJ said in Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd and Others, that first-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and that where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts. However, I do not understand any of the cases as going so far as to say that the deponent to an affidavit in support of an application for summary judgment can have no personal knowledge whatsoever of the facts giving rise to the claim, and rely exclusively on the perusal of records and documents in order to verify the cause of action and the facts giving rise to it. Mr Lombard's affidavit would have been more accurate if he had not claimed personal knowledge of the facts, but said that according to the documents obtained from Absa Bank, the claim in the present action are well founded. The facts relied upon by him emerge solely from those documents. However, the moment that is recognised it must also be recognised that the substantive contents of the affidavit consist entirely of hearsay.

[14] There is a further problem confronting Mr Lombard. In the banking cases to which I have referred, the deponent was an employee of the plaintiff and claimed knowledge acquired in the course of their duties as such. That at lease foreshadows that they could in the ordinary course of their duties have access to, and need to work with, the records of the business. Equally, it is possible that in seeking to recover on the debt, they would have had dealings with the debtor in regard to the contents of those records, and would have had the opportunity to confirm their correctness. Mr Lombard is not only the attorney, but his client's claim is not a direct claim. It is a claim acquired by way of cession. Accordingly, Mr Lombard stands at two removes from the claim itself. That problem is not novel. Where the affidavit in support of an application for summary judgment was signed by a director of the cessionary the court held that, in the absence of anything further to indicate that he had any connection with the cedent and therefore any personal knowledge of the claims, the application was fatally defective. Similarly, it has been held that a trustee appointed to an insolvent at a time after the facts giving rise to the claim occur, could not have

personal knowledge of those facts. That case was stronger than the present one in that it was submitted on behalf of the trustee that he must of necessity have had insight into the books of account dealing with the transaction in question, and accordingly in the exercise of his duties he must personally have obtained the information sworn to in the affidavit. Nonetheless, the court rejected that contention."

26. In her heads of argument, Ms Lennard sought to liken Ms Pillay's position to that of an attorney, with reliance being placed on authorities such as Raphael & Co v Standard Produce Co (Pty) Ltd 1951 (4) SA 244 (C) at 245D and Fischereigesellschaft Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd 1967 (4) SA 105 (C), all of which were referred to and applied in Schackleton (*supra*).

27. There is, in my view, a clear distinction between an attorney who relies on second-hand knowledge obtained from his file (pertaining to information from a client) and an official in a company who deposes to an affidavit with facts obtained from that company's records.

28. In this regard, the Supreme Court of Appeal stated as follows in Rees and Another v Investec Bank Ltd 2014 (4) SA 220 (SCA) at paras [13] - [16]:

"[13] Here Investec had issued a combined summons annexed to which was a comprehensive particulars of claim setting out the cause of action against the appellants, supported by written agreements concluded with the principal debtors in each instance and suretyship agreements concluded with sureties on the terms set out in the agreements. Investec thus had either obtained judgment against the principal debtor or the principal debtor had been wound up at the instance of Mr Rees. Those occurrences operated as the trigger for Investec to proceed on

the suretyship agreements against the appellants. Moreover, the suretyships provided for a certificate of balance to be issued by the relevant bank manager of Investec, which would either serve as a liquid document or constitute prima facie proof of the sureties' indebtedness. It is against that backdrop that Ms Ackermann's affidavit must be viewed.

[14] *Ms Ackermann relied on the information at her disposal which she obtained in the course of her duties as the bank's recoveries officer, to swear positively to the contents of her affidavit. It is not in dispute that in the discharge of her duties as such she would have had access to the documents in question and upon a perusal of those documents she would acquire the necessary knowledge of the facts to which she deposed in her affidavit on behalf of Investec. Prior to the institution of the action Ms Ackermann had been corresponding with the appellant's attorney in regard to the principal debtors' delinquent accounts and had also addressed letters of demand to them, receiving letters in response which canvassed the appellants' defences. She could thus 'swear positively to the facts', 'verify the cause of action and the amount claimed' and assert that in her opinion the appellants did 'not have a bona fide defence to the action' and had entered an appearance to defend 'solely for the purposes of delay'. These factors show that the requirements set out in Maharaj are met.*

[15] *The fact that Ms Ackermann did not sign the certificates of indebtedness nor was present when the suretyship agreements were concluded is of no moment. Nor should these be elevated to essential requirements, the absence of which is fatal to the respondent's case. As stated in Maharaj, 'undue formalism in procedural matters is always to be eschewed' and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj.*

> *[16] The fact that leave to defend was granted in respect of Claim D does not mean as was suggested in argument that Ms Ackermann was untruthful and that her affidavit must be rejected in its entirety. It is clear that Ms Ackermann acquired her knowledge from documents under her control. She thus had the requisite knowledge as required by rule 32(2). In making such a finding Hutton AJ did not err."* (Emphasis added)

29. From the above, it is clear that Ms Pillay has demonstrated that she has the necessary knowledge to depose to her affidavit and to swear positively to the facts contained therein.

30. Further, in her heads of argument, Ms Lennard states:

> *"12. One would have (and at the very least) expected that Pillay would have been au fait with the contractual dealings between Chingara Investments (Pty) Ltd and the Applicant. There is no disclosures suggestive of such inference or conclusion."*

Verification of the cause of action

31. In argument before me, it was further argued that Ms Pillay failed to verify the applicant's cause of action.

32. In this regard, I was pointed to the fact that clause 5.2 (as quoted above) does not, in itself, contain the word "*verify*" and further that paragraph 4 only refers to a single "*cause of action*", instead of using the plural.

33. I am not convinced by these arguments and the over-technical reliance on semantics by the respondent. From the overall content and context of Ms Pillay's affidavit, it is clear to me that she has the necessary knowledge to depose to her affidavit, swear positively to its content and has verified the applicant's cause of action. There is therefore, in my view, no merit in the respondent's defence that the application does not comply with the requirements of Rule 32.

Evidenced aliunde

34. The evidence aliunde referred to relates to statements made by Ms Pillay in her affidavit as to Nedbank's compliance with the NCA and CPA. The respondent takes the view that the plaintiff should have pleaded facts supporting its compliance with these acts in its particulars of claim.

35. The alleged contravention of the CPA and NCA in the defendant's plea have, as has been pointed out, not found their way into his opposing affidavit.

36. The statements made in the plea pertaining to non-compliance with the CPA are quoted below:

> *"1.* ***SPECIAL PLEAS:***
>
> ***SECTIONS 39, 40 AND 49(1) OF THE CONSUMER PROTECTION ACT, ACT 68 OF 2008:***
>
> *The written agreements relied upon by the Plaintiff (annexures "A" to "C" and "E" and "F" to the Plaintiff's Particulars of Claim):*

1.1 are agreements and/or arrangements and/or understandings between two parties, concluded to establish a legal relationship between the Plaintiff and the Defendant; and

1.2 constitute agreements therefore, as contemplated and envisaged in terms of the Consumer Protection Act, Act 68 of 2008 (hereinafter referred to as 'the first Act').

2. In signing these agreements, the Plaintiff had:

2.1 not explained to the Defendant either the nature or the import of the agreements;

2.2 had failed to afford the Defendant the opportunity of seeking independent legal advice thereon, the Defendant being ignorant as to the true nature and import thereof;

2.3 had in omitting to do so:

2.3.1 contravened sections 40(1)(d) and 40(2) of the Act;

2.3.2 had not dealt with the Defendant in a fair and/or honest manner;

2.3.3 the Plaintiff's conduct was unjust;

2.3.4 the Defendant had been unable of protecting his consumer rights;

2.3.5 the Plaintiff had reneged on compliance with its statutory duties as contemplated and/or detailed in section 49(1)(b) and (c) of the Act;

rendering the agreements void, alternatively voidable at the Defendant's instance, further alternatively unenforceable in toto."

37. The relevant sections of the CPA are set out below:

37.1 Section 39:

"Agreements with persons lacking legal capacity

39.(1) An agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer—

(a) is void if the consumer is subject to an order of a competent court holding that person to be mentally unfit

and the supplier knew, or could reasonably have determined, that the consumer was the subject of such an order; or

(b) is voidable at the option of the consumer, if—

(i) at the time the agreement was made the consumer was an unemancipated minor;

(ii) the agreement was made without the consent of an adult responsible for that minor; and

(iii) the agreement has not been ratified by either—

(aa) an adult responsible for that minor; or

(bb) the consumer after being emancipated or becoming an adult.

(2) Subsection (1) does not apply to an agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by act or omission—

(a) induced the supplier to believe that the consumer had an unfettered legal capacity to contract; or

(b) attempted to obscure or suppress the fact that the consumer did not have an unfettered legal capacity to contract."

37.2 Section 40:

"Unconscionable conduct

40.(1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—

(a) marketing of any goods or services;

(b) supply of goods or services to a consumer;

(c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;

(d) demand for, or collection of, payment for goods or services by a consumer; or

(e) recovery of goods from a consumer.

(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

(3) Section 51 applies to any court proceedings concerning this section."

37.3 Section 49(1):

"Notice required for certain terms and conditions

49.(1) Any notice to consumers or provision of a consumer agreement that purports to—

(a) limit in any way the risk or liability of the supplier or any other person;

(b) constitute an assumption of risk or liability by the consumer;

(c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or

(d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5)."

38 Despite listing in the heading to his first special plea sections 39, 40 and 49(1) of the CPA, the plea, in stating that the defendant had not been afforded the opportunity of seeking independent legal advice and had not had the nature or import of the agreements explained, he claims a contravention only of sections 40(1)(d) and 40(2) of the CPA.

39 The respondent's plea and his opposing affidavit do not set out any basis on which he would be considered a "*person lacking legal capacity*" falling within the scope of section 39 of the CPA. In fact, in circumstances where Mr Petersen is acting on his own behalf in these proceedings, it is not clear on what basis such a claim could be made. As stated, no explanation is found in the opposing affidavit.

40 It is further not explained what "*unconscionable conduct*" falling within the scope of section 40 of the CPA, Nedbank is alleged to be guilty of, in order for the respondent's special plea to be understood.

41 The heads filed on behalf of the respondent are, understandably, equally lacking in fact.

42 The respondent's reliance on the provisions of the NCA is even more sparse. It is simply pleaded as follows:

> *"7.*
>
> ***NON-COMPLIANCY WITH PROVISIONS OF NATIONAL CREDIT ACT, ACT 34 OF 2005:***
>
> *The Defendant had concluded the aforesaid agreements (and as referred to in paragraph 1 supra, at times when the Defendant was already over-indebted.*
>
> *8.*
>
> *In terms of section 81(2) of the National Credit Act, Act 34 of 2005 (hereinafter referred to as 'the third Act') a credit provider such as the Plaintiff, may not enter into a credit agreement with a consumer (such as the Defendant) without first taking reasonable steps to assess:*
>
> *8.1 the consumer's debt repayment history;*
>
> *8.2 existing financial means;*

8.3 prospects and obligations;

8.4 the consumer's understanding of the risks of the costs of credit; and

8.5 the consumer's rights and obligations under the proposed credit agreements.

9.

None of these assessments were conducted by the Plaintiff prior to credit being afforded to the Defendant.

10.

The credit as such afforded to the Defendant in these circumstances constitute reckless credit in terms of section 81(2) of the third Act.

11.

The above Honourable Court is therefore entitled to declare the agreements reckless and declare the Defendant over-indebted, suspending alternatively restricting the credit agreements providing for payment of the Defendant's indebtedness for a further period of five (5) years." (*sic*)

43 Ms Lennard states in the heads of argument filed on behalf of the respondent that "*the credit afforded constituted reckless credit in terms of section 81(2)*" of the NCA. She goes further to state that "*this is again a fact that can only be established having regard to the factual and surrounding circumstances of the case*".

44 The respondent has not set out any basis, whether in his plea or his opposing affidavit as to the basis on which he claims Chingara was extended reckless credit, with reference to the principal debtor's financial situation as at the time that the agreements were entered into.

45 Rule 32(3)(b) provides as follows:

*"32 **Summary Judgment***

…..

(3) The defendant may-

….

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor." (Emphasis added)

46 Erasmus (*supra*) at D1-409 to D-410 states:

"'Satisfy' does not mean 'prove'. What the rule requires is that the defendant set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. Only facts which the court can take account of must be alleged. Thus, for example, it was held that secondary evidence as to documents and hearsay evidence are inadmissible. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

The defence must be put before the court on affidavit and not merely orally from the bar with reference to the plea. It is submitted that where all conditions have been fulfilled by the plaintiff entitling him to summary judgment, a mere statement from the bar that the defendant has a defence on the merits as demonstrated by the plea, is insufficient to stay judgment.

The defendant's affidavit should set out material facts and particulars. It is not sufficient for a defendant to state that he has no knowledge of the allegations in the plaintiff's summons, nor to state that the plaintiff's allegations must be subject to grave suspicion, when he has had ample time to test whether the suspicion is well founded or not. It seems that he must take positive steps to confirm his suspicions, for a suspicion by itself is not sufficient ground upon which to refuse summary judgment.

While it is not incumbent upon the defendant to formulate his opposition to the summary judgment application with the precision that would be required in a plea, none the less when he advances his contentions in resistance to the plaintiff's claim he must do so (a) with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which, if proved at the trial, would constitute a good defence to the action; and (b) with reference to the plea that was delivered. Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a bona fide defence for the purpose of the rule. If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides. If a defendant had difficulty in dealing with pleadings because they were not technically correct, that had to be stated in his affidavit filed as a justification for his inability to present an affidavit disclosing the nature and grounds of the defence and the material facts relied upon therefor as required by the subrule. This does not, on the other hand, mean that lengthy and prolix affidavits are required in summary judgment cases. It is not the intention of the subrule to provide the plaintiff with the unilateral advantage of a preview of the defendant's evidence, especially not where, under rule 32 in its amended form since 1 July 2019, an application for summary judgment may only be made after the delivery of the defendant's plea. It has also been recognized that what a defendant can reasonably be expected to set out in his affidavit depends, to some extent, upon the manner in which the plaintiff's claim, to which he is seeking an answer, has been formulated. If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendant's bona fides but it may still, in an appropriate case, exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable." (Emphasis added)

47 Given that the defendant's opposing affidavit is so devoid of any particularity or even the most basic of material allegations regarding the alleged non-compliance with the acts referred to above, I am of the view that the defendant has not raised a triable issue. This is further specifically so where the defendant

did not seek to raise these special defences in his opposing affidavit, in any particularity or at all.

48 I am therefore inclined to grant summary judgment against the respondent.

The relief sought by the applicant

49 The applicant seeks, in terms of its application for summary judgment, the following relief:

> *"**CLAIM A:***
> 1. *Payment of the amount of R350 236.07;*
> 2. *Interest on the amount of R350 236.07 at the rate of 17.50% per annum, compounded daily and capitalized monthly from 14 October 2020 to date of full and final payment; (both days inclusive)*
>
> ***CLAIM B:***
> 3. *Payment in the amount of R1 016 614.07;*
> 4. *Interest on the amount of R1 016 614.07 at the rate of 8% per annum, compounded daily and capitalized monthly from 14 October 2020 to date of full and final payment; (both days inclusive);*
> 5. *An order perfecting the General Notarial Bond;*
>
> ***CLAIM A & B***
> 6. *Costs of suit on a scale as between attorney and client;*
> 7. *Further and/or alternative relief."*

50 The respondent takes the view that the relief sought in terms of paragraph 5 quoted above (an order perfecting the general notarial bond) does not fall within the scope of Rule 32.

51 Ms van den Bergh argued that the purpose of perfecting the notarial bond is to allow for the delivery of movable property. A claim for the delivery of movable property does fall within the scope of the rule. Ms van den Bergh was, however, unable to point me to any authority supporting the contention that Rule 32, by extension, would include an order of the kind sought in paragraph 5.

52 When one has regard to the notarial bond, it defines Chingara as the "*mortgagor*". The respondent signed the notarial bond as the appearer "*in his capacity as a director of [Chingara]*".

53 The bond further provides:

> *"THE APPEARER qq HEREBY DECLARED to bind generally the Mortgagor and all the Mortgagor's movable property of every description and of whatsoever nature and wherever situate, and such as the Mortgagor now possesses or may at any time in the future become possessed of without exception, all the Mortgagor's movable property held, kept and installed at their business premises being SHOP 79 KWAGGA PLAZA, KWAGGAFONTEINT C 196 JR DISTRICT, MKABOLA, MOLOTO ROAD, KWAGGAFONTEIN… but not limited therefore, as well as all stock, replacement stock and equipment at hand at any given time…"*

54 The bond relied upon clearly relates to Chingara's movable property, not that of the present respondent / defendant. Chingara is not a party to these proceedings.

55 Nedbank has pleaded that Chingara has applied for liquidation.

56 In these circumstances, Nedbank is not entitled to relief in respect of the notarial bond in its action against Mr Petersen in any event.

57 I therefore make the following order:

57.1 The application for summary judgment is granted;

57.2 CLAIM A:

2.1 Payment in the amount of R350 236.07;

2.2 Interest in the amount above at a rate of 17.5% per annum, compounded daily and capitalized from 14 October 2020 to date of final payment, (both days inclusive).

57.3 CLAIM B:

3.1 Payment in the amount of R1 016 614.07;

3.2 Interest in the amount above at a rate of 8% per annum, compounded daily and capitalized from 14 October 2020 to date of final payment, (both days inclusive);

3.3 An order giving effect to Notarial General Bond for purposes of execution by Plaintiff on the movable property of the Defendant(s).

57.4 CLAIM A & B:

4.1 Cost of suit on a scale as between attorney and client.

I JOUBERT

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants:	*J. van den Bergh (Ms)*
Instructed by:	*Stegmanns Inc*
Counsel for the Respondent:	*U. Lennard (Ms)*
Instructed by:	*J Sayed and Associates*
Date heard:	*27 July 2021*
Date of judgment:	*20 August 2021*