IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 5106/2010

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

DUDLEY WILLIAM JOHNSON First Defendant

ERIKA PATRICIA JOHNSON Second Defendant

JUDGMENT DELIVERED ON 9 SEPTEMBER 2010

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1. This is an application for summary judgment which served before me in ordinary Motion Court. I heard argument and reserved judgment.

2. The plaintiff, Standard Bank of South Africa Limited, issued summons on 21 April 2010 against the defendants, claiming an amount of R1 361 915,62, being the balance of the principal debt together with finance charges thereon. This is in respect of monies lent and advanced by the plaintiff to the defendants under mortgage agreements pursuant to which two mortgage bonds were registered in favour of the plaintiff.

3. It is alleged that the defendants are in default of their obligations and that such default constituted default as contemplated by section 130 of the National Credit Act, No. 34 of 2005 (the National Credit Act). The plaintiff is

a registered credit provider in terms of section 40 of the National Credit Act, and the defendants are consumers as defined in section 1 of the National Credit Act.

4. The plaintiff pleads that it had given due and proper notice on 10 February 2010 in terms of section 129 of the National Credit Act, that the defendants had not responded to such notice, and the time limits referred to in section 130 of the National Credit Act having elapsed, the plaintiff proceeded to claim payment of the aforesaid amount plus interest thereon, together with an order declaring certain immovable property executable, and costs on the attorney and client scale.

5. The defences raised by the defendants emerged as follows from their opposing affidavit to the summary judgment application.

6. It was only on 5 March 2010 that Mr Johnson collected the registered mail addressed to him by the plaintiff, containing the section 129 notice. Mr Johnson states that the 10 day period whereafter the plaintiff was at liberty to approach the court, had already elapsed by that time. He did not fully comprehend the section 129 notice and it was his understanding that he should only refer the matter *"to resolve any dispute or to develop a plan that is acceptable to both you and Standard Bank to bring your payments up to date"*. He states that, given his financial circumstances, he had *"absolutely no hope of developing a plan that would be acceptable to Standard Bank"*.

7. On 11 March 2010, five days after receipt of the registered mail item, the plaintiff issued summons. The summons was served on the first defendant on 23 March 2010. He then contacted a Ms Louw at the plaintiff to request a meeting. Though she offered to send him a budget form to complete, she pointed out that *"it was actually hopeless for me to try this route".*

8. On 30 March 2010 he again approached Ms Louw as he had not yet received the budget form. She then sent it to him and he immediately made an appointment with a debt counsellor, Ms Nadia Mathews, to determine if he was able to prepare a proposal to the satisfaction of the plaintiff.

9. On 30 March 2010 the debt counsellor accepted his application for a debt review as prescribed by section 86 of the National Credit Act.

10. He states that It was only then that he became aware of the *"actual legal position"*, and the functions and powers that a debt counsellor has in terms of the National Credit Act.

11. It was explained to him that ultimately a Magistrates' Court would have had to make an order restructuring the debt, which order would be binding on all the credit providers. The first defendant states that this position was not clear and ascertainable from the section 129 notice *"which expressly stated that resolving this dispute or developing a plan was contingent upon the plaintiff's approval, which is clearly not the case".*

12. Since he was accepted under debt review, he had at all relevant times duly effected the monthly payments to the payment distribution agency as instructed by his debt counsellor.

13. To date, so the first defendant states, the plaintiff had not attempted to negotiate an acceptable debt rearrangement, or made any counter proposals to his debt counsellor in order to negotiate an acceptable debt arrangement.

14. The debt counsellor had also instructed an attorney to issue a debt review application in terms of section 86 of the National Credit Act – this will be done within 60 business days after the date on which he had applied for a debt review.

The first defence – the action is premature

15. With reference to *FirstRand Bank Ltd v Dhlamini* (2010) JOL 25158 (GMP), the defendants contend that, having only received actual notice of the section 129 notification on 5 March 2010, the plaintiff had prematurely instituted the action five[1] days later – it ought to have waited a further five days. Dhlamini followed *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D&CLD).

[1] As will be set out below, it is in fact six days.

16. In the first instance it is not clear to me that *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* require actual notice – where Naidu AJ concluded, perhaps on a contradictory note as follows at paragraph [55][2]

> *"The credit provider is required, in my view, to bring the default to the attention of the consumer in a way which provides an assurance to a court, considering whether or not there has been proper compliance with the procedural requirements of ss 129 and 130, that the default has indeed been drawn 'to the notice of the consumer', 'Notice', according to the New Oxford Dictionary, means 'attention; observation'. In a case where the consumer has chosen an address in the credit agreement as the domicilium at which all notices, demands or communications may be sent, and the credit provider has accepted that address as the address chosen by the consumer, then the credit provider should ensure, if the notice is sent by mail, that the address to which the notice is posted is in every respect precisely the same as that accepted by the credit provider in the credit agreement."*

17. In terms of the both the first and second mortgage bonds the defendants had chosen 100 Chukker Road, Kenwyn, Lansdowne as the address at which letters, statements and notices may be delivered by registered post and accepted that any letters and notices posted to this address by registered mail "*will be regarded as having been received within 14 days after posting.*"[3] In terms of the plaintiff's "*terms and conditions of loans secured by mortgage bonds*" the defendants agreed that any notice sent by prepaid registered post will be deemed to have been received on the 5th

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[2] I am mindful of the careful analysis by Murphy J in Dhlamini of what Naidu AJ had in fact held
[3] Clause 14.3 of both the first and second mortgage bonds

business day after posting.[4] Accordingly, in terms of the mortgage bonds the defendants are regarded as having received notice by 24 February, and in terms of the standard terms by 17 February.

18. The 10 day period[5] stipulated in the letter as the "*date of it being delivered to you or sent by registered mail*" accordingly commenced on 24 February and expired on 10 March 2010. The action, accordingly, would not have been instituted prematurely on 11 March 2010[6] if actual notice was not required.

19. The question which arises is whether section 129 requires actual notice to be given to the defendants.

20. In *Starita (aka Van Jaarsveld) v ABSA Bank Ltd and Another* 2010 (3) SA 443 (SG), Gautschi AJ pointed out that Murphy J, in *Dhlamini* (at para 27) had placed emphasis on the fact that section 129(1)(a) requires the credit provider to "*draw the default to the notice of the consumer in writing*" and that he assumed that the legislator consciously did not use the words "*deliver*" or "*serve*" in section 129(1)(a).

21. Gautschi AJ disagrees with this for two reasons – first that the expressions "*giving written notice*", "*advise in writing*", "*give notice*", "*deliver*" and "*serve*" are used indiscriminately and without precision. "*Accordingly, undue emphasis should not be placed on the actual words used.*"

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[4] Clause 17.4 of the second mortgage bond
[5] Section 130(1)(a) stipulates them to be business days
[6] see Standard Bank of SA Ltd v Rockhill 2010 JDR 0243 (GSJ) 11 March 2010, per Epstein J

22. The second reason was that the various expressions used in section 129(1) are all reduced to the single word "*delivered*" in section 130(1)(a) "*which is in my view the clearest indication (if one can be found) of the legislature's intention with regard to the fate of the notice.*"

23. Gautschi AJ formulated as follows in para 18.1

> *"It is true that section 129 requires the credit provider to "draw the default to the notice of the consumer in writing" and to "first [provide] notice to the consumer", which would seem to indicate more than simply dispatching a notice, but rather to require that such notice be received by the consumer. One might even add that the word "propose" (to the consumer) in section 129(1)(a) and the expression "give notice" in section 86(10) have a similar connotation. These requirements are all encapsulated in the word "delivered" as used in section 130(1)(a)."*

24. In *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZN) (para 12) Wallis J, came to the conclusion that the Minister had prescribed the manner of delivering documents to a consumer in terms of the National Credit Act and that the method of delivery must be in accordance with the provisions of the definition of *"delivered"* in the regulations, rather than in terms of section 65(2) of the National Credit Act.[7]

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[7] ***65 RIGHT TO RECEIVE DOCUMENTS***

(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must

25. Wallis J's reasoning did not appeal to Gautschi AJ in Starita. Gautschi AJ remarked (para.18.4) as follows in regard to the aforesaid conclusion reached in Munien (*supra*):

> "*It is fallacious, in my view, to apply a definition in the Regulations to an expression used in the Act (the National Credit Act 34 of 2005). The Act does not permit the Minister, in making Regulations, to define expressions in the Act; the Minister is not empowered to dictate matters in the domain of the Legislature. The definition of the word 'delivered' in the Regulations also does not purport to contain a 'prescribed manner' for delivery. It is only a definition and simply indicates the meaning to be ascribed to the word 'delivered' as used in the Regulations. In my view, therefore, no regard can be had to the definition of the word 'delivered' in the Regulations in interpreting sections of the Act.*"

26. Gautschi AJ, however, came to same conclusion as did Wallis J, namely that actual receipt of the notice is not required. He rather relied on the provisions of section 168 of the National Credit Act[8] to state

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(a) make the document available to the consumer through one or more of the following mechanisms-
(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
(ii) by fax;
(iii) by e-mail; or
(iv) by printable web-page; and
(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

[8] *168. **Serving documents***
Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either –

"In my view there is no substantial difference between the words "delivered" and "served". In addition, whilst the words "delivered", "deliver" and "delivery" are used often in the Act, I have searched in vain for any reference to the words "served" or "serve". Section 168 is therefore applicable to a notice which has to be "delivered", which includes a notice in terms of section 129(1) in view of the wording of section 130(1)(a). In terms of section 168, the notice will have been properly served (delivered) when it has been, inter alia, sent by registered mail to that person's last known address."

27. Wallis J, however, also found in Munien that where the consumer had chosen the method and address for delivery, and the credit provider then delivered the notice in the manner chosen by the consumer, it would be irrelevant whether the notice actually come to the attention of the consumer (at par 22).

28. Munien was followed[9] in First National Bank Ltd v Rossouw and Another (unreported, GNP, case number 30624/2009, delivered on 6 August 2009) (Ellis AJ); The Standard Bank of South Africa Ltd v Mellet & Another [2009] ZAFSHC 110 (30 October 2009) (Musi JP) and The Standard Bank of South Africa Ltd v Rockhill & Another [2010] ZAGPJHC 10 (11 March 2010) (Epstein AJ); Firstrand Bank Ltd v Bernardo and Another (EC – PE) (case number 680/09) and Firstrand Bank Ltd v Van den Berg EC – PE 1 September 2009 (case number 1662/09).

(a) delivered to that person; or
(b) sent by registered mail to that person's last known address."

[9] I have not had the benefit of gaining access to all of these jugdments

29. In this division Munien received carefully scrutiny by Davis J in ABSA Bank Ltd v Kritzinger and Another; Standard Bank Ltd v Pienaar and Another (handed down on 16 October 2009 under case no 6474/2009 and 7355/2009). Davis J found at para [13] – [14]

> *"Wallis J held that, while section 65(1) does not contain a cross reference to the regulations, the very purpose of section 65(1) captured in the phrase "delivered in the prescribed manner" envisages that a prescribed manner would be set out in regulations. The lack of statutory specificity to regulations is not sufficient reason alone to justify an argument that the regulations are inapplicable in this case. See Howick District Land Owners Association v Umngeni Municipality 2007 (1) SA 206 (SCA) at para 19 – 20 where Cameron JA (as he then was) provides support for this conclusion.*
>
> *I am therefore in full agreement with the conclusion of Wallis J namely:*
>
> > *The Minister has prescribed the manner of delivering documents to a consumer in terms of the Act and that the method of delivery must be in accordance with the provisions of the definition of "delivered" in the regulations rather than in terms of section 65 (2).' para 12 "*

30. Not only do I agree with Davis J, but I am bound by to follow him. Accordingly I find therefore that the manner in which the plaintiff had delivered the notice had complied with the requirements of section 129; and, as a consequence, I find that the summons had not been issued prematurely.

The wording of the section 129 notice

31. The defendants further contended that the section 129 notice did not properly comply with the provisions of the National Credit Act as it had inserted the words *"that is acceptable to Standard Bank"*, which caused, so the first defendant stated, a material misconception as to the nature and functions performed by a debt counsellor.[10]

32. Section 129 of the National Credit Act provides as follows

> ***"129 Required procedures before debt enforcement***
>
> *(1) If the consumer is in default under a credit agreement, the credit provider-*
>
> *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and"*
>
> (my emphasis)

33. It appears that the defendants object to the words "*that is acceptable to Standard Bank*" in the notice, and that the first defendant was under the misapprehension that the plaintiff's acceptance would always be required.

34. I pause to point to point out that the letter is clear that on receipt of the letter, the first defendant could refer the matter to any one of either the

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[10] See paragraphs 6 and 11 above

offices of the plaintiff (number supplied), the National Credit Regulator (number supplied), a debt counsellor (in respect of whom a number would be supplied by the National Credit Regulator), an alternative dispute resolution agent (again the National Credit Regulator would supply the number), the Consumer Court (again the National Credit Regulator would supply the number), or the Ombudsman for Banking Services (number supplied), *"to resolve any dispute or to develop a plan that is acceptable to both you and Standard Bank to bring your payments up to date."*

35. In this context section 129(1)(a) contemplates that the notice should propose that the matter be referred with the intent that the parties resolve any dispute or develop and agree on a plan to bring the payments up to date. The letter follows the wording of the section and, if any thing, makes it clear that the plan must be acceptable to <u>both</u> the defendants and the plaintiff.

36. Nor does the first defendant convincingly state why he had not approached any of the other persons or entities on receipt of the letter.

37. In the premises this defence also fails.

<u>The section 88(3) defence – notification of a pending debt review</u>

38. The first defendant had applied for a debt review and the requisite Form 17.1 notices had been sent, also to the plaintiff on 30 March 2010. The first

defendant submitted that in term of section 88(3)[11] of the National Credit Act, a credit provider who has received a notice in terms of section 86(4)(b)(i)[12] of the National Credit Act, "*may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement*" until certain conditions are met.

39. Section 86(2) of the National Credit Act, however, provides that:

> *"An application* [for debt review] *in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application the credit provider under that credit agreement has proceeded to take steps contemplated in section 129 to enforce that agreement."*

40. This section must, in the instant case, be considered in conjunction with the provisions of section 130(3)(c)(i) of the National Credit Act which provides that:

> *"(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement*

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[11] "*(3) Subject to section 86 (9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86 (4) (b) (i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until*
(a) the consumer is in default under the credit agreement; and
(b) one of the following has occurred:
(i) An event contemplated in subsection (1) (a) through (c); or
(ii) the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

[12] *86. Application for debt review.-(l) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.*
(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.
....
(4) On receipt of an application in terms of subsection (1), a debt counsellor must –
...
(b) notify, in the prescribed manner and form –
(i) all credit providers that are listed in the application; and ..."

to which this Act applies, the court may determine the matter only if the court is satisfied that -

. . .

(c) the credit provider has not approached the court -

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or . . ."

41. In BMW Financial Services (SA) (Pty) Ltd v Donkin 2009 (6) 63 (KZD) Wallis J (at par [10]) explained that sections 86(2) and 130(3)(c)(i) are designed to ensure that there is no overlap between the processes being followed under debt review (in terms of section 86) and the processes that flow from a creditor seeking to enforce a debt at the time when no debt review process is in place. In the latter instance the creditor is obliged to first give notice in terms of section 129(1)(a). The notice inviting the debtor to refer the credit agreement to a debt counsellor, or other referee, has as its purpose either to resolve any dispute in relation to that agreement, or to reach agreement on a plan that will enable the debtor to bring the payments under that agreement up to date. It is self-evident that this is a process entirely distinct from the general debt review under section 86 which depends on the debtor being over-indebted. As Wallis J points out at paragraph [11], in each instance the prior process takes precedence and the other is excluded until it is complete.

42. The first defendant states that the application for debt review was only made on 30 March 2010, when the requisite form 17.1 notice was sent by the debt

counsellor to all creditors, including the plaintiff. By then the plaintiff had already instituted action (on 11 March 2010)[13] and service had already taken place (on 23 March).

43. In the premises the first defendant had not applied for a debt review before the present action commenced and, accordingly section 86(2) applies so the credit agreements (the two mortgage bonds) are excluded from the debt review process.

44. This is dispositive of this defence.

The section 85 defence – over-indebtedness

45. The defendants requested leave to bring an application in terms of section 85 of the National Credit Act. Section 85 provides as follows:

> *"In any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –*
>
> *(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to court in terms of section 86(7); or*
>
> (b) *declare that the consumer is over-indebted, as determined in accordance with this Part, and make an order contemplated in section 87 to relieve the consumer's indebtedness."*

[13] I need not on these facts consider whether the legal proceedings had commenced with the delivery of the section 129(1)(a) notice

46. Masipa J in Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363 (W) stated the following at para 24:

> *'[24] The powers given to the court under s 85 arise if it is alleged that the consumer under a credit agreement is over-indebted. Clearly, the mere allegation of over-indebtedness can never be sufficient. The test would be that such over-indebtedness should be established on a balance of probabilities. This is supported by s 79(1) which refers to the preponderance of available information at the time a determination is made.'*

47. Masipa J held (at paragraph 19) that the effect of section 85(a) of the National Credit Act is that a High Court, if it refers the matter directly to a debt counsellor, would have to receive the debt counsellor's recommendation and deal with the matter, as would a magistrates' court making an order in terms of s 86(7)(c).

48. As Masipa J pointed out "*(h)aving failed to avail himself or herself the opportunity to voluntarily approach a debt counsellor prior to litigation, it follows that the consumer must at least explain that failure to the court in asking the court to exercise its discretion.*" (at paragraph [28]). It is for the consumer who raises the defence of over-indebtedness to establish on a balance of probabilities that he or she is over-indebted as envisaged in the section (*BMW Financial Services (SA) (Pty) Ltd v Mudaly* case number 16975/09 KZN per Wallis J at paragraph [26]).

49. In this regard the defendants submitted that

(a) It would be detrimental to other credit providers were judgment to be granted.

(b) the debt owing to the plaintiff will be repaid within 200 months.

(c) given the current economic climate, should the property be sold in execution, it will not be auctioned at a market-related price and a large shortfall may result. This in turn would increase the defendant's expenses as they would then have to rent premises and that would reduce the amounts available for redistribution to his creditors.

50. The debt counsellor, in turn, stated that "*the consumer was over-indebted having regard to her* (sic) *financial means, prospects and obligations*" as the monthly essential living expenses (R 2 500,00) and monthly debt obligations (R19 461,46) exceeded the monthly income of R 8 500,00 by R 13 461,46. The total debt amounts to some R 1 473 334,89.

51. No explanation is proffered for the failure to have approached a debt counsellor – that is even prior to the receipt of the section 129 notice – given the self-confessed financial predicament in which the defendants found themselves.

52. Mr Rabie, who appeared for the plaintiff contended that there were no facts disclosed to assist the Court in determining whether the alleged claim of over-indebtedness is *bona fide*. In this regard he pointed out that

(a) Though it is stated that the first defendant is self-employed, no disclosure is made as to the nature of his business, and what the future prospects thereof are;

(b) No information is furnished with regard to the R 8 500,00 income – is it the income of the first or second defendant? (the application to the debt counsellor may have been made by the second defendant as reference is made to "her" financial situation). Is the income constant, or does it fluctuate?

(c) No disclosure of any assets is made, neither by the defendants nor of the business conducted by the first defendant.

(d) It is not possible to asses the monthly obligations without also knowing the amounts outstanding.

53. In the premises I agree with the submission made by Mr Rabie, namely that there are very little, if any, facts to support the statement that the defendants are over-indebted. A factual basis is required in order to support for what is little else than a conclusion drawn by the first defendant and the debt counsellor.[14] There is, accordingly no basis on which a court would exercise its discretion in terms of section 85 of the National Credit Act.

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[14] See for instance Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others 2003 (4) SA 207 (C) as to the requirement to set out 'primary facts' from which 'secondary facts' or conclusions may be drawn. As Van Reenen J pointed at at paragraph [28] *"Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C - E) and accordingly do not constitute evidential material capable of supporting a cause of action."*

54. As Wallis J had pointed out in Donkin, the grant of relief under section 85 is discretionary. I am of the view that precious little has been said which would permit me to exercise any discretion in favour of granting any relief under section 85 (or for coming to the view that another court would grant such relief in due course).

55. In the premises this defence, also fails.

The certificate of balance

56. The certificate of balance was *ex facie* the summons issued in term of clause 6 of the two mortgage bonds. This clause provides that a certificate, signed by any of the plaintiff's managers, will on its mere production, be *"sufficient"* proof, unless the contrary is proven, of the amount due to the plaintiff, the fact that the debt is due and payable, the rate of interest payable and the date from which the interest is calculated. *"Sufficient proof"* is the same as *prima facie* proof (S v Moroney 1978 (4) SA 389 (A) at 406 F – H).

57. Mr Rabie, who appeared for the plaintiff placed reliance on the *obiter* remark by Moosa J in Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd 2005 (2) SA 439 (C) at 438 F – G namely that where the *causae* stipulated in the bond are so wide to include both liquidated and unliquidated claims then "*(t)he certificate of indebtedness is possibly a mechanism to overcome the problem, as it would have been prima facie proof of the amount owing by*

the respondent to the applicant and could have evidenced a liquidated amount in money." (There was no such certificate before Moosa J).

58. The certificate upon which the plaintiff relies, meets these requirements.

59. No defence was raised to the amount claimed by the plaintiff. In fact, in the affidavit of the debt counsellor, the amount owing to the plaintiff is reflected to be R 1 385 992,10, that is slightly more than the amount claimed by the plaintiff.

60. Mr Zazeraj who appeared for the defendants, contended that the loan agreement itself was not placed before the court. This was not raised as a defence in the opposing affidavit and I am not sure that this is correct – the summons refer to monies lent and advanced under the mortgage bonds. Annexed to those are the plaintiff's "*terms and conditions of loans secured by mortgage bonds.*" In my view the summons does comply with Uniform Rule of Court 18(6) which requires a true copy of the written agreement, or of the part thereof relied upon, to be annexed to the summons. There is no allegation in the opposing affidavit that there are other relevant terms (whether in writing or oral).

61. The defences raised by the defendants do not meet the test required to stave of summary judgement.

62. It follows that the plaintiff is entitled to summary judgment as follows - summary judgment is granted against the defendants for:

(a) Payment of the sum of R1 361 915,62

(b) Interest on the amount claimed in (a) above calculated from 8 February 2010 to date of payment at the interest rate prevailing from time to time on the mortgage bond(s), which interest rate on 8 February 2010 was 10.50% per annum, such interest to be capitalised monthly in arrear;

(c) An order declaring erf 59956 Cape Town at Lansdowne, in the City of Cape Town Cape Division, Province of the Western Cape situate at 100 Chukker Road, Kenwyn, Lansdowne executable for the said sums;

(d) Costs of suit on the scale as between attorney and client.

S Olivier AJ

9 September 2010