IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

CASE NO: 11271/2012

In the matter between:

ABSA BANK LIMITED	**Plaintiff**
and	
JACOBA SOPHIA BENADE	**First Defendant**
LOUIS LE ROUX BENADE	**Second Defendant**

JUDGMENT DATED: 4 OCTOBER 2019

LE GRANGE, J:

[1] In this action, the Plaintiff ("ABSA") instituted a claim against the First Defendant ("Benade") for the payment of the sum of R 6 080 263,50 plus interest and costs and that Benade's immoveable property, Erf […] Witsand (the property) which is mortgaged to ABSA, be declared executable.

[2] ABSA's claim against the Second Defendant was founded on a deed of suretyship. The Second Defendant, since the institution of these proceedings was finally sequestrated. ABSA elected not to proceed with its claim against him.

[3] ABSA's claim against Benade according to its Amended Declaration dated 27 June 2014, was formulated as follows:

> "*2.1 The first defendant is indebted to the plaintiff in the amount of R 6 181 893.26 plus 9% interest calculated and capitalized monthly in arrear being in respect of moneys lent and advanced by plaintiff to the first defendant on an overdrawn cheque account with number 4055736496, the full amount whereof is now due and payable.*
>
> *2.2 The agreement pursuant to which the aforesaid overdraft facility was afforded to the first defendant on the said cheque account (hereinafter referred to as "the agreement", was concluded in Kimberley, in writing, on or about 5 July 2002, and at the conclusion of the agreement the plaintiff was represented by the manager of its Kimberley branch, whose particulars are at present unknown to plaintiff, whilst first defendant acted personally. The document, in which the terms of the agreement were recorded, was destroyed in a fire whilst in storage with the plaintiff, and plaintiff is accordingly unable to annex a copy thereof to the declaration.*
>
> *2.3 The material terms of the agreement are as set out in the mortgage bonds annexed to the summons read together with the standard terms and conditions namely BC1/1993 and BC9/2005, copies of which are annexed hereto as E1 &E2."*

[4] Four mortgage bonds that were registered in favour of ABSA over Benade's property were annexed to the Amended Declaration. The mortgage bonds registered were the following: August 2002 (R720 000); October 2003 (R 1 280 000); 3 June 2005 (R 2 000 000); 15 November 2007 (R 2 000 000).

[5] ABSA has alleged that the mortgage bonds read with the "standard terms and conditions" pertaining to the mortgage bonds, annexures E 1 and E 2 to the Amended Declaration, contained the material terms in respect of the facility agreement.

[6] ABSA further pleaded that sections 80 and 83 of the National Credit Act[1] ("NCA") did not apply to the facility agreement.

[7] Benade in her pleadings does not dispute that the mortgage bonds annexed to the Amended Declaration were registered over her property. She however dispute paragraphs 2.1, 2.2 and 2.3 of the Amended Declaration. According to the pleadings Benade in paragraph 3, recorded the following:

> "*3.2 Without derogating from the generality of the aforesaid denials the Defendants deny that the "agreement" of 5 July 2002 ("the 2002 agreement") on which the Plaintiff relies, is at present of any force and effect and/or a valid and enforceable agreement capable of supporting the Plaintiff's cause of action.*
>
> *3.3 In any event, the Defendants allege that the 2002 agreement was cancelled and/or substituted and/or novated by a written agreement concluded between the Plaintiff represented by one or more of its officials and the First Defendant, acting personally, on/about 5 August 2004 at Bloemfontein and/or Kimberley and/or Witsand. A*

[1] No. 34 of 2005

copy of the said agreement is annexed hereto marked "P1".

3.4 On/about 20 June 2005 and at Kimberly and/or Witsand, the Plaintiff represented by one R du Plooy, and the First Defendant, acting personally, concluded a further written agreement in terms whereof the Plaintiff agreed to lend and advance an amount of R4 million to the First Defendant. A copy of the said agreement is annexed hereto marked "P2". The said agreement, "P2", cancelled and/or substituted and/or novated the agreement "P1" referred to above and, in any event, insofar as it may still have been in existence, the 2002 agreement.

3.5 On/about 31 August 2007 and at Kimberley and/or Witsand the Plaintiff, represented by Ria du Plooy, and the First Defendant, acting personally, concluded a further written agreement in terms whereof the Plaintiff agreed to lend and advance an amount of R 5,6 million to the First Defendant. A copy of the said agreement is annexed hereto, marked "P3". The said agreement, "P3", cancelled and/or substituted and/or novated the agreements "P1" and "P2" insofar as they still may have been in existence as well as the 2002 agreement."

[8] Benade has also raised the following defence in paragraph 8 of the pleadings:

"*8.3 At the time when the Plaintiff and First Defendant concluded the agreement and also more particularly, when the agreement, "P3", was concluded:*

8.3.1 First Defendant was over-indebted as is provided for in Section 79 (1) of the National Credit Act, 34 of 2005 ("the NCA");

8.3.2 Plaintiff failed to make a "determination" as provided for in Section 79 of the NCA as and when it should have done so.

8.4 At the time when the agreement was concluded, alternatively when the agreements "P1" and/or "P2" and/or "P3" were concluded the Plaintiff failed to conduct an assessment as required by the provisions of Section 81(2) of the NCA.

8.5 Insofar as it may be necessary it is alleged that if the Plaintiff had done the assessment as required by the provisions of Section 81(2) the Plaintiff would and/or should have realised that the First Defendant was at all relevant times over-indebted.

8.6 In these premises the credit agreement upon which Plaintiff relies, was reckless and stands to be suspended, alternatively be set aside."

[9] The defences raised in sum can be categorised as follows: (i), the overdraft agreement which the parties had entered into in July 2002, which the Defendant described as the 2002 agreement, was no longer a valid and enforceable agreement as the parties on 5 August 2004, concluded a written agreement, in respect of the overdraft facility (P1) which cancelled, substituted and or novated the 2002 agreement; (ii), On or about 20 June 2005 the parties concluded a further written agreement in respect of the overdraft facility, (P2) and that agreement in turn cancelled and/or substituted and/or novated (P1); (iii), On or about 31 August 2007 the parties concluded a third written agreement in respect of the overdraft facility, annexure (P3), which agreement in turn cancelled, substituted and or novated all previous agreements, being (P1 and P2) in respect of the overdraft facility and (iv) when the agreement, (P3), was concluded the First Defendant was

over-indebted as is provided for in Section 79 (1) of the NCA and the Plaintiff failed to make a "determination" as provided for in Section 79 of the NCA. Alternatively, when the agreements (P1, P2 and or P3) were concluded the Plaintiff failed to conduct an assessment as required by the provisions of Section 81(2) of the NCA.

[10] The Plaintiff in order to prove its claim, called two witnesses to give *viva voce* evidence, namely Mrs. Johanna Du Plooy ("Du Plooy') and Mr. Willem Prinsloo ("Prinsloo").

[11] Du Plooy, during the relevant period, was working at ABSA, Kimberly at the private bank division. According to her both Defendants were respected business people in Kimberly and the Second Defendant, who is also the Husband of Benade was an admitted attorney at the time.

[12] Du Plooy gave an overview of the facility agreement, known as the ABSA Platinum 1 Account, that was entered into on 5 July 2002 between the parties. According to the agreement, entered into between the parties, an overdraft facility was afforded to Benade on the basis of an existing cheque account at ABSA and that a second cheque account had been opened for the purpose of the implementation of the facility agreement. The Platinum 1 account was nothing more than a cheque account with an overdraft facility where an immovable property is bonded in favour of ABSA as security.

[13] Du Plooy also gave details regarding the monies loan and advanced to Benade in 2004, 2005 and 2007. According to the documents filed, on 5 August 2004 an agreement (P1) was entered into between the parties. On

20 June 2005, a further agreement (P2) was entered into whereby ABSA loaned and advanced and amount of R 4 million to Benade. The parties on 31 August 2007, concluded another agreement (P3) whereby ABSA loan and advanced an amount of R 5,6 million to Benade.

[14] The mortgage bonds registered in favour of ABSA were done on the following dates: August 2002 (R720 000); October 2003 (R 1 280 000); 3 June 2005 (R 2 000 000); and 15 November 2007 (R 2 000 000).

[15] According to Du Plooy, the monies loan and advanced by ABSA during the abovementioned periods were essentially the overdraft facility on the Platinum 1 account that was increased from time to time and that the last increase occurred in August 2007. Du Plooy had been the Defendant's relationship manager for approximately 7 years' at the time that the overdraft facility of R5.6 million was approved. The facility in February 2011, expired and it was called up. Du Plooy also testified that the facility agreement, annexure "P3," did not constitute proof that the parties had entered into a new agreement. According to Du Plooy annexure "P3" was merely a standard letter to confirm to the Benade that the facility on the current account had been extended and increased. Du Plooy elaborated that it was standard banking procedure to direct a letter of this nature to a client, after an increase of an existing overdraft facility had been granted. Furthermore, the account number remained unchanged and that a new agreement with regard to the overdraft facility would have entailed the opening of a new banking account under a new account number.

[16] Du Plooy further testified regarding the statements furnished by Benade during the said period in respect of her assets and liabilities. According to the documents in Bundle "A", Benade certified that the information ABSA was true and correct. According to Du Plooy, even before

the assessment requirements of the NCA came into operation, she would follow and apply a specific procedure in order to assess a client's financial position, as a prerequisite for the approval of a banking facility.

[17] Du Plooy emphasised that her initial discussions would have focussed on a proper assessment of exactly what the Benade required in respect of an overdraft facility and for what purpose. She testified that she would have obtained and considered the following documents and information: an income and expenditure statement; bank statements; the information with regard to the Benade's credit record, as recorded by a credit bureau; in the event that the client derived his/her/its income from a business – a letter from the client's accountant/auditor to confirm the client's income; and the financial statements or management statements of the business.

[18] According to Du Plooy she also followed the abovementioned procedure in respect of the increased facility of R5.6 million.

[19] Du Plooy's evidence also centred on the fact that, in the context of the increased facility of R5.6 million, she was in constant communication with the auditors, who acted as the accountants for the Benade and the Second Defendant and their various business enterprises.

[20] It is common cause that the application for the increased limit of the facility was prepared by Du Plooy, and submitted to the ABSA's credit department, where two senior credit managers considered and eventually

approved the facility. It was clear from Du Plooy's evidence that the panel of credit managers conducted their own independent verification of the relevant information which had been submitted, in support of the application for the increased limit on the facility.

[21] Du Plooy also refereed to certain email communication between the parties and on 24 June 2010 and 5 November 2010 the Benade addressed emails to Du Plooy in connection with the attempts to sell the Witsand property. According to the emails Benade made the point that she had always conducted her Platinum One account in a prudent and responsible manner; that she and the Second Defendant cannot be blamed for the weak economy and the negative effects thereof on the property market being the causes of the temporary cash-flow problem experienced by her husband and the Second Defendant.

[22] The second witness namely Prinsloo, thereafter testified. Prinsloo is a manager at ABSA's Interest Calculating Solutions Department and stationed in Pretoria. According to the witness he recalculated the amount owing in respect of Benade's account from historic data that had been stored in electronic format on the computer systems of ABSA. According to Prinsloo the last increased limit of the overdraft facility of R5.6 million, had been exceeded by Benade in November and December 2009. Since 30 January 2011, the limit of the overdraft facility was exceeded on a permanent basis and as a consequence, the overdraft was called up by ABSA.

[23] Prinsloo also testified, with reference to the schedule containing his recalculation, and that on 8 May 2012 the debit balance on the facility agreement amounted to R6 080 263-50.

[24] Benade, elected to close her case without adducing any evidence.

[25] In view of the pleadings as amended and the defences raised by Benade, this Court must now determine: (i) whether the agreement (an overdraft facility) entered into between the parties on 5 July 2002, is a valid and enforceable agreement capable of supporting the Plaintiff's action; (ii) whether each of the written agreements, in respect of the overdraft facilities, on 5 August 2004, (P1), 20 June 2005, (P2) and August 2007 (P3), had the effect of novating all prior agreements in relation to the overdraft facility; (iii) the outstanding amount due and payable on the overdraft agreement by the Defendant to the Plaintiff in terms of the facility agreement, as claimed in the present action; (iv) whether the provisions of s 79(1) and 81(2) of the National Credit Act, 34 of 2005, (NCA) apply to the Plaintiff's claim as amended; (v) whether the increased limit of the overdraft facility constituted reckless credit, as contemplated in the NCA.

(i) whether the agreement (an overdraft facility) entered into between the parties on 5 July 2002, is a valid and enforceable agreement capable of supporting the Plaintiff's action.

[26] The evidence of Du Plooy regarding the Platinum 1 overdraft

agreement and how it was implemented in respect of Benade, remains unchallenged. In the absence of any other credible evidence to the contrary Du Plooy's version regarding the overdraft agreement between Benade and ABSA and the increase of the limits thereof has become conclusive evidence. Moreover, if one has regard to paragraphs 3.1 to 3.5 of Benade's pleadings, the existence an agreement in terms of which overdraft facilities had been afforded to Benade had indeed been admitted. Benade has also caused four mortgage bonds (annexures "D1" to "D4" to the Amended Declaration) to be registered over her property, which is a residential dwelling situated at Witsand, in favour of ABSA. The registration of the mortgage bonds has been admitted by Benade.

[27] ABSA's allegation that the mortgage bonds read with the *"standard terms and conditions"* pertaining to mortgage bonds (annexures "E1" and "E2" to the declaration) contained material terms in respect of the facility agreement, cannot be faulted. Benade, purported to deny these allegations, with regard to the incorporation of the standard terms and conditions (annexures "E1" and "E2"), but this denial is without substance, and untenable if regard is had to the express terms of the mortgage bonds which pertinently incorporated "E1" and "E2".

[28] On a conspectus of the evidence, I am satisfied that the contractual terms contained in the mortgage bonds as well as the standard terms and conditions applicable thereto apply to the facility agreement.

(ii) whether each of the written agreements, in respect of the overdraft facilities on 5 August 2004, (P1), 20 June 2005, (P2) and August 2007 (P3), had the effect of novating all prior agreements in relation to the overdraft facility.

[29] It is evident that the facility letter(s) issued by ABSA was not a legal document in the true sense of the word but merely an information letter relating to the increased limit on the overdraft facility. In fact, Du Plooy elaborated that it was standard banking procedure to direct a letter of this nature to a client, after an increase of an existing overdraft facility had been granted. Furthermore, that the account number of Benade remained unchanged. If indeed it was a new agreement with regard to the overdraft facility, that would have entailed the opening of a new banking account under a new account number, which in this instance did not occur.

[30] On a proper evaluation of all the evidence I am satisfied that each of the written agreements, in respect of the overdraft facilities did not novate all prior agreements in relation to the overdraft facility between the parties.

(iii) the outstanding amount due and payable on the overdraft agreement by the Defendant to the Plaintiff in terms of the facility agreement, as claimed in the present action.

[31] Prinsloo's recalculation of ABSA's claim was based on the agreed interest rate of prime minus 2%. In this regard ABSA's version regarding the amount of its claim, and how the interest was calculated has not been gainsaid by Benade. There is no plausible reason to reject Prinsloo's evidence. In the absence of any other contradictory evidence, his evidence becomes conclusive and is accepted. It follows that ABSA has proven the amount of its claim being R6 080 263-50 as well as the interest rate of 7% that amounts to prime minus 2%.

(iv) whether the provisions of s 79(1) and 81(2) of the National Credit Act, 34 of 2005, (NCA) apply to the Plaintiff's claim as amended; (v) whether the increased limit of the overdraft facility constituted reckless credit, as contemplated in the NCA.

[32] Benade in her pleadings aver that at the time the parties concluded the agreement as recorded in annexure "P3" (in August 2007), she was over-indebted, as defined in section 79(1) of the NCA. It was further aver that ABSA failed to make a determination, as was required in terms of section 79(1) of the NCA and failed to conduct an assessment, as was required in terms of section 81(2) of the NCA. Premised on these allegations, the Defendant proceeded to contend that the agreement recorded in annexure "P3" *"was reckless and stands to be suspended, alternatively be set aside"* (in terms of section 83(1) and (2) of the NCA).

[33] The relevant provisions of the NCA, Benade relies upon read as follows:

> "*79. Over-indebtedness*
>
> *(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's-*
>
> *(a) financial means, prospects and obligations; and*
>
> *(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.*
>
> *(2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.*
>
> *(3) When making a determination in terms of this section, the value of-*
>
> *(a) any credit facility is the settlement value at that time under that credit facility; and*
>
> *(b) any credit guarantee is-*
>
> *(i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or*
>
> *(ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.*
>
> *80. Reckless credit*

(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)-

(a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.

(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to-

(a) meet the obligations under that credit agreement; or

(b) understand or appreciate the risks, costs and obligations under the proposed credit agreement,

at the time the determination is being made.

(3) When making a determination in terms of this section, the value of-

(a) any credit facility is the credit limit at that time under that credit facility;

(b) any pre-existing credit guarantee is-

(i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or

(ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor; and

(c) any new credit guarantee is the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.

81. <u>Prevention of reckless credit</u>

(1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

(a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

[34] Having regard to the evidence in this matter, the abovementioned defences raised by Benade is in my view without merit. Firstly, the increase of the overdraft facility in August 2007, annexure P3, did not constitute a new agreement but as indicated earlier, it merely is a standard letter by ABSA confirming that the facility on Benade's current account had been extended and increased. In my view no new credit agreement came into force. It was only a change to the credit limit that occurred under an existing credit facility. It follows the provisions of the NCA was not triggered. The NCA only applies to a credit agreement that was made before the effective date, `*if that agreement would have fallen within the application of this Act in terms of Chapter 1 if this Act had been in effect when the agreement was made, subject to sub-items (2) to (5)'* [2]. Furthermore, Item 4(5) provides as follows:

> *"Despite section 95, for the purposes of this item, a change after the effective date to any credit agreement that was made before the effective date constitutes the making of a new credit agreement, <u>unless it is a change to</u> –*
>
> *(A) the interest rate under a variable rate agreement; or*
>
> *(B) the interest rate or <u>the credit limit</u> under a credit facility.*"
>
> (*my emphasis*)

[2] Item 4(1) of Schedule 3 of the NCA.

[35] In view of the above-mentioned, the provisions of the NCA are not applicable. But secondly, even if be applicable, the defences raised under the NCA cannot succeed for the following reasons:

[36] In argument it was advanced by Benade's counsel, Mr. W Vos that ABSA failed to adequately asses the creditworthiness of her as it should have assessed the income of her and the Second Defendant separately and not lumped it together. It was furthermore contended that no proper income and expenditure accounts supported by source documents and audited accounts were obtained; that Benade was already 55 years old when the last facility was increased in 2007 and in the circumstances the conduct of the bank was reckless. For the latter proposition reliance was placed on the matter of In Absa Bank Ltd v De Beer and Others [3]. In that matter the bank claimed payment of R 1 740 737.00 plus interest from the first and second defendants based on a mortgage loan agreement dated 14 January 2008. There was an initial loan granted to the first and second defendants in the amount of R 651 000.00 which was secured by a mortgage bond. A second loan of 14 January 2008 was secured by a second mortgage bond. All the loans were for a commercial purpose, namely farming on the first and second defendants' smallholding. The claim against the third defendant, the daughter of the first and second defendant's, was based on a suretyship dated 13 February 2006. The first defendant was employed by the Western District

[3] 2016 (3) SA 432 (GP).

Municipal Council until his retirement in 2002. He was then 60 years old. When the loan was granted, the first defendant was 65 years old, which meant that the loan had to be repaid by the time that he had reached the age of 85. At the age of 85, he was far beyond his working life to secure an income to repay the loan. The court in considering the implications of section 81 of the NCA, and held that:

> "*[58] The question is whether in terms of s 83(1) I must declare the present credit agreement as reckless. An agreement is reckless in terms of s 80(1)(a) if 'the credit provider failed to conduct an assessment as required by section 81(2).*
>
> *[59] It is argued on behalf of the plaintiff that the fact that the scorecard exists shows that the bank conducted an assessment. This is surely so but in my view, for two reasons, the assessment made does not comply with s 81(2).*
>
> *[60] The first requirement is that 'reasonable steps' must be taken to assess the proposed consumer's existing means, prospects and obligations. To me this also means that the assessment must be done reasonably, ie not irrationally. Only a reasonable assessment will comply with the following phrase in the preamble to the Act — 'to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting'.*
>
> *[61] It is clearly irrational to have taken the third defendant's, ie the surety's, income into account in coming to the conclusion that the 'existing financial means' existed to pay the instalments. As already pointed out above, a surety does not fall within the definition of a consumer in s 1 of the Act. Furthermore, the surety remains totally out of*

> *the picture until the principal debtors have failed to comply with their obligations.*"
>
> …….
>
> *[63] ….[T]he First defendant was surely idealistic to believe he could produce the necessary income for survival and service of the ever mounting debt from small-scale farming, that is farming with Lucerne and poultry on an approximately 5 hectares. Furthermore, we have the first defendant's evidence that, apart from filling in the application form, the plaintiff never required proper income/expenditure accounts supported by the necessary source documents, not to even mention audited accounts.*"

[37] Mr Vos submitted that the facts in the De Beer case supra, are largely similar to the facts in the present instance and that this court should follow its reasoning.

[38] Mr P. de B. Vivier SC, contended that ABSA took the required reasonable steps to fairly and objectively assess the creditworthiness of Benade. It was also argued that Du Plooy was an experienced banking official and her evidence that she obtained all the relevant information, documentation and applied a specific procedure to assess Benade's financial position cannot be gainsaid and should be accepted in this instance.

[39] It is now trite in our law that each case must be decided upon its own facts and a consumer who alleges reckless credit granting as a defence must set out such defence with sufficient particularity. Mere bare accusations by a

consumer that credit was granted recklessly will however not suffice[4].

[40] In terms of section 81 of the NCA, a credit provider must undertake an assessment before entering into a credit agreement. A credit grantor is therefore required to take reasonable steps to meet its assessment obligation in terms of ss 81(2) and 82(1) which should be determined objectively upon the facts in each given case[5].

[41] In the present instance, the facts are not similar as suggested by Counsel for Benade but clearly distinguishable. The evidence of Du Plooy does not suggests that when the loans were granted to Benade that both her and the Second Defendant's income were simply lump together when the Bank came to the conclusion that 'existing financial means' existed to pay the instalments. Moreover, Benade was a very successful businesswoman in her own right at the time she applied for credit. It also needs to be mentioned that Du Plooy at the time that the increased facility of R5.6 million was approved, had been the Defendant's relationship manager for approximately 7 years. According to Du Plooy's testimony which she would have obtained and considered Benade's the income and expenditure statement(s); bank statements; the information with regard to the Defendant's credit record, as recorded by a credit bureau; the income derived from her business; a letter from the accountant and or auditor to confirm the her income; and the financial statements or management statements of the business. Du Plooy

[4] SA Taxi Securitisation (Pty) Ltd v Mbatha [2013] ZAGPJHC 134 at para 42; see also ABSA Bank Ltd v Malherbe [2013] ZAFSHC 78 (16 May 2013) at para 76 and 78.
[5] Horwood v Firstrand Bank Ltd [2011] ZAGPJHC 121 (21 September 2011) par 5.

was adamant that she followed this procedure in respect of the increased facility of R5.6 million.

[42] Du Plooy was also in constant communication with the auditors of Benade , who acted as the accountants for her and the Second Respondent and their various business enterprises. Furthermore, the application for the increased limit of the facility was prepared by Du Plooy, and submitted to ABSA's credit department, where two senior credit managers considered and eventually approved the facility. The panel of credit managers conducted their own independent verification of the relevant information which had been submitted, in support of the application for the increased limit on the facility.

[43] It also need to be mentioned that although the limit of the facility was exceeded for brief periods in August and September 2009, the Benade maintained the monthly payments on the facility and kept it below the agreed limit of R5.6 million for 2½ years. The limit was only exceeded on a permanent basis, from February 2011.

[44] In respect of the email communication referred to by Du Plooy, the point was made by Benade in June and November of 2010 that she had always conducted her account in a responsible manner and cannot be blamed for the weak economy and the negative effects thereof on the property market.

[45] Having regard to the abovementioned facts objectively, ABSA has

done a reasonable assessment of Benade's creditworthiness and was their conduct rational in the circumstances. The defence raised by Benade in this regard is therefore devoid of any merit and cannot succeed. It follows that ABSA has proved its claim of R6 080 263-50, together with interest thereon at the rate of 7% *per annum*, capitalised monthly, from 8 May 2012 until date of payment with costs.

[46] ABSA has also applied in terms of Rule 46A (2)(a) for an order declaring the said Witsand property executable. The two main aspects which a court must consider in an application under this rule are firstly, whether the property at issue is the primary residence of the judgment debtor and secondly, whether alternative means are available to the judgment debtor to satisfy the judgment debt, other than execution against his or her primary residence.

[47] ABSA has accepted, for the purpose of the determination of the application to execute, that the property is the primary residence of the Benade and the Second Defendant. With regard to the second requirement, it is evident that Benade has not disputed the claim by ABSA that they have no other means to satisfy the judgment and is in fact impecunious. In my view there are clearly no alternative means available to Benade, other than execution against the property, to satisfy the judgment debt.

[48] With regard to the setting of a reserve price, as contemplated in rule 46A(9)(a) and (c), the price of R7 300 000-00, as contended for by Benade, is

in my view unrealistic given the history of the matter, particularly Benade's unsuccessful attempts, over many years, to sell the property.

[49] In my view, the price of R4 000 000-00, would be a realistic price.

[50] For all of the abovementioned reasons the following order is made:

1. Judgment is granted in favour of the Plaintiff, ABSA, in terms of prayers (a), (b) as amended, (c) and (d) of the Amended Declaration.

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LE GRANGE, J