VAN HULSTEYNS ATTORNEYS

«fnbaccno»

MAT«MAT»

SUMMONS

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG «Division» DIVISION, «Court»

CASE NUMBER: \_\_\_\_\_\_\_\_\_\_\_

In the matter between:

|  |  |
| --- | --- |
| FIRSTRAND BANK LIMITED | Plaintiff |
| AND |  |
| «Defname1» «Defsur1»  IDENTITY NUMBER: «ID1» | Defendant |

TO: THE SHERIFF FOR THE HIGH COURT

INFORM

«Defname1» «Defsur1»

(Identity Number: «ID1»), an adult fe/male, whose full and further particulars are to the Plaintiff unknown and having chosen domicilium citandi et executandi at «Domadd» and at «immadd» [the mortgaged property].

Hereinafter called the Defendant that

FIRSTRAND BANK LIMITED, a company duly incorporated and registered with limited liability, a registered bank in terms of the Banks Act, No 94 of 1990 (“the Act”) with its principal place of business situate at 1 Merchant Place, c/o Fredman Drive and Rivonia Road, Sandton, Johannesburg and carrying on business from inter alia 1 Enterprise Road, Fairlands.

(hereinafter called the Plaintiff),

hereby institutes action against the Defendant in which action the Plaintiff claim the relief and on the grounds set out in the particulars annexed hereto.

I N F O R M the Defendant further that if Defendant disputes the claim and wishes to defend the action, the Defendant shall:

1. Within 10 (TEN) days of the service upon the Defendant of this summons, file with the Registrar of this Court at the HIGH COURT BUILDING, VON BRANDIS SQUARE, PRITCHARD STREET, JOHANNESBURG OR PAUL KRUGER AND MADIBA STREET, PRETORIA CENTRAL, PRETORIA notice of Defendant intention to defend and serve a copy thereof on the Attorneys of the Plaintiff, which notice shall give an address (not being a post office or poste restante) referred to in Rule 19(3) for the service upon the Defendant of all notices and documents in the action.

2. Thereafter and within TWENTY (20) days after filing and serving notice of intention to defend as aforesaid, file with the registrar and serve upon the Plaintiff a Plea, Exception, Notice to strike out, with or without a Counter-claim.

I N F O R M the Defendant further that if the Defendant fails to file and serve notice as aforesaid, Judgment as claimed may be given against the Defendant without further notice to the Defendant or if having filed and served such notice, the Defendant fails to plead, except, make application to strike out or counter-claim, Judgment may be given against the Defendant.

AND immediately thereafter serve on the Defendant a copy of this Summons and return the same to the Registrar with whatsoever you have done thereupon.

The Defendant’s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the Defendant claim that the order for execution will infringe that right it is incumbent on the Defendant to place information supporting that claim before the Court.

DATED at SANDTON on this «sumdate»

REGISTRAR OF THE HIGH COURT

VAN HULSTEYNS

Plaintiff's Attorneys

Suite 25, 3rd Floor

Katherine and West Building

114 West Street

Sandown, Sandton

TEL: (011) 523-5300

FAX: 086 624 5558

E-mail: ;

REF: B SEIMENIS/ MAT«MAT»

c/o LEE ATTORNEYS

51 Elandslaagte Street

Hazelwood

Tel: (012) 346 – 7040

Ref: L Lee

VAN HULSTEYNS ATTORNEYS

«fnbaccno»

MAT«MAT»

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG «Division» DIVISION, «Court»

CASE NUMBER: «caseno»

In the matter between:-

|  |  |
| --- | --- |
| FIRST RAND BANK LIMITED | Applicant/Plaintiff |
| And |  |
| «Defname1» «Defsur1» | Respondent/Defendant |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

NOTICE OF OPPOSITION TO MEDIATION

RULE 41A (2)(a)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Please take note that the Applicant/Plaintiff opposes the referral of this matter to mediation.

The Applicant/Plaintiff does so for the following reasons:

Given the many judgments of the Supreme Court of Appeal and the Constitutional Court in regard to matters under the National Credit Act, 2005, and the declaring executable of immovable property, which is sought in such combined summons, it is appropriate and essential that this matter be dealt with by the above Honourable Court itself in execution of its mandatory role of judicial oversight.

The Respondent/Defendant is in no way precluded from approaching the Applicant/Plaintiff and/or its duly appointed representatives throughout the litigation process to discuss possible alternative dispute resolution procedures.

lt is the Applicant/Plaintiff's belief that, at this stage in the litigation proceedings, there exist no bona fide defence to the Applicant/Plaintiff's case and as such it cannot be ascertained what possible material disputes of fact are capable of referral to mediation proceedings.

lt is, at this stage in the litigation process, the Applicant/Plaintiff's bona fide belief that he most expedient resolution to this matter would be through the hearing of his matter by the above Honourable Court.

Should it be discovered during the litigation process that mediation is indeed possible the Applicant/Plaintiff reserves the option of acting in accordance with Ruel 41A(3) (a).

This notice is herewith done entirely without prejudice as envisaged in Rule 41A(2)(d).

Dated at Sandton on this the \_\_\_\_\_\_\_\_\_ day of February 25

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

VAN HULSTEYNS

Applicant's Attorneys

Suite 25, 3rd Floor

Katherine and West Building

Corner Katherine and West Streets

Sandown

Sandton

TEL: (011) 523-5300

FAX: 086 624 5558

E-mail:;

REF: B SEIMENIS/ /MAT«MAT»

c/o LEE ATTORNEYS

51 Elandslaagte Street

Hazelwood

Tel: (012) 346 – 7040

Ref: L Lee

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

AND TO:

«Defname1» «Defsur1»

RESPONDENT

«Domadd»

Being the chosen domicilium citandi et executandi

AND TO:

«Defname1» «Defsur1»

RESPONDENT

«immadd»

Being the immovable property

VAN HULSTEYNS ATTORNEYS

«fnbaccno»

MAT«MAT»

PARTICULARS OF CLAIM

THE PARTIES

The Plaintiff

The Plaintiff is FirstRand Bank Limited, a company having a share capital duly formed and incorporated as such in accordance with the laws of the Republic of South Africa, having company registration number 1929/001225/06 and carrying on business from inter alia 1 Enterprise Road, Fairlands. Its principal place of business is situated at 1 Merchant Place, c/o Fredman Drive and Rivonia Road, Sandton, Johannesburg.

The Plaintiff is registered as a general bank in accordance with the Bank’s Act, 94 of 1990. The Plaintiff is also a registered Credit Provider in terms of the National Credit Act 34 of 2005 (“the NCA”), having been allocated credit provider registration number NCRCP20.

The Defendant

The Defendant is «Defname1» «Defsur1» (Identity Number: «ID1»), an adult fe/male, whose full and further particulars are to the Plaintiff unknown and having chosen domicilium citandi et executandi at «Domadd»; email «email»; and at «immadd» [the mortgaged property].

JURISDICTION

It is respectfully submitted that the above Honourable Court has jurisdiction to entertain this action by virtue of the fact that the hereinafter referred to immovable property is situated within the Court's jurisdiction.

THE IMMOVABLE PROPERTY

The subject matter of this action is the immovable property being:

«fullpropdescription».

Which bears the physical address: «immadd»

(hereinafter referred to as “the immovable property”)

THE LOAN AGREEMENT/S AND MORTGAGE BOND/S

On or about «Loandate1» and at or near «loanplace1», the Plaintiff, at all relevant times represented by a duly authorised person and the Defendant acting personally, concluded a written agreement of loan (“the Loan Agreement”). A true copy of the Loan Agreement is annexed hereto marked “POC1”.

LOAN AGREEMENTS

On or about «Loandate1» and at or near «loanplace1», the Plaintiff, at all relevant times represented by a duly authorised person and the Defendant acting personally, concluded a written agreement of loan (“the Loan Agreement”). A true copy of the Loan Agreement is annexed hereto marked “POC1”.

On or about «loandate2» and at or near «loanplace2», the Plaintiff, at all relevant times represented by a duly authorised person and the Defendant acting personally, concluded a written agreement of loan (“the Loan Agreement”). A true copy of the Loan Agreement is annexed hereto marked “POC2”.

As security for the loan (set out more fully hereunder) the Defendant hypothecated to the Plaintiff the immovable property under cover of a First Mortgage Bond «bondno1» registered in the office of the Registrar of Deeds on «bondregdate1». A true copy of the Mortgage Bond is annexed hereto marked “POC2”.

MORTGAGE BONDS

As security for the loan (set out more fully hereunder) the Defendant hypothecated to the Plaintiff the immovable property under cover of a:-

First Mortgage Bond «bondno1» registered in the office of the Registrar of Deeds on «bondregdate1». A true copy of the Mortgage Bond is annexed hereto marked “POC3”;

Second Mortgage Bond «bondno2» registered in the office of the Registrar of Deeds on «bondregdate2». A true copy of the Mortgage Bond is annexed hereto marked “POC4”.

The material and express terms of the Loan Agreement/s as read with the Mortgage Bond/s (hereafter referred to as “the security documents”) for the purposes of these proceedings were, inter alia:

The Plaintiff agreed to grant to the Defendant a loan in the amount of R«loanamount1» ("the loan amount");

The principal debt amounted to R……. made up as follows

Loan amount R«loanamount1»

Initiation fee R

Thereafter, on or about «loandate2» the Plaintiff agreed to grant to the Defendant a loan in the amount of R«loanamount2» ("the second loan amount");

The Plaintiff granted the loan/s to the Defendant subject to a covering Mortgage Bond being registered in favour of the Plaintiff over the immovable property.

The total amount outstanding would bear an initial variable interest at a rate of «LOANINTRATE»% nominal per annum calculated and compounded monthly. The variable interest rate was linked to the Plaintiff’s prime interest rate and would be adjusted with each change to such rate.

OR USE THIS IF TIERED

The total amount outstanding would bear an initial variable interest at a rate of «LOANINTRATE»% nominal per annum calculated and compounded monthly. The interest rate was tiered and variable and therefore the interest rate and interest charges were subject to change. The variable interest rate was linked to the Applicant’s prime interest rate and would be adjusted with each change to such;

The initial interest rate was based on a Loan to Value ratio of 80%. It was to increase as follows:-

|  |  |
| --- | --- |
| LTV | RATIO |
| 80% - 90% | Initial Rate + 0.5% |
| 90% - 100% | Initial Rate + 1% |
| 100% - 110% | Initial Rate + 1.5% |

The amount outstanding together with interest would be payable by the Defendant to the Plaintiff in «INSTALMENTPERIOD1» monthly instalments each in the amount of R«INSTALMENTAMOUNT1», subject to alteration, payable on the ???? day of each month in advance.

The amount outstanding together with interest would be payable by the Defendant to the Plaintiff in «INSTALMENTPERIOD1» monthly instalments each in the amount of R«INSTALMENTAMOUNT1» in respect of the first Loan Agreement and «INSTALMENTPERIOD2» monthly instalments each in the amount of R«INSTALMENTOUT2» in respect of the second Loan Agreement, subject to alteration, payable on the first day of each month in advance and subsequent instalments no later than the first day of each succeeding month;

The Defendant would be placed in default if the Defendant failed to pay any amounts due in terms of the agreement and failed to rectify the breach within 10 days of delivery of written notice, then and in that event, the Plaintiff would (after compliance with the National Credit Act, if applicable) have the right, at its option, to claim repayment of the full outstanding balance or terminate the agreement, upon which all the amounts whatsoever owing to the Plaintiff by the Defendant would then forthwith be payable in full. The Plaintiff could then institute proceedings for the recovery thereof and for an order declaring the immovable property executable

A certificate purporting to be signed on behalf of the Plaintiff, whose authority or signature need not be proved, would be proof until the contrary is proved of the balance owing and the fact that it is due, owing and payable;

The Defendant agreed that collection costs on the attorney and client scale would be charged by the Plaintiff in the event of the Plaintiff having to enforce the agreement;

The Defendant chose «Domadd» as the chosen domicilium citandi et executandi; and

The immovable property was hypothecated to the Plaintiff as security in the amount of R«BONDAMOUNT», being the capital sum together with an additional amount of R«ADDAMOUNT».

The immovable property was hypothecated to the Plaintiff as security for the:-

First mortgage bond in the amount of R«BONDAMOUNT», being the capital sum together with an additional amount of R«ADDAMOUNT».

Second mortgage bond in the amount of R«bondamount2», being the capital sum together with an additional amount of R«addamount2».

THE EVENTS FOLLOWING THE CONCLUSION OF THE HOME LOAN AGREEMENT AND THE MORTGAGE BOND

Following the conclusion of the loan and registration of the Mortgage Bond, the Plaintiff advanced the loan amount to the Defendant. Any and all suspensive conditions were fulfilled, alternatively were waived by the Plaintiff as the party in whose favour the conditions were to operate exclusively.

The Plaintiff varied the interest rate from time to time as it was entitled to.

In terms of the security documents, the Defendant became liable to make payment of monthly instalments to the Plaintiff.

In breach of the Defendant’s obligations to the Plaintiff, the Defendant failed and/or refused to make payment of the monthly instalments.

On «DEMANDDATE» the Plaintiff, caused a letter of demand, to be addressed to the Defendant’s chosen domicilium citandi et executandi. A true copy of the letter of demand is annexed hereto marked “POC3”

To date the Defendant has failed and/or refused to remedy the breach.

As a result, the total outstanding amount has become due and payable.

As at «S129DATES», being the arrears outstanding on the loan account when the Mortgage Bond was called up, the Defendant was in arrears with his/her monthly instalments to the Plaintiff in the amount R THIS IS THE AMOUNT ON THE S129 LETTER.

As at «ARREARSDATE», the Defendant was in arrears with his/her monthly instalments to the Plaintiff in the amount of R«ARREARSAMOUNT» .

The Defendant’s monthly instalment presently totals R«INSTALMENTAMOUNT».

A statement for the period «STATEMENTDATES» relating to the Defendant’s loan account is annexed hereto marked “POC3”, in terms of which it is apparent that the Defendant has failed to make payment of various monthly instalments.

The last payment in the amount of RAMOUNT was made on DATE.

Accordingly, as at «CERTDATE», the Defendant failed to make payment to the Plaintiff of the instalments referred to and the arrear instalments amount to approximately ??? months.

As at «CERTDATE», the Defendant was truly and lawfully indebted to the Plaintiff in the amount of R«RCAPITAL» together with interest thereon currently accrued at the rate of «JINTRATE»% nominal per annum calculated daily and compounded monthly with effect from «JDATE» to date of payment, both days inclusive.

A Certificate of Balance is annexed hereto marked “POC4”.

FURTHER FACTORS IN SUPPORT OF THE ORDER SOUGHT BY THE PLAINTIFF TO HAVE THE IMMOVABLE PROPERTY DECLARED SPECIALLY EXECUTABLE

In support of its claim declaring the immovable property specially executable, the Plaintiff, in accordance with section 26(3) of the Constitution of the Republic of South Africa Act, 1996 (“the Constitution”), relies on the following:

the Plaintiff lent and advanced monies to the Defendant at the special instance and request of the Defendant, which loan and advance gave rise to the Defendant becoming indebted to the Plaintiff;

the Defendant willingly caused to be registered the Mortgage Bond referred to above in favour of the Plaintiff knowing that in the event of breach the Plaintiff would seek an order declaring it executable for their debt;

the immovable property serves as the Plaintiff’s security in respect of the amount due and payable by the Defendant to the Plaintiff;

the Defendant has failed to make payments of the monthly instalment due to the Plaintiff under the security documents, resulting in the full amount owing to the Plaintiff by the Defendant becoming due and payable and entitling the Plaintiff to an order declaring the immovable property specially executable;

in the light of the Defendant’s persistent breaches of his/her obligations to the Plaintiff to make payment of the monthly instalments, there are no alternative methods for the Plaintiff to recover the accelerated amount owed to it by the Defendant. Had there been some other reasonable way in which the judgment debt can be liquidated within a reasonable period without having to execute against the Defendant’s residence (if such be proved), the Plaintiff submits that the Defendant would ensure payment of the judgment debt prior to these proceedings being instituted;

to the Plaintiff’s knowledge, the immovable property is used for residential purposes. It is unknown to the Plaintiff whether the immovable property is the Defendant’s primary residence and whether the immovable property is presently occupied. There is nothing in the Plaintiff’s records to indicate how many persons currently occupy the property or any details relating to such persons. The Plaintiff is accordingly unable to state whether there is in fact a household headed by women, disabled persons, aged or if there are any children;

to the best of the Plaintiff’s knowledge, the immovable property was not acquired by or with the aid of a State subsidy;

given the history of the account there is little or no prospect that the arrears will be liquidated within a reasonable period and, consequently, it is just that an order declaring the immovable property specially executable be granted;

the proportionality of prejudice which is likely to be occasioned to the Plaintiff in the event that an order is not granted declaring specially executable the immovable property outweighs any prejudice which may be occasioned to the Defendant;

upon hearing the application declaring the immovable property of the Defendant executable, the Court may call for further information to enable this Court to exercise its discretion whether or not to order that the property be declared specially executable and the Defendant is entitled to place information regarding relevant circumstances before the Court as it may deem appropriate within the meaning of Section 26(3) of the Constitution and Rule 46A;

by virtue of the amount owed to the Plaintiff by the Defendant having become due and payable and the fact that the immovable property constitutes the Plaintiff's security in respect of the indebtedness of the Defendant to the Plaintiff, it is appropriate that an order be granted;

the Plaintiff is unaware of the financial strength of the Defendant, save to state that, in light of his/her failure to service his/her monthly obligations, it would appear that the Defendant’s financial position is presently constrained. Although it is the case that the Plaintiff is a major commercial bank, the implications of default en masse by its debtors is serious and makes it necessary to recover debt in proceedings of this nature;

it is unknown if the Defendant is employed or has a source of income to pay off the debt. If the Defendant is employed or has a source of income, however, the income is clearly insufficient to service his/her monthly obligations to the Plaintiff;

the Plaintiff has been unable to establish whether the Defendant has other assets which can be attached to settle the outstanding amounts, however bearing in mind the outstanding amount is substantial, the attachment and selling of movable property is unlikely to satisfy even a small portion of the outstanding amount. Attaching and selling the movable property of the Defendant might only delay the inevitable and increase the hardship of the Defendant;

the Defendant will not lose access to housing as a result of execution being levied against the immovable property of the Defendant in terms of a court order as the Defendant can at any time enter into an appropriate lease agreement; and

the Plaintiff has no ulterior motive in approaching the Court for the order as set out herein.

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

SAUNDERSON, JESSA AND DAWOOD REQUIREMENTS

The immovable property is a residential property, according, the Plaintiff, will make application to the above Honourable Court on notice in terms of the provisions of Rule 46A of the Uniform Rules of Court for an Order declaring the immovable property specially executable, as prayed for below and the Defendant is given notice that:

The Defendant’s attention is drawn to section 26(1) of the Constitution, which accords to everyone the right to have access to adequate housing. Should the Defendant claim that the order for execution will infringe that right, it is incumbent on the Defendant to place information supporting that claim before the Court.

The Defendant is entitled to place information regarding relevant circumstances before this Court as it may be deemed appropriate within the meaning of Section 26(3) of the Constitution and Rule 46.

The Defendant is advised that in terms of Rule 46A no writ shall be issued against their primary residence unless a court, having considered all of the relevant circumstances, orders execution against such immovable property.

The Defendant is advised that if he/she objects to the immovable property being declared executable and is called upon to place such facts and submissions before the Court to enable the Court to consider them in terms of Rule 46A(6) to enable the court to consider them in terms of Rule 46A(8) of the Rules of Court and that a failure to do so may result in an order declaring the immovable property specially executable consequent upon which their property may be sold in execution.

The Plaintiff would be significantly prejudiced if the order sought in terms of this matter were not to be granted and it would not be justifiable in the light of what is detailed herein to order that the Plaintiff must first execute against the Defendant’s movables before executing against the immovable property. In The Standard Bank of South Africa v Saunderson 2005 (2) 264 (SCA), the judgment expressly states that, where a property is expressly hypothecated, the immovable property may be attached in order to satisfy the Bond Holder’s claim.

Compliance with the provisions of the NATIONAL CREDIT ACT 34 OF 2005 (“NCA”)

It is submitted that the Plaintiff has complied with the provisions of Section 129 and Section 130 of the NCA.

On «S129DATES», the Plaintiff, caused notices in terms of the provisions of Section 129 of the NCA, as read together with Section 130 thereof (“default notice”), to be addressed to the Defendant by registered mail.

It is respectfully submitted that the South African Post Office would, in the normal course, have secured delivery of a registered item notification slip, informing the Defendant that a registered article was available for collection.

A “Track and Trace Report” was conducted on the default notice referred to above. Internet generated “track and trace reports” retrieved from the South African Postal Services, which records how the default notice was actioned at each Post Office and captured.

A true copy of the default notice, proof of postage and the track and trace report are annexed hereto marked “POC5”.

It is evident from the annexed Track and Trace Report that the registered default notice was correctly dispatched to the Postal Offices, «S129POSTOFFICE», which Postal Office has jurisdiction over the Defendant’s nominated address, namely «Domadd» in terms of the security documents. IF NOT SAME POST OFFICE, SHOW HOW

A reasonable consumer in the position of the Defendant would have ensured retrieval of the registered item from the Post Office and engaged with the contents thereof. This notwithstanding, the Defendant has elected not to take action thereon or enforce the rights contained therein.

On «S129DATES» the Plaintiff caused an email to be forwarded to the Defendant advising the Defendant of the breach and attaching the default no tice. A copy of the email is annexed hereto as “POC8”. ELABORATE HOW YOU KNOW EMAIL ADDRESS IS DEFENDANT’S.

OR USE THIS IS REGISTERED EMAIL:

It is submitted that the Plaintiff has complied with the provisions of Section 129 and Section 130 of the NCA.

On «S129DATES», the Plaintiff, caused notices in terms of the provisions of Section 129 (1)(b) of the NCA, (“default”), to be transmitted to the Defendant by way of electronic mail in accordance with Sections 12 and 19 of the Electronic Communications and Transaction Act 25 of 2002 (“ECTA”).

This was done by placing reliance on Section 12 0f ECTA read together with Sections 65, 129(5)(b) and 129(5)(7) of the NCA. 19(4) of the Act and Section 12 of the ECTA provides that “in writing” can be in the form of a data message.

This was the manner in which the default notice were transmitted to the Defendant.

A copy of the default, a copy of the electronic mail through which the default notice was transmitted, together with proof of delivery, are annexed hereto marked "POC5”.

The Registration Certificate (proof of delivery) as required by Section 129(8)(a) of the NCA was generated by an Authorised Agent of a Licensed Postal Services Operator.

The Postal Services Act 124 of 1998 provides for the regulation and control of postal services, and defines two categories of Postal Services n South Africa: reserved postal service or an unreserved postal service.

The proof of delivery in NCA section 129(7) is satisfied by “(a) written confirmation by the postal service or its authorised agent….”

Registered Communication Proprietary Limited is an Authorised Agent of a Postal Service License Operator (Postal Services Act 124 of 1998, Schedule 2, s(1(c)], and thus complies with the provisions of Section 129(7) (a) of the NCA by confirming the delivery of the no tice.

The Registered Communication Proprietary Limited, in its capacity as an authorised agent of the Licensed Postal Service Operator, has issued registered Communication Certificates (“proof of delivery” notices), confirming in writing that it received the electronic mail and that delivery of the electronic mail, comprising of the default notice to the Defendant’s elected email address, namely «email», was duly completed, further certifying that the electronic mail and that the electronic email and default notice was accurately delivered and unaltered.

The Registered Communications, Registration Certificate is annexed hereto marked “POC6".

The methodology employed in transmitting a registered email and registered SMS is as follows:

The sender composes the email or SMS to be transmitted;

The email or SMS is then sent to the servers of the licensed postal service operator or its authorised agent, in this instance Registered Communication Proprietary Limited;

Receipt of the electronic Default Notice is formally registered and time stamped by the Licensed Postal Service Operator (or its authorised agent), with the sender’s relevant metadata i.e. the sender's contact details, date and time of sending relating to the outbound email or SMS being recorded;

The email or SMS is delivered to the recipient at the electronic addresses so elected by the recipient and the recipient's metadata i.e. the recipient's contact details, date and time of receipt (OR Non- Delivery) of the inbound email or SMS is recorded.

At this point in the process both the sender and the recipient's metadata is then presented on a Registered Communication Registration Certificate which is equivalent to a "Track and Trace Report" produced for normal registered post, which is then digitally signed by Registered Communication Proprietary Limited (in its capacity as an authorised agent of a Licensed Postal Service Operator), which signature confirms in writing that the electronic mail or SMS was duly received, encrypted and delivered to the recipient’s elected address.

From the aforesaid I respectfully submit that the method of service employed in sending the Default Notices is compliant with ECTA and meets the requirements as contemplated in section 129(5)(b) read together with section 129(7)(a) of the NCA and meets the threshold of an acceptable mode of delivery of section 129 Default Notices in terms of the NCA, as supported by the Constitutional Court in Kubanya v Standard Bank of South Africa LTD 2014 (4) BCLR 400 (CC).

The method of service is further sound, capable of being proven, is recognized in law, is effective and indeed constitutes proper electronic service.

Registered Communication Registration Certificates in the present action demonstrate to this Honourable Court that the Default Notices were indeed transmitted to a person at an address as elected by the recipient, the electronic message meets the requirements of the ECTA and the delivery of the electronic message is duly confirmed in writing by an authorised agent of a Licensed Postal Service Operator, as required by the National Credit Act 34 of 2005.

It is therefore humbly submitted that there has indeed been compliance with the requirements as set out in the NCA through the process utilized herein

Regardless of the aforementioned section 129 letter calling upon the Defendant to remedy the breach of the Loan Agreement as read with the Mortgage Bond, the Defendant has not done so, having been in default of the Loan Agreement for at least 20 (twenty) business days and at least 10 (ten) business days having elapsed since the Plaintiff delivered the aforesaid notices to the Defendant.

The Plaintiff has complied with Section 130 of the NCA in that:

the Defendant is in default of the Loan Agreement for a period of at least 20 (twenty) business days;

at least 10 (ten) business days have elapsed since the Plaintiff delivered the S129 letters to the Defendant;

There are no matters arising by virtue of the claim detailed herein which are pending before the National Consumer Tribunal that may result in an order affecting the issues to be determined by this Honourable Court; and

The Plaintiff has not approached the Court during a time that this matter was before a debt counsellor, alternative dispute resolution agent or Ombud with jurisdiction or consumer court.

SECTION 86(10) IN TERMS OF THE NCA

On or about DATE OF 17.1 the Plaintiff received a Form 17.1 in terms of the NCA advising that the Defendant had applied to be placed under Debt Review. A copy of the Form 17.1 is attached hereto as annexure “POC?”.

On «S129DATES» the Plaintiff caused a letter to be sent to the Defendant in terms of Section 86(10) per pre-paid registered mail to the Defendant, advising the Defendant that their account is in arrears and that 60 business days have elapsed since the date on which the Defendant applied for debt review and the debt review process was terminated with immediate effect. A true copy of the said notice together with proof of service on the Defendant, the debt counsellor and National Credit Regulator is annexed hereto as annexure “POC>”.

SECTIONS 88(3) OF NATIONAL CREDIT ACT 34 OF 2005(“THE NCA”)

On or about DATE OF 17.1 the Plaintiff received a Form 17.1 in terms of the NCA advising that the Defendant had applied to be placed under Debt Review. A copy of the Form 17.1 is attached hereto as annexure “POC>>”.

On or about DEBT REVIEW COURT ORDER DATE the Defendant obtained a debt review restructuring order in debt review proceedings before the National Consumer Tribunal, in terms of which his debt with the Plaintiff (including in respect of the Loan Agreement), was formally restructured (“the debt review order”). A copy of the order is attached as annexure “POC?”. Or The Defendant was found to be over-indebted and the payments to the creditors were rescheduled. A copy of the 17.2 is annexed hereto as “POC>”.

Notwithstanding the terms of the debt review order OR PICK ONE the restructure of the debt the Defendant failed to adhere thereto, with the result that the Defendant’s debt review proceedings were automatically terminated.

The Plaintiff is accordingly entitled to commence debt enforcement proceedings under the Loan Agreement against the Defendant.

Notification of the termination was forwarded to the Defendant’s debt counsellor as well as to the National Credit Regulation. A true copy of the emails are annexed hereto as “POC?”.

SECTION 129(3) SUBJECT TO SUBSECTION (4) OF THE NCA

The Defendant is advised that, the provisions of Section 129(3)(a) and (4) of the National Credit Act 34 of 2004 (“the NCA”) may apply.

In order for the credit agreement to be reinstated the Defendant is to make payment of all arrear amounts owing to the Plaintiff, together with the Plaintiff’s permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement.

The arrears amounts, enforcement costs and default charges referred to above may be obtained from the Plaintiff or its attorneys of record.

PRE-LITIGATION STEPS

Prior to instructing its attorneys of record to institute legal proceedings against the Defendant, the Plaintiff inter alia, performed all or some of the following steps in an attempt to avoid litigation in the weeks prior thereto:-

The Plaintiff has on numerous occasions contacted the Defendant in an attempt to enter into suitable arrangements.

Contacted the Defendant telephonically. Where the Plaintiff was unable to contact the Defendant telephonically the Plaintiff left a voice mail or sent a SMS notification or an email.

Contacted the Defendant telephonically approximately \_\_\_\_\_\_\_\_\_telephone calls were made during the period \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to date. Where the Plaintiff was unable to contact the Defendant telephonically the Plaintiff left a voice mail or sent a SMS notification or an email.

Approximately \_\_\_\_\_\_\_\_\_\_\_\_\_ SMS notifications were sent and approximately \_\_\_\_\_\_\_\_\_\_\_emails were sent during the period \_\_\_\_\_\_\_\_\_\_\_\_\_\_ to date;

Entered into arrangements with the Defendant. Any arrangements entered into between the Defendant and the Plaintiff have not been honoured.

A copy of the OCS report is annexed hereto as annexure “POC?”. OCS is an online bank communication system that records details of the applicant’s communications and dealings with its customers and attorneys.

PREVIOUS ACTION

The Plaintiff previously instituted legal proceedings arising from the same cause of action against the Defendant. The Plaintiff obtained judgment against the Defendant and the immovable property was eventually attached under case OLD CASE NUMBER. The Defendant has settled the arrear instalments due to the Plaintiff and in terms of Constitutional Court under case CCT 73/2015, between Plaintiff and Ms. Nomsa Nkata, delivered on 21 April 2016, the credit agreement has been reinstated and the judgment which had previously been granted against the Defendant in this Court, was rendered of no force or effect. In the circumstances, no plea of lis pendens may be raised to the new legal action.

CONCLUSION

In the circumstances, the Plaintiff is entitled to enforce the Loan Agreement/s against the Defendant for all amounts owing thereunder as together with an order declaring the immovable property executable as envisaged in the security documents.

WHEREFORE the Plaintiff prays for judgment against the Defendant, for:-

Payment of the sum of R«RCAPITAL»

Interest thereon at the rate of «JINTRATE»% nominal per annum calculated daily and compounded monthly with effect from «JDATE» to date of payment, both days inclusive.

Declaring specially executable for the said sum

«fullpropdescription»

Authorising the issuing of a writ of execution in terms of Rule 46 as read with 46A for the attachment of the immovable property described in paragraph 3 above;

that a reserve price be set for the sale of the immovable property, at a sale in execution, at a value to be determined by the Honourable Court;

Cost of suit on the Attorney and Client scale; and

Further and/or alternative relief.

DATED at SANDTON on this the «sumdate»

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

BARBARA SEIMENIS

(Retained Rights of Appearance in terms of Section 114(5) of the Legal Practice Act 24 of 2014)

VAN HULSTEYNS

Plaintiff's Attorneys

Suite 25, 3rd Floor

Katherine and West Building

Corner Katherine and West Streets

Sandown, Sandton

TEL: (011) 523-5300

FAX: 086 624 5558

E-mail:;

REF: B SEIMENIS/ /MAT«MAT»

c/o LEE ATTORNEYS

51 Elandslaagte Street

Hazelwood

Tel: (012) 346 – 7040

Ref: L Lee