IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE Case No. 1359/18

In the matter between:

SWAZILAND BUILDING SOCIETY Plaintiff

And

THE TRUSTEES FOR THE TIME BEING OF BHUBHUDLA TRUST 1st Defendant

NTOMBIFUTHI DLAMINI 2°d Defendant

BUSISIWE SPHIWE NGCAMPHALALA 3rd Defendant

Neutral citation : Swaziland Building Society v The Trusteesfor the Time Being of Bhubhudla Trust and 2 Others. (1359/18).. SZHC..[58).

Coram : Maphanga J

Date heard : 14 December 2018
Date delivered: 29 March 2019

Summary: *Civil Procedure - Summary Judgement-Rule 13 joinder-whether permissible in summary judgement Proceedings.*

Civil Procedure - Rule 32(5)- scope of discretion and requirements to be met by defendant in order to repulse summary judgement application;

JUDGMENT

[1] This application concerns a summary judgment motion brought by the Plaintiff against the defendants. In this suit the Plantiff seeks judgment against the defendants jointly and severally sounding in the sum of E3 219 441-85 to in respect of monies loaned and advanced, together with interest on the sum at the rates of 11 % and 12.5 % per annum calculated daily and compounded monthly in arrears from pt July 2018 to date of final payment inclusive; costs at attorney and client scale including collection commission as provided for in the in the mortgage bond.

[2] The Plaintiff, Swaziland Building Society (The Society) also seeks to have certain hypothecated property being Portion 42 (a portion of Farm 18) of Farm No.706 situated at eZulwini in the Hhohho district, measuring 2030 square metres, held by the 1st defendant ('Bhubhudla Trust' or simply 'The Trust") under Deed of Transfer No. 772/2013 dated 17th October, 2013 especially executable.

[3] The 2nct and 3rct Defendants are the surviving Trustees of the r= Defendant, a famiy property holding trust founded and established by Mr Nqaba Dlamini ('the founder')in 2008 under Notarial Deed, after the demise of the founder who was also the third trustee of 1st Defendant.

[4] The essential facts are that during the years 2014 and 2015 the founder of the Trust initiated and negotiated certain loan agreements which were eventually concluded between the first Defendant represented by the Trustees and the plaintiff. The loan agreements were concluded within a period of one year apart and pursuant thereto the plaintiff advanced the sums of E2, 550, 000 (Loan 1) in 2014 and E2,000,000 (Loan 2) in 2015 respectively respectively.

[5) It is common cause that the key material terms of the loans were that interest was exigible on the capital sums loaned at initial rates of interest of 9.25% and 9.5% per annum in respect of Loans 1 and 2 respectively. It was a special condition of the loan agreements that these initial interest rates were variable at the Plaintiffs discretion and in particular in regard to the 2nct loan amount a special interest condition was inserted in terms of which the Plaintiff would charge stipulated rate at a prime lending rate plus 2% subject the right and discretion to vary this rate up or down at its instance.

[6] The repayments of the loan accounts were to be serviced on terms that the 1st defendant would make monthly repayments in respect of each of the loan accounts held with the plaintiff at stipulated remittance rates of E26,245,00 payable over 15 years for Loan 1 and that of E21, 568.00 per month payable over 14 years in respect of Loan 2. Both these loans were secured in part by way of two mortgage bonds passed and granted by the trustees which bonds were registered against a certain immovable trust property under Mortgage Bond instruments No. 518 of 2014 and No. 524/2015. The mortgage bonds were registered over the pt Respondent's hypothecated property I have referred to.

[7] In addition the founder and the 3rd Defendant further provided further security in the form of suretyship bonds in terms of which they each jointly and severally bound themselves to the Plaintiff as sureties and co• principal debtors in respect of and to the extent of the loan liability incurred in regard to the said loans.

[8] Written into the aforesaid mortgage and suretyship deeds were the now standard renunciation and waiver clauses by the defendants of their benefits, defences and exceptions that would otherwise avail at common law.

[9) In terms of certain special conditions in the loan agreement and mortgage bond it is common cause that the plaintiff required the 1st defendant to provide a homeowners insurance policy to cover loss of damage by fire or other proprietary risks in respect of the buildings on the property in respect of which the mortgage bond obtained.

[10) I should mention as part of the key common cause facts, that beyond the above-listed securities, the late Mr Dlamini as the founder procured a credit life insurance policy (also known as a mortgate protection insurance policy) to cover the capital sum of the debt and other related or ancillary sums attaching to the loans (the full value) to cover the loan balance represented. I shall revert in greater detail to these conditions and its attendant circumstances in this judgment as it touches on one of the cardinal issues arising in this action.

[11] In the event and pursuant to the loan and mortage bond the plaintiff in due course advanced the loan sums in respect of both loans which were administered through a consolidated account. The sums solicited and advanced were drawn down by the 1st defendant in a course of transactions upon special application and the plaintiffs consent. This was done in a series of transfers of the cash sums of E500.00 at each instance on divers instances in respect of both loan amounts. All these transactions have been recorded in the standard requisition forms that plaintiff has attached to the declaration. Nothing turns on these papers.

Breach

[12] It is also common cause that after the death of the principal the account fell into arrears and as a result acting on the breach foreclosed on the loans and instituted the present action for the recovery of the loan sums which upon acceleration of the loan debt became due and payable and the ancillary remedies.

[13] On the 27th August 2018 the plaintiff then instituted the present action against the defendants. Thereafter with the defendants having issued a notice to defend the action the plaintiff filed a declaration and shortly thereafter notice for the present summary judgement application. The summary judgement follows the rule 32 (3) of the High Court rules and brought on notice supported by and affidavit veryfying the the claim by reference to the various documents pertaining to the loan including agreement including the loan agreements, mortgage bonds, suretyship agreements together with a certificate of balance setting out the quantum of the claim. These appear as **Annexures A to G** to the particulars of claim.

[14] The defendants *have* opposed the summary judgement application by filing an affidavit resisting summary judgment wherein they raise a number of contentions challenging the basis and quantum of the plaintiffs claim. That necessitated that the defendant seek and obtain leave to file a replying affidavit to which I shall have regard to herein momentarily. But before I do I find it most timely to briefly set out the principles governing summary judgement in order to properly frame the issues that arise in this application as much as the parties respective contentions in that regard

SUMMARY JUDGMENT-THE PRINCIPLES

[15] Perhaps the most erudite exposition of the principles in the interpretation of our summary judgment rules emanates from the recent exploration and examination of the origins and scope of the rule in recent judicial opinions by my brother Mamba Jin a number of decisions including *inter alia* the case of Swaziland Tyre Services and other cases that followed closely upon the core reasoning on the subject of the rules of summary judgment law in this jurisdiction.

(16] Summary judgment procedure is governed by rule 32 of the Rules of the High Court. It is a extraordinary, robust, expeditious and expedient remedy enabling a litigant with an unassailable liquid or liquidated claim in law to obtain time- efficient and cost-effective satisfaction by attaining a relatively early judgment thus obviating a protracted full blown action or trial proceedings in that regard.

The rule

[17) In terms of Rule 32 (5) a defendant in an action wherein the plaintiff has brought a summary judgment motion, in order to succesfully repulse such

an application, is required to file an opposing affidavit within which he must satisfy the court in relation to that claim that 'there is an issue or question in dis12ute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof'.

[18] Before the recent restatement of the position by Mamba Jin the series of judgments I refer to there had been an inclination by our courts to equate our rule with others in the jurisdiction where a more stringent test for repelling summary judgment is applied in line to the relative rules to summary judgment prevalent to those jurisdiction. In a word His Lordship Justice Mamba has demonstrated, by careful analysis and examination of the wording of our rule, the fundamental distinction between the conventional test and the one dictated by the broader wording of our rules on the subject.

[19] Prior to the case ***Swaziland Tyre Services (Pty) Ltd v Sharp Freight (Swaziland) (Pty) Ltd*** **(381/2012) [2014) SZHC74** ('the *Tyre Services* case') and allied cases [1] the then prevailing judicial position had been to consider the disclosure of a bona fide defence to be the only viable basis for resisting summary judgment by a defendant in summary judgment proceedings. With much hindsight it does appear, and I say this with the requisite respect and diffidence, that this may have been an overstatement of the rigour of the rule premised on a misreading and misconception of its true scope.

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[1] See *Zanele Zwane v lewis Store (Pty) ltd t/a Best Electric* Civ i l Appeal 22/200 l, *Swaziland Industrial Development ltd v Process Automatic Traffic Management (Pty) Ltd* Civil Case No. 4468/08. *Sinkhwa Semaswati ltd ua A-listerBread and Confectionary v PSB Enterprises (Pty) ltd* Case No. 3830/09, *Nkonyane Victoria* v *Thakila Investment (f'ty) Ltd, Musa Magongo v First National Bank (Swaziland)* Appeal Case No. 3 l /1999. *Mater Dolorosa High School v RJ..\fStationer)' (Pty) Ltd* Appeal Casi: No. 3/2005. Also *Swaziland Development and Financial Corporation v Vermaak Stephanus* civil case no. 402 l /2007 and *Swaziland Livestock Technical Services v Swaziland Government and Another*

[20] In the *Tyre Services* case the learned Judge, recalling his previous remarks in an earlier judgment in, *Sinkhwa Semaswati t/a Mister Bread Bakery and Confectionery v PSB Enterprises (Pty) ltd* (an unreported judgment delivered in February 2011) poignantly remarked as follows as pertains the rule:

> *"{3] In terms of Rule 32 (SJ (a) of the Rules of this Court a defendant who wishes to oppose an application for summary judgment" ... may show cause against an application under sub rule 1 by affidavit or otherwise to the satisfaction of the court and, with the leave of the court the plaintiff may deliver an affidavit in reply." In the present case the defendant has flied an affidavit. In showing cause rules 32 (4)(a) requires the defendant to satisfy the court "... that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof" 1 observe here that before these rules were amended by Legal Notice Number 38 of 1990, rule 32 (3)(b) required the defendant's affidavit or evidence to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor." This is the old rule that was quoted by counse/for the plaintiff in his heads of argument and is similarly worded, I am advised, to rule 32(3)(b) of the Uniform Rules of Court of South Africa. Thus, under the former or old rule, a defendant was specifically required to show or "disclosefully the nature and grounds of his defence and the material facts relied upon therefor", whereas under the present rule, he is required to satisfy the court that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial on the whole claim or part thereof The Defendant must show that there is a triable issue or question or that for some other reason there ought to be a trial. This rule is modeled on English Order Number 14/3 of the Rules of the Supreme Court.*
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> *[4] A close examination or reading of the case law on both the old and present rule shows that the scope and or ambit and meaning of the application of the two rules appear not to be exactly the same. Under the present rule, the primary obligation for the defendant is to satisfy the court that there is a triable issue or question, or that for some other reason there ought to be a trial. This, I think, is wider than merely satisfying the court that the defendant has a bona fide*

defence to the action as provided in the former rule. See VARIETY INVESTMENTS {PTY) LTD v MOTSA, 1982-1986 SLR 77 at80-81 and BANK OF CREDITAND COMMERCEINTERNATIONAL (SWAZILAND) LTD v SWAZILAND CONSOLIDATEDINVESTMENT CORPORATJON LTD AND ANOTHER,1982-1986 SLR 406 at page 406H-407E which all refer to a defendant satisfying the court that he has a bona fide defence to the action and fully disclosing its nature and the material facts relied upon therefor. I would also add that where there is a dispute offact a court would be entitled to refuse an application for summary judgment. Under the present rule, the defendant is not confined or restricted to satisfying the court that he has a bona fide defence to the action or to complain of procedural irregularities.

[SJ In MILES v BULL{1969} 1QB258; [1968} 3 ALL ER 632, the court pointed out that the words "that there oughtfor some other reason
to be a trial" of the claim or part thereof, are wider in their scope than those used in the former rule referred to above. "It sometimes ha recise "issue or uestion in ctsusts which ought to be tried." nevertheless it LS..QJll)_arent that forsome other reason there ought to be a trial....

Circumstances which mi ht a ord "some other reason or trial" mi ht be where e.. the de endant is unable to et in touch with some material witness who might be able to provide him with material or a de ence or i the clsim is o a hig]J_Jy__com licated or technical nature which could only properly be u_nde[!itoodi such evidence were given or if the p/aintJ!fs case tended to show that he had acted harsh!_y_qndunconscionablv and it is thou ht desirable that if he were.J.QJJ_etiudsunsiu: at all it should be in full light of publicity."

[21) Since these judgments our courts have come squarely and firmly in favour of the above interpretation as the correct position on the application of rule 32(5) in summary judgment application. In effect it leads to this proposition- that the disclosure of a genuine or clear defence by a defendant in his affidavit resisting summary judgment should readily enable him to defeat a summary judgment bid by many a plaintiff, but that is not the standard he must invariably satisfy.

(22] The emerging consensus is that, whilst the defendant does not evince a potent or *bona fide* defence to the claim he is called to answer claim or set up material facts in support thereto, it is sufficient if he is able to demonstrate that there is 'triable issue' or an issue in respect of which there ought to be a trial but may equally defer summary judgment if he shows that there is a question or issue as to the validity of the whole or part of the plaintiffs claim which ought to be referred to trial.

(23) Again in ***First National Bank Swaziland Ltd t/a Wesbank v Rodgers Mabhoyane du Pont case No.4356/09*** a judgment delivered on the 8th June 2012, the learned Mamba J encapsulated the essense of the principle behind the rule in the following words:

> *"[7] In Sinkhwa Semaswati (supra) I referred to the differences between our current rule and the old rule on this topic and I do not find it necessary to repeat that here, suffice to say that the old rule required the defendant to disclose fully the nature and grounds of his or her defence and the material facts relied upon therefor. Emphasis was placed on a defence to the action. The current rule entitles a defendant to satisfy the court "... that there is an issue or question in dispute which ought to be tried" or that for some other reason the matter should be referred to trial."* (My underscore emphasis)

[24] Now, the upshot of the caveat in English case of ***Miles and Bulls*** as in other judgments founded on the same principles, is that it affirms the view that a defendant might not be well placed to raise a recognisable and clear defence to the plaintiffs claim or any element thereof, but may fervently raise certain questions or queries to aspects of the claim that, at the very least, require further and closer examination or thorough investigation , if justice were to be served to the parties.

[25] In effect many a defendant in their opposition to summary judgment may bring to light certain circumstances that call into question the validity and intergrity of the plaintiffs claim in some very material respect.
With these principles in mind I do note that it has been submitted on behalf of the Plaintiff that neither of the defendants' grounds nor lamentations against the grant of summary judgment have any merit in law; thus as the argument goes, the issues set out therein are not tenable defences against the plaintiffs claim. That may well be. It is understood that these issues or submissions may not have been articulated in such a way that they give rise to valid or viable defences.

[26] The reason for that may well be that the material facts and evidence that would enable the defendants to fully consider and mount a consise case against the plaintiffs claim are not attainable to them on account of the fact that the only persons *au fait* with the full facts are the plaintiffs as the deceased with whom plaintiff excusively dealt with in those dealings is no

more. The only way fuller evidence could be obtained would be upon full discovery and disclosure of the material documentary evidence.

[27] In final anaysis the question that arises is whether the defendants averments on affidavit meet the test formulated above to enable it to stave off summary judgment in the sense of showing 'cause against the application for summary judgment'.

DEFENDANT'S CASE

[28] The 2°d defendant, in her affidavit resisting summary judgment, raises a series of issues in opposition of the plaintiffs application. These issues and the attendant submissions warrant separate consideration in their turn. I propose to traverse these issues in the context of the circumstances and the plaintiffs contentions in rebuttal.

QUANTUM OF PLAINTIFF'S CLAIM

[29] The second defendant disputes her liability as surety and co-principal debtor to the plaintiffs claim. When the matter was argued before me, Mr Motsa who appeared for the Plaintiff, graciously conceded the error and indicated that the Plaintiff was no longer pursuing a claim founded on suretyship against the znct Defendant as indicated also in the plaintiffs replying affidavit. For that reason the application is taken as especially amended in this regard and therefore it is of no moment herein.

[30) But she also disputes the first defendants liability for the stated claim on divers aspects or elements thereof on the quantum.

Interest Rate Claim

[31J A certificate of balance submitted by the plaintiff in support of the sums claimed reflects an item representing a significant total of 1, 763, 097.50 described as the aggregate of compound interest charged against the account over a the period of indebtedness from 30th April 2018 to 30th June, 2018. It is quite likely at a blush that this is an error for I cannot conceive of how so much interest could have accrued to this magnitude within a period of two months.

f32] I must hasten to point out that this is my own observation and there is nothing in the plaintiff affidavit taking issue with this specific element. She does however quibble the rate of interest claimed in the summons and the declaration.

[33) As regards the interest sums raised in the summary judgment these are two-fold. The plaintiff seeks to recover post-litigation interest accruing a temporae morae at 'rates of 11% and 12.25% respectively on the sum of E3 219 441. 85 from the date of issue of the summons to date of final

payments. I am left with a question as to how it is proposed the interest claimed in this respect is to be reckoned based on two rates of interest on a composite or lump sum. Again it would seem there must be an oversight or error in drafting that occurred here.

(34) The nub of the interest question relates to the rates of 11 % and 12.25% considered against the plaintiffs averments in setting out the basis of the interest claim and ostensibly its computation on the Joans itemised therein as Loan 1 and Loan 2 respectively. In paragraph 1.1.2 the plaintiffs cause for the interest rates charged and the method of levying interest expressed in terms of a payment cycle is averred as follows:

'1.1.2 the first Defendant:

1.1.2.1 agreed to pay:

1.1.2.1 interest to the Plaintiffon the outstanding balance of the capital sum, at the Plaintiffs initial interest of9.25% and 9.5 per annum, calculated daily and charged monthly in the arrears;

1.1.2.1.2 the plaintiffs usual and customary charges, interest/commission, whilst acknowledging the plaintiffs right to adjust the same from time to time

1.1.2.2 undertook to repay the capital sum, together with interest thereon in monthly instalments, initially equalling E26, 245.00 (loan No.1 over a period of 15 years) and £21,568 ('loan No.2' over a period of 14 years)"

[35] Although not specifically set out in that manner it is apparent that the interest rates of stated above pertain to 'Loan 1' and 'Loan 2' respectively and *have* been understood in that way by the second defendant. Her complaint in regard to the interest rate is simply that the rates of interest of 11 % and 12.5% charged against the defendant are at variance with the rates appearing in the loan agreements and that the plaintiff appears to *have* unilaterally varied the said stated rates to the prejudice of the first defendant. In other words she disputes the contractual basis for the interest rates used to compute the accrued interest component of the claim.

[36] In summary the defendants complaint is that in so far as the plaintiff has in its computation of the interest claim premised that interest component on capitalised compound values calculated on the basis of a variable and higher rate than what she terms an agreed fixed rate, they dispute liability

to such a claim on the basis that it is at variance with the agreed terms. They therefore contend for leave to defend the claim on this basis[2].

(37] The plaintiff rebuts these contentions as misconceived and without merit on the basis that they are based on a misreading of the loan instruments (the loan agreeement and the mortgage bond deed) in that these documents make plain that the rates of 9.25% and 9.5% are explicitly stated to be 'initial' interest rates and that in any event the agreement and bond terms provide and allow for a variable rate of interest at the discretion of the plaintiff. In support of this argument plaintiff points to and invokes clause 17 of the Mortgage Bond deed on whose terms the plaintiff is permitted to capitalise and compound the interest rate chargeable."

(38] Further it was contended on behalf of the plaintiff that in any case the interest claims the method of calculation and the basis thereof are especially pleaded and set out in the Plaintiffs declaration being paragraph 1.1.2 of the particulars of claim averred.[4]

(39] It is evident that as regards the interest aspects of the claim the plaintiff primarily relies on the general and special terms and conditions of the agreement as articulated in the Letters of Loan Offer/ Acceptance as read with the Mortgate conditions.

(40] The general terms attaching to the main agreement are clear in so far as the rates of interest stipulated as 9.25% in respect of loan 1 and 9.5% in respect to loan 2 are described therein as 'initial' annual rates of interest. These terms must be read in conjunction with the special conditions to the main agreeement which contain reservations in favour of the plaintiff to vary the rate of interest applicable to the loan amounts

[41) It is clear therefore that accepting and subscribing to these general terms and special conditions of the Jetter of offer, the first defendant agreed to be bound by these conditions. Further clauses 17 in the relative Mortgage Bond Deeds securing these loans these conditions of the variation of interests rates as well as the mode of calculation on the loan accounts allows for the capitalisation of the accrued interest and the compounding of the loan sums in that regard from time to time at the stipulated payment cycle set out in the bond instruments. I do not think these circumstances admit to any doubt over the power of the plaintiff to vary the interest rates or the fact that these rates were variable at the instance of the plaintiff.

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[2] Id paragraphs 8, 14 and 15 of Affidavit Resisting Summary Judgment at page 96-98 of Book of Pleadings

[3] Id clause 17 at page 82 of Bk.

[4] Id page 8-9 of Book.

[5] See Special conditions to Loan Offer at pages 23 and 26 of Book of Pleadings

(42) For these reasons I take the view that the first defendant's complaint over the interest rates has no merit.

Debit Entries and Levied

(43] In addition to disputing the interest the 2nct defendant raises other questions in regard to certain sums appearing in the statements of account annexed to the Declaration reflecting the history in the operation of the loan accounts. Considering the terms and conditions attaching to the loan and mortgage agreements I think the defendants' complaints over the debit items charged against the loan account operated by the 1st defendant are not justified.

(44) The disputed items are specified as the additional charges added to the capital loan amounts including bond costs, service charges and administration fees the contractual basis whereof is called into question. Representing the plaintiff, Mr Motsa submitted that there is nothing untoward in the manner these items were charged against the account as the first defendant agreed as per clauses 21 and 23 of the Mortgage Bond that all administrative and finance costs and fees as well as dispursements pertaining to the mortgage bond and ancillary charges in respect of insurance premiums advanced and remitted in favour of the 1st Defendant would be charged and debited into the loan account. I must agree as that appears very clearly provided for in the said conditions. These items are reflected in detail in the printout statement reflecting the history of transactions captioned under the code "**AD**' and '**MI**" to show the administrative costs and interest. I must add that where the statements reflect the debit entries under the codes "MP"and "SC" for instance, the relative narration against those items show these to be "Mortgage Protection" premiums and "Service Charges" respectively.

[45) There are further items appearing in regard to the statement of account in regard to loan 2 **(ANNEX "B" to the Replying Affidavit at pp 29 to 40)** that the defendant's dispute as 'unexplained substantial debits' that defendant suggest have been surreptitiously added to inflate the capital loan account and for which no basis or foundation is established in the declaration. These items include certain figures that seem to have been transposed from another statement under the title **'SUBSIDIARY MORTGAGE LOAN ACCOUNT STATEMENT'** bearing the Account No: 136332-02 at pages 41 to 43 of the Book of Pleadings.

[46] To bring into focus the items complained of, it may be noted that in that 'sub-account' the items that the defendants are referreding to are given the code type HZ and are shown as a credit. A corresponding entry in annexure B, the so-called MORTGAGEACCOUNTSTATEMENTappears under the reference either under the code 'HJ' and reference "sub-account repa", In the Replying Affidavit deposed to for and on behalf of the

plaintiff, the Managing Director, Mr Timothy Nhleko explains these items as those transposed from especially created sub-accounts for the premiums.

[47] I must say that upon close examination of the items the 2nd defendant refers to as unexplaned debits under the reference **'SUB-ACCOUNT REPA'** appear to correspond to the figures appearing as credit under the code **'H2'- SUB-ACCOUNT HARV'** in the statement running from page 41-43.

[48] The Managing Director's explanation of these debits in paragraph 7 of his Replying Affidavit is that the entries are a mere internal accounting arrangementin terms of which sub-accounts for the insurance premiums and the second loan account were created for the convenieance of separating the handling of the mortgage insurance and home-owners insurance premium entries; that these in consolidation found their way to the main loan account as debits from the credit entries in the premiums and loan 2 sub-accounts. Indeed these figures appear to be reflected in the sub-accounts for premiums and second loan account as a consolidation process to reflect the charges for the recovery of premiums 'Hl' and 'HMP' on the one hand and in the main account.

[49] I do not consider the whys and wherefores of these accounting mechanisms to amount to much in terms of raising genuine triable issues as they do perhaps matters of detail and convenience: Likewise, as in the insurance, service and other administrative charges I do not think there is merit in the defendant's complaints or submissions in this regard.

[50] This leaves the main complaint as pertains the issues regarding the mortgage protection insurance circumstances in relation to the defendants alleged liability for the repayment of the loan. Linked to these issues is the question of the perceived potential liability of the plaintiff for the mooted counterclaim for any damages arising out of and delictual or contractual breaches by the plaintiff in their role as an insurance intermediary. I turn to this question at this time.

MORTGAGE PROTECTION INSURANCE

[51] It is common ground between the parties that the founder of the first respondent (the late Mr Nqaba Dlamini) arranged with the plaintiff to take out what is termed 'credit life insurance' also known as mortgage protection policy for the mortgaged debt. It is also common cause that the plaintiff duly facilitated these arrangements and procured the placement of the cover. This was done at the time of conclusion of the first loan agreement in 2014.

[52] For the sake of absolute clarity it is important to comment briefly on the nature of this type of insurance and the sort of risk it is intended to indemnify in the insurance market. Usually a credit provider or lender will require the debtor to, at the inception of the risk or debt take out, and during the term of the agreement maintain credit life insurance so that he loan balance will be paid in the event of the death or disability ofthe customer or client. Typically the event assured is cover payable in the event of the client's death, disability or terminal illness or other catastrophic event that may impair the consumer's ability to service the loan. The sums payable are usually structured so that they decrease in correlation to the balance in other words becoming a decreasing sum assured product in insurance parlance.

[53) As may be seen from nature and purpose of the policy it is clear from these features that the product is mutually beneficial to both the lender and the client in that it serves as collateral security for both the insured and the credit provider in that it will guarantee payment of a sum equal to the outstanding debt under the credit or loan agreement upon the death of the life assured or their permanent disability. All indications are that this was the type of life insurance product that was placed on behalf of the deceased founder with the Swaziland Royal Insurance Corporation.s

[54] Having procured the mortgage protection plan the plaintiff also facilitated the maintenance of cover on behalf of the deceased through the remittance and recovery of premiums by levying and charging such premiums against the first defendant's loan account with the Society and that this arrangement subsisted until sometime in June 2018. According to the total premium deducted from the 11th April 2014 to 30th June 2018 amounted to **E88 975.80.**

[55] It is also not in doubt that unfortunately one of the events covered in terms of the policy came to pass in that the founder of trust died in February 2017. In that context the 2°d defendant at paragraphs 17 to 21 asserts the following:

> ***"17. The loan in dispute was secured by a Mortgage Protection Policy in terms of which, on the death of the principal (the late Mr. Nqaba Dlamini) of the*** *1st* ***defendant, a death benefit cover would settle the*** *t=* ***defendant's then existing liability with the Plaintiff facilitated the insurance cover with Swaziland Royal Insurance Corporation (SRIC), which the*** *t»* ***defendant had no contact with, even though the premiums were***

6 Previously SRIC,before the change of its moniker to Eswatini Royal Insurance Corporation (ESRIC),as it is presently known.

debited monthly from the t» defendant's account with the plaintiff and remitted to SRIC.

18. It is clear from the monthly debit items in the statement (Annexure BJ that there were premiums paid by the Jst defendant in this regard.

19. A perusal of pages 1 and 2 of Annexure B (being the Mortgage Account Statements) indicates that a standard rate o/0.68% of the outstanding sum was payable as a premium.

20. As Annexure B again reflects, this insurance premium was also payable in respect of sums in excess of E2, 000, 000.00 which meant that cover would be extended accordingly. However, the insurance cover was confined to E2, 000,000.00 when the principal of the Trust passed away in February 17"

[56J It seems to me that much of what the deponent asserts factually at paragraphs 19 and 20 of her affidavit as regards the *value* of the insurance covered or sums insured, is no more than her own deductions or suppositions. I also surmise from what she says that what she means by the 'insurance cover' being confined to E 2, 000, 000.00 is in reference to the total sums actually paid by SRIC upon the settlement after the deceased's death. It is another way of restating the fact that SRIC repudiated the claim in excess of E2 000, 000 or the balance of the mortage debt. That is why in paragraph 21 she proceeds to state that:

"21. the t» defendant contends that the Insurer should have paid/or the outstanding liability in full and is entitled to be indemnified by the Insurer which is liable to be joined as a third party in these proceedings in terms of Rule 13 of the Rules of this Honourable Court."

[57] I think in considering the defendant's protestations to the plaintiffs claims as relates to the insurance matter, a natural place to start is the 2nct defendant's assertion at paragraph 21 *above* which suggests an intent to join the insurer in the proceedings and in so doing transpose some form of defence to the plaintiffs claim on that basis. In my understand the essense of the Plaintiffs strident response to this assertion is simply that the 1st defendant's stated intention to seek indemnification from the insurers is not tenable as a defence to its claim in so far as the insurance policy does not create an accessory obligation to the mortgage bond.

Collateral not Accessory Obligation

[58] The law on this subject merits consideration. It has been stated that Credit life or mortgage protection insurance may be compared to a

performance guarantee bond or insurance as the indemnities provided via the former instruments by the insurer creat an obligation on it topay the mortgage balance covered by the instrument upon the happening of the assured event but is not an accessory obligation like a suretyship. Its purpose is to create a correlative obligation to protect the trust or trustees in the event of the death of the life assured principal or founder (the event) and make good the trust's or defendant's obligation under the bond. It creates a parallel relationship between the life assured and the insurer separate from that of the mortgagor and the credit provider. Logically the obligation under the Mortgage Protection Insurance is wholly independent of the underlying loan and bond agreement in comparatively much the same way as say letters of credit create a completely autonomous obligation separate and removed form an underlying sale agreement. It follows therefore that such disputes or issues that may subsequently arise between the insurer and the beneficiaries are of no moment in so far as the mortgagor's obligations are concerned.

I think it accords with the above reasoning and principles that the insurance arrangements although involving a proximate role of the credit provider on account of it having provided broking facilities to the deceased, these and the policy or contract is severable from the underlying loan obligation. For an analogy with performance guarantee obligations and the indemnities thereunder see ***Lombard Insurance Co. Ltd v Landmark Holdings (Pty) Ltd and The Trustees for the Time Being of the*** *Pringle* ***Bay Trust***[7].

[59] But the first defendant's contemplated joinder of the insurer and its allusion an intent to claim indemnity from it in respect of the debt does not presume to put up a defence to the plaintiffs claim but an indication of an intent to serve appropriate a third party notice on the insurers; which the 1st defendant considers a legitimate avenue and remedy arising out of the circumstances of this matter. That is the nub of the defendant's position in reference to the summary judgment application.
It is trite that a third party notice does not create a *!is* between the plaintiff and the third party nor is it intended to.[8]
The cardinal question becomes whether the contemplated Rule 13 process is a permissible or viable proposition for which summary judgment should stand over?

THIRD PARTY PROCEDURE

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[7] *Lombard v Landmark* & *Others* (343/08) (2009] ZASCA 71 (unreported) at paragraph 19-20 at pages 6 and 7 of the judgment where the court gives an analysis of a construction guarantee issued by an insurance company in favour of the owner or employer to pay the latter on demand the guaranteed sum in full upon the failure of the contractor's obligations.

[8] See Herbstein and *Van* Winsen, *The Civil Practice of the High Courts of South Africa,* 5th ed.)UTA at page 234; *Rabie v Kimberly Munisipaliteit* 1991 (4) SA 243 (NC) at 2SOE.

(60) Whilst the existence of an indemnity guarantee in the form of an insurance policy to cover liability for a debt may not strictly serve as a valid defence against a plaintiffs claim for a debt based on a breach of contract between itself and the defendant, *inter se,* our civil procedure does accommodate and provide a process for the joinder of a third party into the fold of the proceedings by service of a notic in terms of Rule 13 of the Rules of the High Court (Third Party Notice). This procedure enables a defendant to claim indemnification from a third party, in appropriated circumstances, against the judgement claimed against the defendant in the event of judgment being granted against the said defendant. **(See *Bunton v Coetzee* (20794/2014) [2016] ZASCA 31; *Oosthuizen v Castro and Ano.* (2858/2012) [2017] 4 All SA 876 (FB); 2018 (2) SA 529 FB).**

(60) The procedure for joinder under r13 provides a facility for enabling issues which are substantially the similar or correlative to be tried in a single hearing so as to avoid the difficulties and inconvenience of multiplicity of actions. It has been said to provide for the justiciability of the relief sought against a third party in pari passu with the relief in the principal easer.That is precisely what the znd defendant adverts to in paragraph 21 of her affidavit resisting summary judgment deposed on behalf of the 1st defendant and think it would be a traversty of justice in light of the peculiar circumstances of this matter were the defendants to be denied an opportunity to do so and have the door shut on its face.

[61] Properly framed I think it is in the context of the third party procedure that the znd defendant could reasonably speak of a legitimate expectation that the insurer's would indemnify the defendants in regard to the outstanding debt. Indeed the third party proceedure may conceivably be the sole substantive basis on which this matter may proceed to trial after the pleadings close.
In the exercise of the discretion conferred on the Court by the rule as to summary judgment I am firmly of the view that the contemplated third party joinder is another reason why it would not be timely to determine this matter on summary judgment. After all third party joinder has been held to be competent in provisional sentence proceedings in *Sardady v De Paiva* 1977 (1) SA 157 (T). But allied to the contemplated plea of indemnity the credit life insurance problem in this case has surfaced more than the contemplated third party joinder.

Plaintiff's role as an Insurance Agent or Broker

[62] This brings to mind what is perhaps a crucial element to the defendant's complaints which appears to me to be much broader and somewhat imprecise in its ambit. It is premised on the plaintiffs role as an intermediary which it assumed when it undertook the procurement and facilitation of the credit life policy. I must mention that the proper lens to

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[9] Herbstein and van Winsen, ibid (Slh ed.) at page 234.

view this scenario is not that of an altruistic and independent service provider. In the one sense the relationship of the plaintiff and the 1st defendant in respect of the insurance arrangements is an arms-length dealing where the plaintiff's role was one of an insurance agent or broker. But there is another angle to it. Whilst the mortgage insurance policy was ostensibly for the benefit of the trust or trustees in is clear that at another level there existed a comity or confluence of interests between the trust and the plaintiff as regards the security provided by the policy.

[63] In the latter sense the plaintiff may have been subject to a conflict of interest. This is in respect to the fact which is common cause that the plaintiff was uniquely placed in that upon the death of the deceased, it is the plaintiff that initiated filed and negotiated the insurance settlement process. There is no evidence that were any instructions by the Trust or trustees to initiate the claim nor is there anything to suggest there was any discourse or consultation or disclosure between the plaintiff and the surviving trustees in relation to the insurance affairs in the aftermath of the deceased's death or at any time during the course of the settlement process. This leads to the inescapable but beguiling perception that the plaintiffs vantage position was unique also in that it had a direct say and hand in how the policy was procured, structured administered and managed in as much from the facts it appears it was solely responsible for reaping the fruits of the policy.

[64] The Plaintiff's response to the defendants implicit imputation of plaintiffs liability for the inadequacy of the mortgage insurance cover is to reject the basis thereof. It invokes clause 1.2 of the Mortgage Bond in terms whereof it disavows its responsibility and or liability arising in its role as a broker for and on behalf of the deceased as regards the handling of the mortgage insurance transaction and account and on that basis claims indemnity for any prospective liability contemplated by the defendant's in this regard.

Indemnity Clause

[65] The wording of the indemnity clause relied upon by the Plaintiff to staving off the defendants' insurance assertions is contained in clause 1.2 of the standard mortgage bond deed as more fully appears at pages 65 and 77 of the Book of pleadings:

> *"In relation to the any policy or insurance referred to in this bond or any other policy of insurance whatsoever relating to the property hereby mortgaged or to the mortgagor, the Society shall in no circumstances be or be deemed to be Agent by the mortgagor and the Society shall in no circumstances whatsoever be liable to the Mortgagor or any other person in respect of any alleged inadequacy or invalidity of insurance; and in the event of the Society receiving any remuneration from any person or company whether by way of*

the commission or otherwise, in respect of or in relation to any such policy or insurance .... "

[66] The above clause seems to be consistent with the final sentence of the preceding paragraph 1.1 of the bond also seeks to place sole responsibility of ensuring adequacy of the insured value of the insurance indemnifying the credit provider from any risk of penalties occasioned by shortfall in the insurance coverage as follows:

> *"The mortgagor shall ensure that the insured values are adequate from time to time and shall have no claim of whatsoever nature against the Society in the event of under insurance and the insurance company enforcing average calcutations'?"*

[67] It seems to me that as a matter of interpretation principle, the efficacy of the indemnity relied on depends on the construction to be given to the qualifying reference in that clause to *.(JJJJ!_QQjj_g_Q{insurance referred taia this bond'* or the meaning of *'any other policy of insurance whatsoever relating to the properly hereby mortgaged or to the MORTGAGOR'.*

(68] The phrase 'any policy of insurance referred to in this bond' can only mean the policy of insurance' that the mortgagor is obliged to maintain *g* ainst the risks of fire or total loss (homeowners) in respect of the buildings on the property or any other risk that the SOCIETY'ma from time to time require with an insurance company to be approved by the Society.

[69] Likewise *'an other olic _g insurance whatsoever re/atin to the ro er hereb mart aged or to the MORTGAGOR*i's self explanatory in so far as the touchstone for reference there is in relation to the mortgaged property. It becomes apparent from the above wording that credit life or mortgage protection insurance policies by their nature do not attach or relate to.the mortgaged property but to the life assured and the risk of non-payment or non-performance in the event of death.

[70] In the context of this case it is clear that the 'MORTGAGORi' s the first defendant but the 'life assured' was the deceased, so thatthe phrase
'insurance relating to the mortgagor' cannot include a life insurance policy of the deceased. Based on this logical reasoning it becomes clear that the indemnity clause if given its proper restrictive construction does not avail the plaintiff in relation to the claimed indemnity. Surely it certainly cannot absolve the plaintiff for accounting to the first defendant in regard to the insurance claims and ancillary activities undertaken by it on behalf of the deceased and the beneficiaries/ trustees upon his death or from potential liability for any possible delictual or contractual claims

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IO Reference to 'under-insurance' and enforcement ofaverage calculations' refers respectively to the technical insurance terms as pertains adequacy in thevalue of the insurance cover in relation to the actual risk or repayment value; under-insurance being the deficit of value, whilst average calculations are the penalty adjustments the insurer may impose as penalties for underinsurance.

for damages arising out of the insurance contract. These vexed issues turn on the proper interpretation of the indemnity clause behind which the plaintiff seeeks refuge.

Interpretation of Contracts

[71] A question concerning the interpretation of an exclusionary or exemption clause in an insurance contract has arised before the courts in other Roman Dutch jurisdiction following similar common law principles as ours. We can certainly take a leaf on the approaches to interpretation of such contract clauses as persuasive to our system as well. Such was the situation in the South African case of Oosthuizen v Castro and Another-[11]. In that case the court found itself having to determine the efficacy of an exemption clause in a professional indemnity policy relied upon by an insurance company cited as a third party by the defendant in an action for delictual damages. The court considered leading English and South African law authorities on the interpretation of insurance provisions and in particular quoted the following dictum by **Smalberger JA** in the locus classicus on construing insurance contracts in South Africa - the judgment of ***Fedgen Insurance Limited v Leyds*** **1995 (3) SA ~33 (AD)** where at **p38** A-Ethe learned judge said:

> *"The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise .... Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted ...., for it is the insurer's duty to make clear what particular risks it wishes to exclude ..... A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability* is *limited, must be plainly spelt out. In the event of a real ambiguity the contra proferentem rule, which requires a written document to be construed against the person who drew it up, would operate against the insurer as drafter of the policy .... " (authorities relied upon excluded from quotation)"*

11 *Oosthuizen v Castro and Ano.* (2858/2012) [2017] 4 All SA 876 (FB); 2018 (2) SA 529 FB)

[72] To grant credit of the plaintiff it is arguable that the exemption mortgage bond clause that Mr Motsa has relied in the context of the factual circumstances as a whole gives rise to some ambiguity as to the interpretation its scope and application in reference to the words 'in relation to any policy of insurance referred to in this bond or any other policy of insurance whatsoever relating to the property" concerned in the mortgage. In such a case the above principles should ordinarily apply so that the adverse exemption clause should be restrictively interpreted against the plaintiff as the drafter of the mortgage conditions.

[73] Leaving for the moment the interpretation legalities there is another impediment to the plaintiffs exemption. If there is any ambiguity or doubt was to whether the taking up of the credit life policy by the deceased falls to be dealt with in terms of the said exemption clause 1.2 of the mortgage special conditions invoked by the plaintiff, the Managing Director will *have* put paid to such ambiguity to the application of the bond conditions to the mortgage protection guarantee circumstances when in that affidavit he stated the following at paragraph 7 of his affidavit:

> '7. *Ad Paragraphs 12 & 13*
>
> > *7.1 The plaintiff was lending the loan to a Trust. Therefore, the only insurance policy it strictly required was the homeowners policy. However, as extra security the deceased decided to take an extra insurance policy called the credit life insurance (alias Mortgage Protection Policy -* 'MPJ *through the Swaziland Royal Insurance Corporation via the Plaintiff In this case the insurance premiums were paid at an initial rate of E3S9.37 on page 1 of the statement rising to E1, 020.00 as drawdown increased"*

[74] By the plaintiffs own admission the defendant was exempt from the application of the said clause 1.2 in so far as the provision of the credit guarantee insurance on account of the first defendant being an artificial person. It follows therefore that the efficacy of the clause 1.2 relied on by the plaintiff in so far as it seeks to claim the indemnity therein is restricted to its role as an intermediary in relation to any insurance sanctioned under the mortgage bond or any insurance whatsoever relating to the property. The clause must therefore be restrictively applied to bond related insurances and no other extraneous policies such as the personal life insurance sought by the deceased of his own accord outside the terms and conditions of the first defendant's bond to apply only to insurances if any under the bond as relate to the property financed by the home loan.

(75] Due to its adverse effects it cannot reasonably be opened so wide as to include within its ambit any other voluntary and extraneous policy for which the society offered its brokerage services to the insured as a benefactor and founder of the first defendant in his personal initiative as a prudential measure.

The second reason the plaintiff cannot presume to seek refuge in the exemption or indemnity clauses invoked is simply that it seems to misconceive the essence of the znd defendants complaint to be an imputation or attribution of liability for any alleged inadequacy or invalidity of the mortgage protection policy on it. Nothing could be further from the truth and the facts as they appear on the papers.

[76] As may be seen from paragraph 21 which encapsulates in her frustration concerning the 'insurance problem', she seems to advert to an expectation that the insurance policy should have paid the Joan debt in full; hence her assertion that the insurer should be liable to be joined as a third party in these proceedings. Whatever the merit of those expectations and the suggested joinder, it is clear what the object of her concern is in the context of the action.

(77) In my view what in this context the plaintiff is not insular or from any responsibility arising from its role as a broker for the deceased in relation to its claim against the first defendant or its duties to the Trust, the trustees or beneficiaries in relation to its role, knowledge and function in relation to its undertaking as an intermediary in respect of the mortgage insurance arrangements. It should bear some responsibility not least among which is a duty to account to the interested parties who incidentally stand in the capacity as trustees who the plaintiff in part holds liable as sureties.

Arms-length collateral dealings

(78] It is clear that a significant focal point of the defendant's complaint is the plaintiffs admitted role as broker in the placement of the insurance instruments and its responsibilities in that regard. Within this matrix it becomes necessary to apply ones mind as to whether plaintiff owed the defendants any legal duties in regard to good faith and disclosure and to what extent this impacts on the efficacy of its claim. That this is a necessary dimension to the matter becomes abundantly clear in that it is self-evident and therefore common cause that plaintiff played a critical role as an interlocutor for and on behalf of the deceased in the acquisition of the policy and also the beneficiaries to the credit life insurance (the trustees, trust beneficiaries and the trust) upon the death of the deceased.

[79] The upshot of these circumstances and the matrix is that, the invoked indemnities notwithstanding there is no doubt that at the very least the plaintiffs position, apart from the obvious one of being a credit provider and mortgagee, it also acted as an insurance broker serving as an

intermediary but in so doing also action not purely on an altruistic basis but in its own self-interest for its own benefit on account of the value to it of the security and guarantee provided by the insurance bond.

I now come to the heart of issue. It is another significant common cause fact emerging from the papers that the complexity of the contractual matrix shows is that in the course of its undertaking as an intermediary the plaintiff initiated and prosecuted a claim against the insurers to redeem the guarantee held under the mortgage policy. There is an admission that the plaintiff submitted a claim with the insurer and it has disclosed in the replying affidavit that it was in the course of lodging such claim that the *"the insurer only paid for the initial loan and ex gratia for the other loans of the deceased under account number 136381 as appears in the copy of the statement marked annexure "K".*

[80] Without the background facts explaining what the reference to account 136381 relates to, I think this confounds the already complex circumstances surrounding the insurance affairs. The confusion abounds also because so far there has been no reference to another account apart from the mortgage bond account No. 136332 in relation to the mortgage loan account to which the foreclosure action relates. There is nothing to suggest that in the insurance claim undertaking the plaintiff was acting upon the instruction, in consultation with and upon proper sanction or approval by the trustees.

(81] On the contrary what emerges is a distinct impression that the trustees were completely in the dark regarding the insurance affairs of the deceased and by extension the position of the first defendant in that regard. It would appear it was not until after the death of the deceased and presumably after 'the settlement of the mortgage protection policy claim' that information regarding the mortgage insurance started percolating to the trustees. At some point in time after the said settlement there was a course of correspondence initiated by the znd defendant and the plaintiffs mortgage department. It was during this exchange that details of the insurance matters were revealed to the trustees. From these letters is is apparent that this was upon the surviving trustees having taken the initiative to make fervent enquiries as to the circumstances and terms of the settlement. It appears that this enquiry was made in October 2017 well after the insurance settlement having been effected in June 2017.

(82] It is necessary to reproduce the full text of the Jetter of enquiry concerning the insurance settlement as has been attached by the znd defendant to her opposing affidavit as Annexure Tl. It makes for insightful reading and it is addressed by the znd defendant on behalf of the trust:

'16 October 2017

THE MORTGAGE MANAGER
SWAZILAND BUILDINGSOCIETY
ASAKHE HOUSE
GWAMILE STREET
MBABANE.
Dear Sir/Madam

RE: BHUBHUDLA FAMILY TRUST ACCOUNT NUMBER 136332

1. *The money demanded by the Society as outstanding from the Trust in respect of the above-mentioned account is difficult to accept.*

2. *The trust loan accounts had a mortgage protection policy cover in the event of the death of the Trust principal. Premiums were religiously paid in respect of this insurance cover.*
3. *We have gone through the standard terms and conditions of the mortgage protection policy cover and we have not been able to find that excludes the benefit of settling the Trust liability by the insurer.*

4. *As we understand, the rejection of the insurance claim arises from the maximum cover of E2, 000, 000.00 (Two Million Emalangeni) in respect of each loan account unless certain conditions (such as medical certification in respect of certain medical conditio.ns) were fulfilled.*

5. *Kindly clarify when the condition in paragraph 4 above was introduced and detail its scope to enable us to scrutinise it*

6. *It also seems there is another factor of a consolidation of two loan accounts in order to limit the benefit of the insurance cover. We would obviously resist this because separate insurance premiums were payable in which case the benefit should accrue to each premium paying loan account.*

7. *Having regard to the basis of our resistance ofyour demand as set out above, kindly motivate it- furnishing us with all the relevant supporting documentary information.*

8. *We look forward to hearing from you soon so that we can resolve this matter once and for all*

Yours faithfully,

(Sgd)
TRUSTEE - NTOMBIFUTHI P. DLAMINI

[83] It appears from the range of queries raised in that Jetter that the author was as keen on eliciting much information from the plaintiff pertaining to the circumstances of the insurance cover as she was to get some explanation as to the basis for the repudiation by the insurers of a significant portion of the debt.

[84] The response from the plaintiff came shortly on the 18th October 2017 in a letter addressed by the Manager Mortgage, Mr. JL Manana whose crucial paragraphs in relation to the enquiry state:

18th October 2017

Bhubhudla Family Trust
P.0Box390,
MBABANE.

Dear Sir,

RE: BHUBHUDLA FAMILY TRUST ACCOUNTNUMBER ML. 136322

"..... It is correct that remiums were aid towards the Mortga e Protection cover o account 1363332 but this did not finalise or 11-ut_into effect the cover because other re uirements had_not been submitted by the insured.

We requested the trustee, Mr. Dlamini, by our letter dated January 2017 to undertake the necessary medical requirements in order to qualify for maximum cover (a copy of our letter is enclosed for ease of reference), but he never responded hence the additional cover was not finalized.

Please note that SRIC ended u a in a total o E3 229 060.94 31229 060.94 above theirobli ated E2 000 000 total. E1 229 060. 94 was paid into account 136381 and E2 Million into account 136332.

I hope this clarifies your queries. We again request that you continue servicing the account so that it does not fall into arrears.

Yours faithfully

). L., MANANA
MANAGER MORTGAGE

(My emphasis)

[85] In a subsequent Jetter dated 21st May 2018, some seventeen months after Mr Manana's response, the znct defendant complains of its lateness, having only become aware of Manana's letter when it was forwarded under cover of an e-mail on the day of writing. She points out that Mariana's response omitted to attach the letter or notice allegedly sent to the deceased on the 2Qth January 2017 allegedly informing him at the time of the insurers conditions and requirement that the deceased undergoes a medical evaluation and certification in order 'to qualify for maximum cover'.

(86) The znct defendant took issue about the alleged notice to the deceased to undergo a medical evaluation as follows:

"Secondly, given that he deceased passed on 17th February 2017, you will appreciate that there was insufficient time between 20 January 2017 (or whatever subsequent date the deceased would have received the letter) and 17th February 2017 to enable him to fulfil the stipulated medical requirements.'

[87] She further reminds the Mortgage Manager that in his late response he had in any event failed to respond to specific questions in terms of paragraphs 5 and 6 of the letter of the 16th October 2017, namely• concerning dates when the condition pertaining to medical certification was introduced and a query regarding the consolidation of the loan accounts for insurance purposes. In that regard she makes further more detailed pointed questions regarding the communication to the deceased of the medical insurance requirements and other questions as pertains the history circumstances, structure and underwriting arrangements concerning the mortgage insurance product. I simply highlight some of the key issues the letter itself certainly goes into more depth in terms of eliciting more comprehensive disclosure of the insurance arrangements.

There is no evidence of the Plaintiffs response to the znct defendants enquiry of the 2l5ı May 2018.

[88] In a compelling way, the contents of Annexure L to the Plaintiffs replying affidavit suggest that at the time of the claim, there must have been some serious discourse, controversy or debate between the insurers and the plaintiff about the parameters of the cover and probably over the vexed question of interpretation and or application of a clause in the policy about the so-called 'free medical cover' and its meaning or impact on the extent of the cover under the product. That cannot be known until and unless the correspondence and the claims procedures are opened up and there is a full disclosure in that regard.

[89] It evident that the 2°d respondent in her letter dated 21st May 201812 earnestly pressed the mortgage manager to provide more information pertaining to the details and conditions of the credit life insurance policy but the sought information was not forthcoming. It may well be that already the atmosphere had become adversarial given the plaintiff's demand for payment of the balance of the debt
All said I think these facts give rise to the defendant's expectation as to fulfillment of its right to access to information flowing from the plaintiffs duties to account as fiduciary; which duty is owed to the Trust (the beneficiary of the mortgage protection insurance.

[90] As can be seen from the line of correspondence there was a palpable frustration expressed by the 2°d defendant in her affidavit when she says in reference to her dealings with the plaintiff:

> *"22. The t= Defendant pursued an enquiry with the Plaintiff which will reveal how exactly what transpired resulting in the limited insurance cover. I annex hereto marked T1, T2 and T3 respectively, being copies of self-explanatory letters exchanged between the parties in this regard.*
>
> *23. I submit furthermore, that once the full picture emerges regarding the role of the Plaintiffin the omissions that might have prompted the Insurer to limit the death benefit to the t= defendant, the intention is tofile a counterclaim against the Plaintifffor the negligence resulting in the limitation.*
>
> *24. For now however, the t= defendant will content itself with a counterclaim that speaks to the legitimate expectation created by the Plaintiff, that the death benefit cover under the mortgage protection Policy would liquidate the entire indebtedness Jo the t= defendant to the plaintiff."*

DUTIES OF *A* FIDUCIARY OR INSURANCE AGENT

Agency

[91) The totality of the evidence and the cirumstances surrounding the procurement of the mortgage protection insurance (credit life cover) for the deceased as facilitated by the plaintiff, leads me to conclude that this interposed an arms-length agency or brokerage relationship - one to which the fiduciary dutes of an agent or broker to their client abide.

In regard to these facts I do not think is is tenable for the plaintiff to at once:

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lZ Id p 105 of Book of Pleadings, Annex T3' to the Affidavit Resisting Summary judgment.

a) Maintain, as it does on the papers, that the mortgage plan was not a contractual requirement but one transacted outside the conditions of the mortgage bond by the deceased with the insurers; albeit facilitated through the agency of the plaintiff; whilst at the same time,

b) It seeks to invoke the mortgage indemnity or exemption clause in Article 1.2 of the Special Conditions of the Mortgage Bond to effectively disavow its responsibilities and or duties as an agent or broker or any consequential liability in that role.

[92] That would amount to an act of approbation and reprobation. In the scheme to things I think the plaintiff assumed the role and function of an insurance broker and in that capacity acted as an intermediary between the insurer and the deceased principal of the first defendant (the 'Trust'). As it happens other that what is documented and exists in some form of record, only the responsible employees of the plaintiff, the deceased and the insurers know the details of what transpired in the course and outcome of the acquisition of the mortgage protection insurance plan in question.

Fiduciary's duty of diclosure

[93] The basic issue that has arisen in this summary judgment application concerns the trustees quest for information including such facts as would enable the defendants to engage the plaintiff meaningfully in regard to the plaintiffs claim. They require insight into the circumstances as pertains to the procurement of the proceeds of the insurance claim after the deceaseds death and the application of those proceeds by the plaintiff towards partial liquidation of the mortgage debt. For that reason the discovery and disclosure of the information is highly pertinent to the plaintiffs claim for there is evidence that the plaintiff appropriated the proceeds of the the mortgage insurance settlement towards the payment of iis claim. They now assert that there remains an unsatisfied balance. That was not placed in evidence in the plainfiffs papers nor was it specifically pleaded in the particulars of claim. The only issue that has been pleaded is that the defendant has defaulted in payments and consequently plaintiff asserts there has been a breach of the contract on the basis it seeks the accelerated remedies upon foreclosure.
But there is obviously more to the plaintiffs claim than what has been disclosed.

[94] The fuller and detailed information resides in the plaintiff. Its suppression would if not addressed, give rise to a perception of an attempt to conceal key information and the existence of conflict. A conflict that must be resolved in the interest of all.

The plaintiff acted as an insurance agent in so far as the mortgage insurance business is concerned. It acted as an intermediary. One of the cardinal duties of an insurance agent or broker is to render to its principal a full account of all he does in connection with business sanctioned by his client. There falls upon him a continuous obligation to allow the principal to inspect the books and relavant vouchers relating to the authorised business. In a word the client should be afforded access to all key information regarding the transacted business.
The scope of the duties of an insurance broker are explained in *Enaz (Pty) Ltd v Mutual and Federal Insurance Co. Ltd and Ano* (1614/2002) [2003] ZAWCHC60 where the court refers to other judicial pronouncements on the subject as follows:

> *'The duty of an insurance broker, in the performance of the mandate on behalf of the insured, is to exercise reasonable care and skill in the execution of his or her mandate. Lenaerts v JS N Motors (Pty) Ltd and Another 2001_{4) SA 1100 (W) at 1108 F.*

[95] *In Harvest Trucking Company Ltd v P.B. Davis Insurance Services {1991}2 Lloyds Report 638 (QB) at 643, the court acknowledged the difficulty in defining with any precision the exact scope of the duty. It went on to say 'The precise extent of the insurance intermediary's duties must depend in the last resort on the circumstances of the particular case, including the particular instructions which he has received from his client. In many cases those duties will include advising his client on the type of insurance best suited to his requirements and, subject to his client's instructions, exercising reasonable care to obtain insurance which will best meet those requirements. It is normally not an ordinary part of a broker's or intermediary's duty to construe or interpret the policy to his client, but this again is not of course a universal rule. If a broker or intermediary is asked to explain the terms of a policy to his client and does so, then he must exercise due care in giving an accurate explanation. Again if the only insurance which the intermediary is able to obtain contains unusual, limiting or exempting provisions which, if they are not brought to the notice of the assured may result in the policy not conforming to the client's reasonable and known requirements, the duty falling on the agent, namely to exercise reasonable care in the duties which he has undertaken, may in those circumstances, entail that the intermediary should bring the existence of the limiting or exempting provisions to the express notice of the client, discuss the nature of the problem with him and take reasonable steps either to obtain alternative insurance, if any is available, or alternatively to advise the client as to the best way of acting so that his business procedures conform to any requirements laid down by the policy.'*

(See also Robert Merkin 'The legal position of insurance brokers'

1994(11) South African Mercantile Law Journal 78)."

CONCLUSION

[96] On the conspectus of the evidence so far, there is a host of issues in relation to the mortgage insurance affairs that can only be ferreted out properly if the court exercises its discretion in favour of permitting this matter to proceed to trial.
I must say that the manner in which issues evolve in summary judgment proceedings is not so controlled as to lend itself to a fuller statement of issues in as concisely formulated in the precesion of pleadings. It goes with the territory of the assertion of contentions and factual matter in an affidavit format that this state of affairs will necessarily exist.

In *Robinson v Randfontein Estates GM Co. Ltd* 1925 AD 173 at 198 the importance, purpose and nature of pleadings was emphasised by the court in the following words:

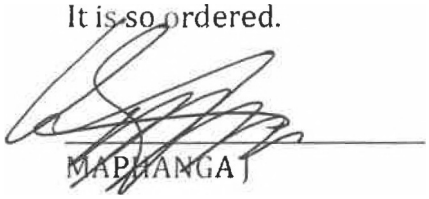
> *"The object of pleadings is to define the issue; and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within these limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings"*

[97] The difference between the statement of material and submissions in motion as opposed to action proceedings lies in the organic fashion in which issues evolve and are formulated in action proceedings because of the systematic process for eliciting particularity and precission in the statement of the issues. With this in mind it may be noted that in summary judgment proceedings there are a range of outcomes that follow the event of a court declining to enter judgment for the plaintiff. It may *inter alia* grant leave to the defendant to defend the whole claim or a portion thereof and to that end allow the matter to proceed organically by way of pleadings and the rules as to conduct of actions. Often where the potential issues are complex or involved that is the best way to proceed in order to allow the matter to evolve organically.

There is a limit to which the court may, without forestalling or restrictively impacting on fuller ventilation of a range of issues, direct the hearing of evidence on specific matters or questions. This is one matter where given the nature of the question that emerge, it would be It is for this reason that in keeping with the scope of our rules as to summary judgment it is the finding of this court that the 1st defendant has made sufficient cause against the grant of summary judgment and to allow the defendants leave to defend the action. In the result I direct that matter takes its normal course in terms of the rules as to conduct of actions.

In the result I am inclined to grant the defendants leave to defend the action and permit this matter to proceed to trial. Summary judgment is therefore dismissed. Costs being to be reserved to be in the cause.

It is so ordered.



MAPHANGA J

Appearances:

For the Plaintiff: Mr K. Motsa

For the Defendant: Mr. K. Hlophe.