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

Case No : 9895/12

In the matter between :

ABSA BANK LIMITED — Plaintiff

and

KEVIN RUDOLPH LUBBE — First Respondent

MARILYN CECILIA LUBBE — Second Respondent

JUDGMENT

IRISH, AJ :

1. This is an application for summary judgment in which the plaintiff seeks the following relief:

   1.1. Payment of the amount of R530 109,31;

   1.2. Interest on the amount of R530 109,31 from 6 January, 2012 to date of payment at the rate of 9% per annum, which interest is calculated on daily balances and capitalised monthly;

1.3. Costs of suit on the scale as between attorney and client;

1.4. Further and/or alternative relief;

1.5. An order that erf 18178 Bellville, situate in the City of Cape Town, Cape Division, Western Cape Province, in extent 421 square metres and held by Deed of Transfer T92106/1993 be declared executable.

2. The plaintiff instituted action by issuing a combined summons on 21 May, 2012. It cites itself as a registered commercial bank and as a credit provider in terms of section 40 of the National Credit Act, 34 of 2005 ("the NCA"), having a principal place of business at an address in Gauteng. The two defendants, who are married to each other in community of property, are cited at their chosen *domicilium* at 66 Banjo Walk in Belhar, within the area of jurisdiction of this court.

3. It is common cause that the defendants borrowed money from the plaintiff bank against the security of a first mortgage bond No B57883/2006, registered in favour of the plaintiff on 15 June, 2006 over erf 18178 Bellville. The annexed mortgage bond records that it is a continuing covering bond for a capital amount of R420 000,00 together with an additional amount of R84 000,00. The mortgage constitutes a credit agreement for the purposes of the NCA.

4. The mortgage bond provided that the defendants be jointly and severally liable as mortgagors to the plaintiff bank as mortgagee and that the extent of their

indebtedness at any time, and that such indebtedness be due and payable, could be proved by a certificate signed by any manager of the plaintiff mortgagee.

5. Service of the summons was effected on the second defendant personally at her chosen *domicilium*; and service on the first defendant was effected by leaving a copy with the second defendant, as his wife, at the same address, which was also his chosen *domicilium*. The inference that this is the defendants' place of residence is confirmed in the affidavit opposing summary judgment, in which the first defendant confirms that he resides at the said address. It is not expressly alleged that the property is his "primary" residence; nor does the first plaintiff expressly state that the second defendant resides at such address with him. For the purpose of this judgment, however, I assume that the residence is the matrimonial home of the defendants and therefore their primary residence, as contemplated in rule 46(1)(a)(ii).

6. The summons drew the attention of the defendants both to the provisions of section 26(3) of the Constitution and to rule 46(1)(a)(ii) and called upon them, in the event of their objecting to the order sought to declare the property executable, "*to place facts and submissions before the court...*"

7. Annexure "C" to the particulars of claim is a certificate by a manager of the plaintiff's home loans recoveries department, one du Plessis, certifying that the total amount due and payable in terms of the bond on 5 January, 2012 was R530 109,31, together with interest thereon at the rate of 9% per annum, capitalized monthly, from 6 January, 2012 to date of payment. The defendants have not

sought to challenge the correctness of the content of this certificate.

8. The particulars of claim further record that the defendants applied for debt review in terms of section 86(1) of the NCA and that the Bellville Magistrate's Court granted a debt re-arrangement order on 31 May, 2011, a copy of which order was annexed as annexure "D".

9. The material parts of annexure "D" red as follows:

"*It is ordered:*

That the estate of the Consumers be declared over-indebted in terms of the National Credit Act 34 of 2005.

That the consumers' debt obligations be restructured from 31/5/11 in terms of section 87(1)(b)(ii) of the Act as set out in Annexure "M2"; and

That the obligation to the Credit Providers listed be re-arranged as follows:"

No annexure "MC2" is annexed to the copy of the order attached to the particulars of claim. The order itself, however, does set out a list of creditors, together with a reference number for each, the annual interest payable on the debt in question, the "New Monthly Instalment" in respect thereof and the estimated period of repayment of each debt. In the case of the plaintiff, these particulars are recorded as being: reference 8064519798; interest at 10.00% per annum; new monthly instalment of R281.22 and an estimated period of 157 months to effect repayment.

10. The order further contains the following provisions relevant to the matter before me:

> *"That the National Payment Distribution Agency (hereafter the NPDA) are appointed as the distribution agency of the Consumer, to distribute their monthly payments to the Credit Providers; and*
>
> *That the Consumers must not enter into any further credit agreements until his obligation in terms of this Court Order have been fulfilled in terms of Section 8 of the Act; and*
>
> *That the Credit Providers may enforce their rights in terms of Section 88(3)(b)(ii) of the Act, should the Consumer be in default in terms of this Court Order..."*

11. The listed payments required to be made in terms of the order of court to the eleven creditors listed therein totals R5791.05 per month.

12. The plaintiff further alleges the following:

> *9. In terms of the debt re-arrangement order, the Defendants are required to pay a monthly instalment of R281.22. However, the Defendants have failed to pay the full required instalment amount between June 2011 and May 2012. The Defendants have in fact failed to pay any instalments to the Plaintiff for the months of June 2011, September 2011, November 2011, February 2012 and April 2012. The aforementioned is highlighted on the Defendant's statement of account from the Plaintiff's data base which is attached hereto*

and marked "E".

10. In terms of the debt re-arrangement order, the Defendants were required to pay a total amount of R3093,42 from June 2011 to and including April 2012. The Defendants have however only paid a total amount of R2 654,30.

11. The Defendants are in default of the debt re-arrangement order and the Plaintiff may therefore enforce the concerned credit agreement (sic) as per section 88(3) [see section 88(3)(b)(ii)] of the Act."

13. The defendants having entered appearance to defend, the plaintiff on 26 June 2012 applied for summary judgment The application for summary judgment is supported by an affidavit signed by one Fossey, who declares herself to be the home loan legal specialist of the plaintiff bank and who further states that, unless clearly indicated to the contrary, she has knowledge of the facts stated in the affidavit "*either personally or as a result of my access to all relevant documents and computer data pertaining to the cause of action against the Respondents.*"

14. On this basis, Fossey verified the cause of action and the amount claimed in the summons and confirmed the defendants' indebtedness to the plaintiff in the amount of R530 109.31 together with interest thereon, as set out in the particulars of claim. She goes on to opine that the defendants do not have a *bona fide* defence to the action and that the entry of appearance to defend was solely for the purpose of delaying judgment on the claim.

15. The plaintiff filed a further affidavit in terms of Western Cape Consolidated Practice Note 33(2), hereinafter referred to as PN 33(2). This affidavit repeats a number of allegations contained in the particulars of claim and already confirmed by the affidavit in support of summary judgment. Indeed, paragraphs 1 to 6 of the affidavit are unnecessary verbiage. The affidavit then states:

15.1. "*6. At the time of issuing summons, Defendants were in arrears with instalments in the amount of R43 219,35*".

15.2. "7. *The Defendants' current arrears amount to R51 435.72 and the current total outstanding balance I R548 160,51. The Defendants' monthly instalment in terms of the mortgage loan agreement is R4 240,90 and they have failed to pay their required monthly instalments for a period of 12.128 months. The aforesaid information is highlighted on the annexed print out marked "A". Therefore, the debt is most certainly not trifling.*"

16. The aforesaid annexure "A" (which is in itself largely unintelligible) is objected to by the defendants on the basis that it constitutes impermissible evidence before the court. I consider this aspect later in the judgment.

17. The affidavit opposing summary judgment was deposed to by the first defendant, the second defendant filing a confirmatory affidavit. The affidavit records that the plaintiff originally issued summon commencing action against the defendants in February 2012, under case number 2308/12, in which the self-same amount owing under the bond was claimed and alleging that the plaintiff had terminated a

debt review of which it had been notified in accordance with the provision of section 86(1) of the NCA. In response, the defendants' attorney addressed a letter to the plaintiff's attorneys of record, pointing out that the alleged termination of the debt review process "is inconsistent" (I presume "incompetent" was intended) and drawing their attention to Wesbank A Division of FirstRand Ltd v Papier (National Credit Regulator as Amicus Curiae) 2011 (2) SA 395[1]. In response thereto, and perhaps mistakenly, the action was withdrawn.

18. The opposing affidavit further records that, at the time of issuing summons (ie, the summons commencing the action currently before me) "*no notice was ever given to the Respondents that they were in any default whatsoever. In fact, the Respondents have faithfully paid the monthly contributions in the amount of R6100 per month to the NPDA. A copy of their payment record is annexed hereto as Annexure "B*".

19. The schedule annexed reveals a series of payments into the account of R6 100,00 each, as also various payments made to creditors from the account, which is evidently that administered by the NPDA. However, the amounts paid to individual creditors do not exactly correspond with the several amounts ordered to be paid in terms of the order of the Magistrate's Court.

20. The defendants acknowledged that there was a shortfall in the monthly distribution by the NPDA to the plaintiff, the plaintiff having been paid R265.43 in terms of annexure A, rather than the R281.22 ordered by the Magistrate. The

[1] Criticized and not followed in Collett v Firstrand Bank Ltd 2011 (4) SA 508 (SCA).

defendants allege, however, that the arrear amount owing consequential upon this shortfall is only R126.32.

21. The defendants go on to point out, however, that – as at the end of April 2012, certain of the other creditors have been settled in full, in consequence whereof the monthly instalment being paid by the NPDA to the plaintiff has increased almost tenfold to an amount of R2 600,00 per month.

22. Accordingly, say the defendants, by the end of June 2012 instead of the total amount of R3655.86 that should have been paid to the plaintiff in terms of the Redistribution Order, the plaintiff has in fact received R7 854,30. Given that the monthly payment is required to be R281.22, the plaintiff has effectively received accelerated payment of an amount equivalent to 14.92 months.

23. Mr Jonker, who appeared for the plaintiff, argued the following two propositions:

23.1. Firstly, that it was common cause that the plaintiff had not been paid the amount ordered by the magistrate and that, at the time the summons was issued on 21 May 2012, the defendants had underpaid that which had been ordered in the redistribution order by R439.12;

23.2. Secondly, that the defendants were in arrears on the bond repayments at the time of issue of summons in the amount of R43 219.35 and that, in accordance with the affidavit of Fossey, the arrears now constitute R51 435.72 of a total outstanding indebtedness of R548 160.51. Even with the

increased payments, there was still a monthly shortfall so that the total indebtedness was ever-increasing.

24. In consequence, submitted Mr Jonker, the plaintiff was entitled to proceed against the defendants for the outstanding balance of the loan and, given the quantum of the arrears – which he termed not trifling – it would be appropriate that the mortgaged property be declared executable. He accordingly asked for judgment against the defendant jointly and severally for payment of the amount of R530 109.31[2], together with interest thereon, in terms of a draft order handed up at the hearing.

25. Mr Basson, who appeared for the defendants, put up a spirited defence to these propositions, submitting:

25.1. That the defendants had faithfully paid a monthly contribution of R6 100,00 to the NPDA;

25.2. That the total amount payable in terms of the court order was only R5 791.05;

25.3. That, at the timer of issuing the summons, that arrears were not the R35 000,00 alleged by the plaintiff, but rather a paltry R126.32 shortfall under the distribution order;

[2] Ie., the amount claimed in the summons, rather than the indebtedness reflected in the PN 33(2) affidavit.

25.4. That, in consequence of the increased distribution to the plaintiff since May 2012, the defendants have in fact paid well in excess of that which they were required to do in terms of the court order.

26. It is convenient to deal first with the dispute regarding the content of the further affidavit filed in accordance with the terms of Practice Note 33(2), since that will determine the evidence which is properly before me. The procedure governing summary judgment is to be found in rule 32 of the Uniform Rules of Court. Subrule (2) sets out what a plaintiff who is entitled to seek summary judgment in accordance with the provisions of sub-rule (1), must do. In short, an appropriate person must testify to the correctness of the facts alleged by the plaintiff, and further verify the cause of action and the amount claimed. The deponent must be in a position to swear that in his opinion there is no *bona fide* defence and the action is being defended solely in order to cause delay. If the claim is based on a liquid document, same must be annexed to the affidavit.

27. The defendant is afforded a choice of response to this application, in terms of the provisions of subrule (3). He may give security to the satisfaction of the registrar for any judgment including costs which may be given; or he may satisfy the court by affidavit (or, with leave, by oral evidence) that he has a bona fide defence to the action, by disclosing fully the nature and grounds of such defence and the material facts relied upon therefor.

28. There follows sub-rule (4), which provides that no evidence may be adduced by the plaintiff "otherwise than by the affidavit referred to in subrule (2), nor may

either party cross-examine any person who gives evidence viva voce or on affidavit..." It is apparent from these provisions that the rules do not envisage the court undertaking any audit of the cause of action as pleaded by reference to supporting evidence provided by the plaintiff; rather, the plaintiff merely confirms on, oath without elaboration, that the factual allegations contained in the summons are true.

29. In Rossouw and Another v Firstrand Bank Ltd 2010 (6) SA 439 SCA, the court held that handing up proof of postage by registered post at the hearing of a summary judgment application was precluded by the provisions of Uniform Rule 32(4).[3] However, the court further held that the practice of handing up a certificate of the outstanding balance due at the date of a hearing (whether in the court a quo or on appeal) performs a useful function and is not precluded by the provisions of the subrule, being essentially *"an arithmetical calculation based on the facts already before the court that the court would otherwise have to perform itself."*.[4] The court further went on to point out that, to the extent that such a certificate "*may reflect additional payments after the issue of summons ... this constitutes an admission against interest by the bank, and the bank is entitled to abandon part of the relief it seeks.*"[5]

30. The question, therefore, arises as to the status of the affidavit handed in ostensibly in accordance with the provisions of PN 33(2).

31. PN 33(1) gives effect to (and specifically refers to) the aforesaid judgment in

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[3] Paragraph [47]
[4] Paragraph [48].
[5] *Ibid.*

Rossouw's case. There follows PN33(2), which reads as follows:

> *"In order to satisfy the court of the matters referred to in section 130(3) of the Act, an affidavit by the credit provider must be filed when judgment is applied for."*

32. The important considerations in section 130(3) of which the court must satisfy itself are two in kind:

32.1. provisions that are essentially dilatory in nature, precluding the credit provider from approaching the court (*ie*, requesting the court to determine proceedings commenced in respect of a credit agreement to which the Act applies):

32.1.1. whilst there is a matter arising under the credit agreement in question pending before the Tribunal that could result in an order affecting the issues to be determined by the court;

32.1.2. during the time that the matter is before a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction (section 130(3)(c)(i);

32.1.3. if the consumer has surrendered property to the credit provider, prior to such property having been sold (section 130(3)(c)(ii)(aa)..

32.2. provisions that act as a bar to the credit provider obtaining relief:

32.2.1. non-compliance with the procedures (if applicable) of sections 127, 129 or 131;

32.2.2. that the credit provider has not approached the court despite the consumer having

32.2.2.1. agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;

32.2.2.2. complied with an agreed plan as contemplated in section 129(1)(a); or

32.2.2.3. brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

33. The matters in respect of which the court is obliged to satisfy itself are therefore, part from the procedures imposed by sections 127, 129 or 131, considerations which could postdate the issue of summons and which could not therefore be dealt with by way of allegations contained in the summons itself, as enjoined in Rossouw's case and given effect to in PN 33(1).

34. How is the court to satisfy itself as to these matters, other than by evidence placed before it? The judgment applied for might be judgment in default of appearance, or might even be judgment at the conclusion of a trial. But in many cases the approach to the court will be for summary judgment. There is accordingly the need to reconcile the restrictive provisions of Uniform Rule 32(4) with the mandatory requirements of the Act. It seems that PN 33(2) goes no

further than regulating for this division how the evidence demanded by section 130(3) of the Act is to be placed before the court at the time judgment is applied for. In short, it does not legislate the requirement for such evidence, which would ostensibly be *ultra vires* the powers of the Judge President.[6]

35. Which does not, of course, entitle a credit provider to seize the opportunity to place other evidence, not enjoined by section 130(3) or covered by PN 33(2), before the court by way of affidavit or otherwise. Accordingly, Mr Basson's objection to the affidavit under consideration is valid, to the extent that it contains matter not so covered.

36. The paragraph to which Mr Basson objects reads as follows:

> *"The Defendant's current arrears amount to R51 435.72 and the current total outstanding balance is R548 160.51. The Defendant's monthly instalment in terms of the mortgage loan agreement is R4 240.90 and they have failed to pay their required monthly instalments for a period of 12.128 months. The aforesaid information is highlighted on the annexed print out marked "A". Therefore, the debt is most certainly not trifling."*

37. None of these allegations are covered by the provisions of section 130(3) or PN 33(2). To the extent that the deponent might have thought that the content of this paragraph was compliant with section 130(3)(c)((ii)(dd), it is in my view not compliant. What the sub-section requires is a not a statement of outstanding indebtedness (which would be proved in the usual way by means of the certificate, sanctioned in Rossouw's case), but rather a statement that the

[6] *Cf* Harmony Caterers (Pty) Ltd v Ford 2002 (5) SA 536 WLD

consumer has not brought the payments up to date – a quite different thing. (Any part payments should obviously be included in the formulation of the certificate of indebtedness.) Accordingly, Mr Basson's objection is well-founded and the content of paragraph 7 together with the annexed print out referred to therein must be ignored for the purposes of these proceedings.

38. Which brings me to a consideration of whether or not the defendants were in compliance with their obligations in terms of the order of the Magistrate's Court for the District of Bellville made on 31 May 2011, or not. Section 88(3)(b)(ii) removes the bar to litigation by a credit provider against a consumer if "*the consumer defaults on any obligation … ordered by a court…*"[7]

39. The sub-section accordingly envisages the concurrence of three jurisdictional requirements:

    39.1. a default by the consumer;

    39.2. of an obligation

    39.3. ordered by the court.

40. To deal with the obligation, first. What was ordered, as set out above, was a restructuring of the defendants' (consumers') obligations in terms of the credit agreements dealt with in the order, in terms of section 87(1)(b)(ii) of the Act. The obligations of the defendants to the various listed credit providers were re-arranged and, in the case of the plaintiff bank, that obligation now became one to pay the amount of R281.22 per month. The recordal in the order of the applicable

[7] See the unreported judgment of Dlodlo, J in Firstrand Bank Ltd v Fester and Another (case number 14597/2011), 15 September 2011; Firstrand Bank v Fillis and Another 2010 (6) SA 565 (ECP) per Eksteen J..

interest rate on the debt and of the estimated period of repayment do not constitute obligations; only the order to pay the amount in question.

41. The court also ordered the manner in which such obligation was to be carried out. In terms of the order, the NPDA *"are appointed as the distribution agency of the Consumer, to distribute their monthly payments to the Credit Providers"*. So, the obligations of the defendants in terms of the court order were not to make payment of specific amounts to individual credit providers; but rather, to pay the total of such monthly payments to the NPDA in order for them, in turn, to pay the applicable amount to each credit provider.

42. It accordingly became possible for this court appointed intermediary to default in the performance of its obligations - for example, if the NPDA, despite having received the correct amount from the consumer, paid an incorrect and insufficient amount to an individual credit provider. That default would not, in my view, constitute a default by the consumer, such as to bring into operation the provisions of section 88(3)(b)(ii). On this point Mr Jonker argued that the NPDA was, in terms of the order, the agent of the consumer and therefore any default by such agent could be attributed to the consumer as the agent's principal. I do not think that the NPDA is an agent in that sense. It is a court-appointed intermediary or representative and it serves as the conduit for the transfer of monies between the consumer and the credit provider(s). But it has no authority to represent the "principal" and certainly none to create contractual obligations between the "principal" and a "third party". The NPDA is little different from a

nuntius in this regard;[8] alternatively, the NPDA may be seen as a court appointed trustee to receive and distribute the monthly payments. Either way, I do not see that the NPDA can be regarded as having accepted a mandate from the defendants to represent them in any manner whatsoever.

43. Accordingly, in my view, any default of performance by the NPDA in terms of the court order would not constitute a default by the consumer, unless it was a consequence of a default of the consumer. In the matter under consideration, one of the complaints of the plaintiff is that it was not paid the amounts ordered by the court. The reason for this is not hard to find:

44. Accordingly, if the defendants paid the total of the amounts ordered by the court to the NPDA, they would be in compliance with their obligations in terms of the court order and the plaintiff would not be able to rely on section 88(3)(b)(ii).

45. The defendants were required to make a total monthly payment of R5791.05 in terms of the court order. The order simply refers to "new monthly instalments", without in anyway specifying any date for payment. Accordingly, regardless of the terms of the individual credit agreements and the obligations being restructured, it appears that if a payment as ordered by the court were to be effected within the calendar month following the order and within each month thereafter, there would be compliance. It would be helpful if orders of this nature could specify the day of each month by which the consumer is required to make payment to the PDA; and the day of such month by which the PDA is obliged to make payment to the credit providers. That would render more certain at least one element of an alleged

[8] See the discussion in Silke *The Law of Agency in South Africa* 3rd Ed pp 39-41, particularly footnote 167.

default.

46. According to the schedule of distribution payments annexed to the opposing affidavit, the distribution scheme had already been put into effect some two months before the court order. So, a payment of R6 100,00 was made on 1 May, 2011 and put out to various credit providers over the next three days. A similar pattern emerges for the period 28 May, on which another payment was made, to 30 May, when further payments were effected. The court order then intervened on 31 May, with effect from 31 May, 2011. The magistrate could hardly have expected the defendants to make another payment on that very day; so that it seems that the intention of the order was that the month would run from the 1st of June, and each calendar month thereafter. So, another payment of R6 100,00 was made on 29 June and paid out on the 30th. The following month, the payment of R6 100,00 was effected on 28 July and the payments pursuant thereto made on the 29th.

47. The payments that were made by the NPDA to the plaintiff were R265.43 and the reson for this was apparently the retention of two amounts of R14.72 and R17,10 each month, respectively described as "DC Rehab fee" and "DCM Billing". I am left to speculate as to what these amounts may be, but they appear to be charges or fees payable to the distribution agency. If that is the case, there is nothing in the court order that sanctions such deductions. One accepts that there will be costs of administration involved in a scheme of this nature; but any such costs which are intended to be deducted from the consumer's payments should be included in the monthly schedule of payments, so that the amount ordered to paid by the consumer is sufficient to cover both such costs of administration and the

payments ordered to be made to credit providers. The distribution agency may not sequester a portion of the payment intended to satisfy the obligations of credit providers to satisfy its own fees or expenses.

48. In the result, the plaintiff did not receive the amount ordered by the court. But, as explained above, I am satisfied that this default was not that of the defendants; it appears to have been the result of the actions of the NPDA.

49. That would be the end of the matter, had the defendants maintained a regular pattern of monthly payments. However, they did not do so. There was not payment in September, although a late payment was made on 3 October and payments distributed to credit providers on the 4th. Thereafter things reverted to the correct pattern; but, once again, in April of this year no payment was effected, the payment occurring on 2 May and the distribution being effected by the NPDA on the same day.

50. Regardless therefore of the payments effected to the plaintiff bank in the wrong amount, there were also at least two months in which no payment was effected at all (even if such was subsequently made up.) These constitute default by the consumer and the failure to make any payments to the plaintiff bank in those months cannot be attributed to the NPDA. In accordance with the reasoning of the learned judge in Firstrand Bank Ltd v Fester and Another[9], once the jurisdictional requirements set out in section 88(3)(a) and (b) are present, the statutory bar to litigation is uplifted and the credit provider is entitled to proceed by way of litigation.

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[9] *loc. cit. supra*

51. The defendants not having challenged the correctness of their indebtedness as evidenced by the certificate annexed to the summons and marked "C", the plaintiff is entitled to:

51.1. Summary judgment in the amount of R530 109.31;

51.2. Payment of interest on the aforesaid amount of R530 109.31 at the rate of 9.00% per annum as from 6 January 2012 to date of final payment, such interest to be capitalised monthly in advance.

52. The plaintiff also seeks an order declaring the mortgaged premises executable. I have difficulty with granting this relief. In this regard, I take into account the following factors:

52.1. Whilst the defendants were in default of their obligations in terms of the court order, those obligations were remedied very promptly and the plaintiff suffered no significant prejudice in consequence thereof.

52.2. The defendants say that they have increased their monthly payments to the plaintiff in consequence of some of the smaller creditors having now been paid in full, and that the extent of their arrears is accordingly being lessened month by month.

52.3. The current amount payable monthly in terms of the bond (as reflected in annexure "E" to the particulars of claim) is about R3 500,00. As the indebtedness of the defendants to the lesser credit providers falls away, they will have an increasing amount to service this debt. They have been paying

R6 100.00 per month for distribution. One certainly cannot form the view, accordingly, that the defendants will not in the future be able to service this mortgage fully in accordance with the terms of the contract.

53. I accordingly decline to declare the property executable. I am conscious that this refusal will leave the defendants open to potential execution against their movable assets. I can but express the hope that that can be avoided, at least as regards the content of their home. It seems to me that the defendants have made a real effort to deal with their previously unmanageable debt burden and that it would be in the credit providers' interest to continue to work with them in this regard, especially since the process appears to be bearing fruit.

54. There remains the question of costs. The plaintiff has obtained summary judgment and seeks its costs on the attorney and client scale, in accordance with the provisions of the mortgage agreement. That is the bargain made by the defendants with the plaintiff and the plaintiff is entitled to enforce that bargain. On the other hand, the defendants have successfully defended the application to have their home declared executable, which is a not insignificant victory.

55. Having given the matter consideration, I have decided to award the plaintiff the costs of the action, up to and including the issue and service of the application for summary judgment, such costs to be on the scale as between attorney and client; but that all costs incurred by the parties thereafter, including the costs of appearance, should be borne by such parties themselves.

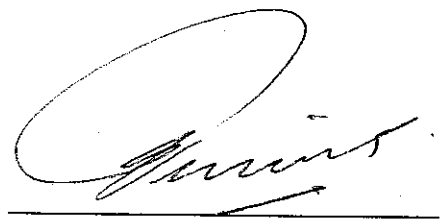
56. For the reasons aforesaid, I make the following orders:

1 The plaintiff is granted summary judgment in the amount of R530.109,31 against the defendants, jointly and severally, the one paying the other to be absolved;

2 The defendants are in like manner ordered to pay interest on the amount of R530 109.31 or part thereof at the rate of 9.00% per annum as from 6 January 2012 to date of final payment, such interest to be capitalised monthly in advance;

3 The application to have erf 18178 Bellville declared executable is refused;

4 The plaintiff is awarded the costs of the action, up to and including the issue and service of the application for summary judgment, such costs to be on the scale as between attorney and client; but all costs incurred by the parties thereafter, including the costs of appearance, shall be borne by such parties themselves.



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