PRESENTATION NOTES

Good morning your Lordship, I am the Applicant in this matter and will, like all instances prior to these proceedings be addressing this Honourable Court on the application before the Court today.

As before I shall not be assisted by a legal representative.

NOTES

Thank you your Lordship.

This is an appeal in terms of Section 20(4)(b) read with Section 20(1) of the Supreme Court Act, 59 of 1959, read together with Rule 49(1) from the court a quo, whosefinal judgment was handed down by his Honourable Judge Mabesele on the 2nd of February 2012. The appeal lies against the whole of the judgment of the Court a quo.

NOTES

The Appeal was lodged /...

The Appeal was lodged and filed before this Honourable Court on the 23rd of February 2012, within the time periods so prescribe by Rule 49 of Uniform Rules of Court.

NOTES

IN RESPECT TO PARAGRAPH 1 OF THE GROUNDS OF APPEAL.

It is common cause between parties whom enter into written agreements that each one of these parties have a common "consensus"[1] as to what role each party has in the agreement. In these presences, the prefect is, that the Respondent, as the holder of "money", would draw from its safe an amount equal to the amount loaned and place the "money" into the possession of the Applicant, so to fulfil the "loan" segment of the agreement. After-all, one cannot lend which one does not possess. A plagiaristic perception in the public dominium is that banks do loan what they possess, that is liquid "bank notes".

NOTES

In this regard a /…

[1]Blaas v Athanassiou 1991 (1) SA 723 (W): Bowditch v Peel and Magill l921 AD 56 1: Constantia Insurance Co Ltd v Compusource (Pty) Ltd 2005 (4) SA 345 (SCA): Goldschmidt and Another v Folb and Another 1974 (1) SA576 (T)

In this regard a closer examination of the definition of "deposit" is required. The definition is found in the Bank Act, 94 of 1990, as amended, and the pertinent segments thereof read as follows:-

'**deposit**', when used as a noun, [when used as a verb, or any derivative thereof, has a corresponding meaning] means an amount of money paid by one person [*the Respondent*] to another person [*the Applicant*] subject to an agreement [*written loan agreement*] in terms of which-

(a) an equal amount [*what is loaned*] or any part thereof will be conditionally or unconditionally repaid, either by the person [*the Applicant*] to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; [Para. (a) substituted by s. 1(a) of Act 55 of 1996.]AND

(b) no interest will be payable on the amount so paid or interest will be payable thereon at specified intervals or otherwise, notwithstanding that such payment is limited to a fixed amount or that a transferable or non-transferable certificate or other instrument providing for the repayment of such amount mutatis mutandis as contemplated in paragraph

(a) or for the payment /…

(a) or for the payment of interest on such amount mutatis mutandis as contemplated in paragraph (b) is issued in respect of such amount; but does not include an amount of money-

(i) paid as an advance, or as part payment, in terms of a contract for the sale, letting and hiring or other provision of movable or immovable property or of services, and which is repayable only in the event of-

(aa) that property or those services not in fact being sold, let and hired or otherwise provided;

(bb) the fulfilment of a resolutive condition forming part of that contract; or

(cc) the non-fulfilment of a suspensive condition forming part of that contract;

(ii) …;

NOTES

One can deduce /…

One can deduce from the definition of deposit that a process of deposit is one that follows a particular administrative process; this process needs to follow the principals laid down in terms of Generally Accepted Accounting Principles (GAAP) so to enable correct entries and proof in the books of the Respondent.

It follows that for the Respondent to have dispensed with its obligation in terms of the "written loan agreement" it was required to "deposit" what was borrowed, [*money*] into the account of the Applicant.

To this effect, the Respondent had not shown, nor has it alleged in its filings in the motion court or presented such proof that it had done so; and to the alternative, the Respondent had not shown in any proceeding before the Honourable Courts, unto date, that it had obtained the explicit permission from the Applicant to "deposit" on behalf of the Applicant such "monies" loaned into another's account. This issue was raised in proceedings prior; not in as much detail and as decisive as in these premises, I must admit, but non-the-less it was raised.

Why is this important? It is important as it lays the foundation to the facts dispensed with in subparagraph 1.1 to 1.7 of the Grounds of Appeal before this Honourable Court. Thus it establishes the proverbial "nexus" or link that is required to show and prove what is alleged.

The Respondent will /…

The Respondent will argue that its contract succeeds these requirements of proof and that the Applicant, through effecting payment and receiving the benefit, [the property], it has ratified the burden of proof placed upon the Respondent. This would be correct given the fact that, had the Respondent dispensed with "depositing money" into the Applicant's account, which it did not, or had it obtained its explicit instructions to "deposit money" into a third parties account, which it does not have.

NOTES

Within these premises, the Applicant had in fact not realised that the Respondent had in effect never "deposited money" [the tangible part of the written agreement and part and parcel of the requirement of owning what one lends] into either one of the accounts, nor did the Respondent have tangible "money" to do so. Furthermore, the Respondent did not have "money" available prior to the granting of the loan and had only acquired such "procedural borrowings" after concluding the written agreement with the Applicant. In toto, the Respondent had establish a network of interwoven procedures, elaborate certifications and guarantees whereby it had raised nothing more than "I owe you notes" and "accounting entries" that are supposedly factual liquid "money".

These facts are /…

These facts are elaborated on in points 1.1 to 1.7 of the grounds of appeal, which I will deal with now:-

IN RESPECT TO PARAGRAPH 1(1.1).

In view of the business of a bank, a bank sends a clear message to the public in its publicised media advertisements that, it "the bank" affords potential clients the ability to borrow from a bank. Thus, it is clear that a bank stands to be the one whom owns and possesses the "money" from where the applicant will receive its borrowings. If this is so, it would not be and cannot be such a burdensome process to obtain from a bank a confirmation [supporting affidavit] from the Respondent to confirm same. To this degree, the Respondent had refused to confirm same. It has denied in the records that it is obliged to do so, and there reliance is based on the presence / argument of a "written agreement". With due respect, your Lordship, the presence of the Respondent's "written agreement" does not even mention that it is the holder of money that it intends to loan to the applicant. A notation what would have been valuable in their reliance on the "written contract". The very lack of these wording's presence raises the bar as to why the Respondent [and other banks] negate this very important and fundamental fact in contract law.

The answer, your Lordship /…

NOTES

The answer, your Lordship, with due respect, can be found in the Bank Act, Act 94 of 1990, as amended:-

NOTES

PART 1: DEFINITIONS

'**allocated capital and reserve funds**' means such amount of qualifying capital and reserve funds as may be approved and assigned by the board of directors of a bank as capital and reserve funds designated to provide for the risks pertaining to the particular nature of such bank's business as contemplated in section 70(2), 70(2A) or 70(2B), as the case may be; [Definition of 'allocated capital and reserve funds' inserted by s. 1(a) of Act 20 of 2007.]

'Qualifying capital and /…

'**qualifying capital and reserve funds**' means the net sum of capital and reserve funds required to be held by a bank, calculated and determined in accordance with the provisions of section 70(2), 70(2A) or 70(2B), as the case may be, having regard to the nature of such bank's business; [Definition of 'qualifying capital and reserve funds' inserted by s. 1(/) of Act 20 of 2007]

'**hybrid-debt instrument**' means a financial instrument that combines certain features of equity financial instruments and debt financial instruments; [Definition of 'hybrid-debt instrument' inserted by s. 1(i) of Act 20 of 2007]

'**liquid assets**' means-

(a) Reserve Bank notes, subsidiary coin (excluding such notes or coin to the extent to which it is taken into account in the calculation of the minimum reserve balance, a bank is required to maintain in an account with the Reserve Bank in terms of section 10 of the South African Reserve Bank Act, 1989 (Act 90 of 1989)), gold coin and bullion; [Para. (a) substituted by s. 1(c) of Act 9 of 1993.]

(b) any credit balance in a clearing account with the Reserve Bank; [Para. (b) substituted by s. 1(d) of Act 9 of 1993.]

(c) [Para. (c) deleted by s. 1(e) of Act 9 of 1993.]

(d) treasury bills of /…

(d) treasury bills of the Republic;

(e) [Para. (e) deleted by s. 1(e) of Act 9 of 1993.]

(f) securities issued by virtue of section 66 of the Public Finance Management Act, 1999 (Act 1 of 1999),to fund the National Government; [Para. (f) substituted by s. 1(c) of Act 36 of 2000 and by s. 1(f) of Act 19 of 2003.]

(g) …->>>>>>Not relevant to these proceedings<<<<<<<<

(i) …

(ii) …;

(h) and (i) . . . . .[Paras. (h) and (i) deleted by s. 1 (e) of Act 9 of 1993.]

(j) securities of the Reserve Bank with a maturity of not more than three years to the last redemption date thereof;

NOTES

‘secondary unimpaired reserve /…

'**secondary unimpaired reserve funds**' means-

(a) such funds, obtained from actual earnings or by way of recoveries, as may be prescribed and which have been set aside, but which are not disclosed as a general or special reserve in the financial statements or consolidated financial statements of the bank or the controlling company concerned;

(b) a prescribed percentage of the amount of any surplus resulting from a revaluation of assets and determined as prescribed;

(c) a prescribed amount of general provisions or a reserve held against unidentified and unforeseen losses;

(d) funds obtained by way of premiums on the issue of cumulative preference shares or debt instruments issued in accordance with the prescribed conditions, whether or not such funds are disclosed as a general or special reserve in the financial statements or consolidated financial statements of the bank or the controlling company concerned;

(e) such percentage of a reserve arising from compliance with financial reporting standards as may be prescribed;

(f) such percentage of minority interests arising from the consolidation of accounts as may be prescribed; or

(g) funds constituting primary unimpaired reserve funds where such funds, …

Or any portion thereof /…

or any portion thereof, are excluded from qualifying primary reserve funds as a result of a prescribed limit, but does not include any fund required to be maintained in terms of any other law, unless so prescribed; [Definition of 'secondary unimpaired reserve funds' inserted by s. 1 (f) of Act 36 of 2000 and substituted by s. 1 (o) of Act 20 of 2007.]

AND

'**securitisation scheme**' means a synthetic securitisation scheme or a traditional securitisation scheme as defined in Government Notice R681 published in Government Gazette 26415 on 4 June 2004; [Definition of 'securitisation scheme' inserted by s. 1 (p) of Act 20 of 2007.]

From the above, my Lord, the bank, like the Respondent follows a process similar to the following:-

OVERVIEW:-

The South African Reserve Bank (SARB) assumed responsibility for the minting of coins in 1988. Previously the mint was owned by government. The cost of minting coins varies according to their metallic content and size. Commercial banks pay for these bank notes and coins and their accounts are credited when they return worn / damaged bank notes and coins.

The SARB invests the money it receives from commercial banks and the interest received on such investments are called seigniorage[i].

It is used to fund /…

It is used to fund the operations of the Central Bank. 10% of profits after taxation are retained and a fixed dividend of R200 000 per annum is paid to the SARB's shareholders. The balance of profits is paid over to the State.

NOTES

CONTENTION:-

Liquid money represent 6 to 5% and commercial banks, like the Respondent, create the remaining 94-95% of the money supply by allowing borrowers, who have provided the requested security or collateral in the case of secured loans, to withdraw an agreed amount relative to the amount of share capital and reserves, which commercial banks have invested in property, short term assets and so-forth.

Formerly, the SARB would issue directives as to the amount of reserves required relative to the duration of the loan, the volume of credit advanced and the maximum growth rate at which credit extension could increase. This mentioned system was abolished in September 1980. Currently the SARB prescribes only the level of reserves (*reserve requirements*) that commercial banks must hold on deposit at the central bank.

NOTES

The percentage of share /…

The percentage of share capital and overall reserves, which commercial banks must maintain, is governed by regulations prescribed by the Bank for International Settlements in Basel, Switzerland and the Registrar of Banks. At present it is 10% and will be raised in terms of the Basel III agreement to 14% by 2018. However, South African commercial banks already exceed this recommended level and their share capital and reserves stand at 14.2% of all outstanding loans. It should be noted that the 14% mark is an overall percentage and that for property loans, for example, only 7% of loans provided need to be covered by reserves.

From the aforesaid, my Lord, it will be perceived that commercial banks are not quasi[ii] borrowers and lenders of money, but creators of money out of nothing, their capacity to do so being limited only to their holdings of share capital and reserves, and deposits, which they have the ability to leverage up. Thus when a loan is granted there is an increase in the money supply. On the other hand when a loan is repaid, money is destroyed and there is a decrease in the money supply. This is known as the fractional reserve banking system. It may be contrasted with the full reserve banking system, where banks are only able to lend out money which they have received as deposits. Under this system the responsibility for creating the money supply (*out of nothing*) at nominal or zero interest rates resides exclusively with a state bank as was the case with the German Reichsbank (1933-1945), the Banca d'Italia (1936-43) and the Bank of Japan (1931-45).

On these loans, which represent money created out of share capital, reserves and deposits, banks charge interest, which is used to pay interest on deposits and to cover operational expenses. A large portion of this interest received, where the banks have created money out of nothing, may be construed as being similar to seigniorage.

The banks other /…

The bank's other important source of income is the fees charged on various transactions. The interest rate charged is influenced by the repo rate (*formerly known as the bank rate*), currently standing at 5.5% per annum, which is set by the SARB and altered from time to time, as dictated by circumstances, at Monetary Policy Committee meetings. The maximum rate of interest, which may be levied by commercial banks on loans, was determined by the Usury Act, Act No. 73 of 1968, now the National Credit Act, Act No.34 of 2005 the *in duplum rule* is applicable, viz. that the total interest levied may not exceed the amount loaned.

NOTES

Your Lordship, the aforementioned can be summarised in given careful scrutiny of the Bank Act, Act 94 of 1990, as amended, Sections 70, and 70A and 72 read with Sections 73. Furthermore Government Gazette No. 30628, Volume 511, January 2008 which amends the Bank Act by changing the "business of a bank" ~ [definition in Section 1 which pertinently excludes concepts of securitisation from the "business of the bank"].

NOTES

The amendments brought /…

The amendments brought about in Government Gazette No. 30628 includes special reference to, "asset-backed commercial paper ("ABCP") programme", "clean-up call", "commercial paper", "credit-enhancement facility", "credit-enhancing interest-only strip", "delayed payment on asset", "disclosure document", "first-loss credit-enhancement facility", "liquidity facility" and so on.

NOTES

It is evident that the banks are employing securitisation processes that assist them in avoiding borrowings in liquid form, thus establishing nothing more than empty boxes, which contents is only filled by the people whom pay interest into nothing.

Had the banks, like the Respondent, acted in accordance to borrowings in the 'traditional sense', e.g. liquid money, the banks would effectively have much less to loan, but would be justified in asking interest at a given rate as the loss, although temporary, is factual and not a simulated paper shifting exercise at the cost of the public.

NOTES

In respect to paragraph /…

IN RESPECT TO PARAGRAPH 1(1.2).

Within these premises of securitisation, the Respondent had to, at one or other stage, within the drafting of documents and given of securities and / or cessioned to "another", grant such juristic entity or other statutory body the permission to deal with the securities given to it; It therefore follows common cause that the latter must have been done so to establish so called guarantees, especially to the loan backed by a bond registered over the Applicant's property. Having done so, the Respondent would lack *locus standi* to bring this matter before this Honourable Court.

NOTES

To further this argument, the contents of Section 1 [Government Gazette No. 30628, Volume 511], which prescribes that it is NOT the 'business of the bank' to deal in;-

"**asset-backed commercial paper ("ABCP") programme**" means a programme in terms of which predominately commercial paper with an original maturity of one year or less is issued to investors, which commercial paper is…

Backed by assets or /…

backed by assets or other exposures held in an insolvency remote special-purpose **institution**, or such other programme as may be specified in writing by the Registrar;-

"**parties involved in a securitisation scheme**" means a **special-purpose institution**, **parties acting in primary roles** and **parties acting in secondary roles**;

"**preference share**", when issued by a special-purpose institution that is a company, means such preference shares not forming part of the equity share capital of the special-purpose institution;

NOTES

"**repackager**" means an institution that, whether at the commencement or during the life of a traditional or synthetic securitisation scheme, acquires and subsequently-

(a) transfers the assets; or

(b) transfers the risk relating to assets,

"clean-up" in relation /…

"**clean-up call**" in relation to-

(a) a traditional securitisation scheme means an option that makes provision for-

(i) the commercial paper issued in terms of the said securitisation scheme to be called or repaid before all the underlying or securitisation exposures have been repaid;

(ii) the repurchase of the remaining securitisation exposures and assets,that is, the repurchase of the remaining securitisation exposures and assets once the pool balance or outstanding securities have fallen below a specified level;

(b) a synthetic securitisation scheme means a contractual provision or **clause that provides for the termination of credit protection** when the amount of the underlying exposures is less than a specified amount;

NOTES

"**commercial paper**" means-

(a) any written acknowledgement of debt, irrespective whether the maturity thereof is fixed or based on a notice period, and irrespective whether the rate at which interest is payable in respect of the debt in question is a fixed or floating rate; or

(b)/(c)… "credit-enhancement facility /…

(b) …

(c) …

"**credit-enhancement facility**" means any facility or arrangement in terms of which the provider of such a facility or obligor under the arrangement is obliged to absorb losses associated with-

(a) the assets transferred in terms of a traditional securitisation scheme; or

(b) the risk transferred in terms of a synthetic securitisation scheme, including both a first-loss credit-enhancement facility and a second-loss credit-enhancement facility;

"**credit-enhancing interest-only strip**" means an asset that-

(a) represents a valuation of cash flows related to future margin income; and

(b) is subordinated;

In conjunction hereto, the "written agreement" makes provision that the Respondent can, without further notice to the Applicant, cession its rights at parol. Thus it can be deduced that the Responded made provision for securitisation.

It is a requirement that all /…

The Respondent, being a bank cannot conduct the business of securitisation as defined in Government Gazette No. 30628, Volume 511; it is specifically excluded from the "business of the bank"

It is a requirement that all material facts are brought to the attention of a Court so to enable the presiding officer to make an informed decision or to adjudicate the matter in accordance with governing law. Within these premises, the Applicant had attempted to bring these facts to the Courts attention, by over technologizing which in probably better asserted by simplification.

It is possible that the Responded had, though its proceedings before this Honourable Court, attempted to pull the wool over the wolf eyes by electing to disregard the Applicants request to produce such documents, which could have assisted the Applicant to thoroughly plead to the averments made in the Respondents finding affidavit.

It is therefore probable that the Respondent was not it possession of "liquid money" in the first instance and therefore not be entitled to have loaned what it purported it could and through its process of securitisation lost its *locus standi* to bring this action.

IN RESPECT TO /…

IN RESPECT TO PARAGRAPH 1(1.2).

The majority of this paragraph was addressed in paragraph 1.2 and needs no further discussion here other than to show evidence that the Respondent is part of the (South African Securitisation Forum) SASF.

AND to define what is meant with "securitisation" without referencing the highly technical nature of their given definitions in statuary provisions:-

Securitisation is a structured finance process, which involves pooling and repackaging of cash-flow producing financial assets into securities that are then **SOLD TO INVESTORS**. The name "securitisation" is derived from the fact that the form of financial instruments used to obtain funds from the investors are securities.

All **ASSETS** can be securitized so long as they are associated with **CASH FLOW**. Hence, the securities, which are the outcome of securitisation processes, are termed ASSET-BACKED SECURITIES (ABS). From this perspective, securitisation could also be defined as a financial processes leading to an emission of ABS.

Securitization often utilizes /…

Securitisation often utilizes a special purpose vehicle (SPV), alternatively known as a special purpose entity (SPE) or special purpose company (SPC), in order to reduce the risk of bankruptcy and thereby obtain **LOWER INTEREST RATES FROM POTENTIAL LENDERS**. A credit derivative is also generally used to change the credit quality of the underlying portfolio so that it will be acceptable to the final investors.

Securitization has evolved from tentative beginnings in the late 1970s to a vital funding source with an estimated total aggregate outstanding of $8.06 trillion (*as of the end of 2005, by the Bond Market Association*) and new issuance of $3.07 trillion in 2005 in the U.S. markets alone.

It is critical here, to once again point out that the Respondent, as a bank (a) DID not have what it loaned, (b) it obtained what it lent from securitization (c) backed by security given by the Applicant (d) and a mortgage bond registered onto the "immovable property purchased" by the Applicant and (e) that the Respondent is prohibited by statuary provisions in the Bank Act to obtain, grant or give loans on its own immovable securities and (f) that the Respondent is precluded from dealing in securitization in its "business of a bank" and lastly it is (g) precluded from earning any additional commission or alike benefit (directly or indirectly) from a third party it has mandated for the securitization.

Mr Herbert Dreyer /…

Mr Herbert Dreyer, Corporate Finance Deloitte & Touché of KZN attributes the word "securitisation" to have first appeared in the Wall Street Journal in 1977, and in the same year the Bank of America concluded the first securitisation transaction through Solomon Brothers, thereafter 'Freddie Mac' and soon thereafter 'Fannie Mae' contributed to creating a liquid 'SECONDARY MORTGAGE MARKET' in the US.

The introduction of securitisation was founded due to the "The mismatch of funds due to regional imbalances, with people moving to the West Coast (the sunbelt states)", "Interstate banking regulation prevented banks and savings institutions from lending money outside their state boundaries.", "East Coast surplus funds could thus not be used at the West Coast where funds were needed.", "Interest rate regulation of mortgage- lenders (thrift institutions) required a three per cent spread between the cost of funds and the rate at which mortgage loans are advanced.", "Interest rate mismatch occurred because mortgage loans were made at fixed rates, while lending institutions (thrifts) had to obtain funds at floating rates, causing an erosion of earnings in inflationary times." and "Growth in demand for home finance as baby boomer generation reached home-buying age in the 1970'."

Mr Herbert Dreyer, continues and describes securitisation as:-

"[Traditional] Securitisation scheme" means a scheme"

- whereby a special purpose /…

- whereby a special purpose institution ("SPI"):

- issues commercial paper to investors,

- uses the proceeds of such issuance primarily to obtain various types of assets, and

- makes payments in respect of the commercial paper so issued from the cash flows arising or proceeds derived from the assets, consisting of claims sounding in money, transferred to such SPI by an originator, a remote originator or a repackager.

It is therefore safe to allege that the attractiveness, lucrative and profit earning potential of securitisation, where the Respondent risks nothing, because it is backed by the Applicants securities which it had effectively securitised through securitisation process by selling it on and acting as nothing more than an intermediary. NOT as the one that loans.

IN RESPECT TO PARAGRAPH 1(1.3).

The contention remains, as stated before, that a factual perception was made by the Respondent to the Applicant that at all material times while concluding the "written agreement" that it was in fact the owner, possessor and title holder of such liquid money that it, the Respondent was willing to lend to the Applicant.

Had the Respondent indicated /…

Had the Respondent indicated that it was not in possession of such liquid money as purported prior to and during the application process, the Applicant would have been placed in a factual position wherein he could have made an informed decision to proceed or decline the offer as the Respondent would, technically be acting as intermediary between the Applicant and a process of securitisation that can attract cost and expenditure generally associated with such dealings. Furthermore, the Respondent, acting as intermediary would be profiting from the "written agreement" and the "securitisation" of the securities obtained from the Applicants application for a home loan, secured by a bond registered over the property.

The indifference between the two aspects is a critical factor that impacts on how much is paid back to the Respondent. This instance is illustrated by current legislation that prescribes that earnings of an intermediary are restricted or prescribed like the Estate Agency Affairs Act, 1976[2] or must be declared by brokers[3] earning commission[4]. **IN RESPECT TO /…**

[2] Code of Conduct ~ 4. Duty to disclose ~ 4.1 An estate agent shall--
4.1.1 convey to a purchaser or lessee or a prospective purchaser or lessee of immovable property in respect of which a mandate has been given to him to sell, let, buy or hire, all facts concerning such property as are, or should reasonably in the circumstances be, within his personal knowledge and which are or could be material to a prospective purchaser or lessee thereof;
4.1.2 if he conducts his business in terms of a franchise, disclose clearly and unambiguously in all his correspondence, circulars, advertisements and other written documentation that he operates in terms of a franchise and state thereon his name and the name of the franchisor;
4.1.3 if he conducts his business under a trade name or style other than his own name, clearly disclose his full name in all correspondence, circulars and other written documentation;
4.1.4 not perform or attempt to perform any mandate in respect of a particular property if a current prior mandate, which conflicts with the aforesaid mandate, has been accepted by him, unless he has disclosed to the person who has given the later mandate the existence of such prior mandate, and the fact that he will not be the estate agent's client in respect of that property.
[3] Financial Advisory and Intermediary Services Act, 2002
[4] Chapter IV - Codes of Conduct ~ 16. Principles of code of conduct
2) A code of conduct must in particular contain provisions relating to –
a) the making of adequate disclosures of relevant material information , including disclosures of actual or potential own interests, in relation to dealings with clients;
b) adequate and appropriate record-keeping;
c) avoidance of fraudulent and misleading advertising, canvassing and marketing;

IN RESPECT TO PARAGRAPH 1(1.4).

What is import in this regard is to understand that the Respondent, acting as an intermediary, receives from a securitisation process, not liquid money but a form of "undertaking" to effect payment when a particular "maturity" period is reached **PLUS** returns on the money earned on interest, cost and fees with capital from the Applicant. Thus the Respondent earns from the proceeds of securitisation and that of the "written agreement"; effectively and argued differently, the Respondent as a bank is in violation of the Bank Act as it acts outside it legislative mandate prescribed as "the business of the bank".

The mentioned procedure is one of simulated transactions, in other words, a mere accounting entry "that purported to have been loaned", now received as an instalment plus interest. Thus, "liquid money" is received into an "illiquid loan".

To illustrate the aforementioned, securitisation is the conversion of a pool of assets with a regular and predictable cash income, such as mortgage repayments or credit card receivables into a security or marketable instrument.

In very basic terms /…

d) proper safe-keeping, separation and protection of funds and transaction documentation of clients;
e) where appropriate, suitable guarantees or professional indemnity or fidelity insurance cover, and mechanisms for adjustments of such guarantees or cover by the registrar in any particular case;
eA) the control or prohibition of incentives given or accepted by a provider; and
f) any other matter which is necessary or expedient to be regulated in such code for the better achievement of the objects of this Act.

In very basic terms, securitisation enables a company (in most cases a bank) to "sell" a large number of its assets (e.g. mortgage loans), which would otherwise not be attractive as individual purchases, to a specially formed company - the Special Purpose Vehicle ("SPV"). The SPV funds the purchase by issuing debt securities in the capital markets, and the cash flows derived from the asset (such as the mortgage or credit card repayments) will serve as principal and interest payment obligations under the marketable securities. Hence the issued securities are called Asset-Backed Securities ("ABS"). Securitisation is the generic term for any kind of Asset- or Receivable-Securitisation. It is derived from the word security, because usually illiquid and sometimes even intangible assets that generate a constant cash flow are formed into a tradable security and are floated on the debt market.

IN RESPECT TO PARAGRAPH 1(1.5).

It becomes the Applicants business when realisation is made to the facts so far brought before the Honourable Court, so far so, that judicial intervention is required to intervene and investigate these very serious and troublesome actions of the Respondent; Insofar it owes not only a duty to the Applicant, it owes a duty to the public, whom in their thousands upon thousands have become mere instruments of profiteering.

The decimare starts from /…

The decimare[5] starts from the very moments a prospective borrower walks into the offices of the bank for a loan and ends when triple or more of the borrowings had been paid. These averments might very well be strong words, but need to be emphasised in considering the following statement;-

CHANGES TO THE SECURITISATION REGULATIONS

The trigger for the accelerated development of the securitisation market in South Africa was mainly due to a change to the law in December 2001 by the South African Reserve Bank. Prior to the introduction of the new regulations, securitisation was regulated by two separate Government Notices:

1) Government Notice No. 153 published in the Government Gazette No. 13723 on 3 January 1992; and 2) Government Notice No. 2172 published in the Government Gazette No. 16167 on 14 December 1994 (the "existing regulations"). The previous regulations created uncertainty amongst originators and especially amongst banking originators. It is a contravention of the Banks Act to operate the business of a bank without registration as a bank or as a branch of a foreign bank. However, in terms of the new securitisation regulations published in Government. Notice 1375 on December 13, 2001, the operation of a securitisation scheme is not regarded as "the business of a bank", (provided that the

conditions set out in /…

[5] From Latin decimare "to take the tenth (decimus) part of anything", in particular referring to the levying and payment of tithe and also the practice of capital punishment applied to one man at random (by lot) out of every ten in a legion

conditions set out in that Government Notice (commonly referred to as the "securitisation exemption" or the "securitisation regulations") are complied with).

Another main aspects of the legal change were to allow banks to fulfil multiple roles in a securitisation transaction. In other words, the new regulations allows for corporates as well as banks to use securitisation, and by widening the definition of a securitisation transaction, the still relatively small sector is developing fast to accommodate a variety of players to a level that took the US and countries in Europe many years to obtain.

The new regulations are aimed at facilitating the growth of the securitisation industry in South Africa in accordance with market demand, existing international securitisation principles and the draft proposals by the Bank for International Settlement ("BIS") for capital adequacy.

"At the beginning of 2004, Sanlam, one of South Africa's largest insurers, together with Absa, the largest mortgage lender, announced the establishment of a joint venture company that will offer home loans to Sanlam clients. Sanlam Home Loans,…

currently originating mortgages /…

currently originating mortgages among its existing clients in association with Absa's servicing abilities, expects to securitise its first pool of residential mortgages and is planning to issue the first securities for around R1BN-R1.5BN in the summer of 2005.

More issues will follow annually as soon as the process gets going. Traditionally, banks provide home loans by getting funds from their own investors, depositors and the money market. To service these investors and depositors means banks must have an expensive branch network. They also add interest on to the cost of these funds to cover overheads and still provide a profit margin for themselves.

Through securitisation, individual borrowers are linked directly to the wholesale investors, therefore resulting in lower interest rates given to the public and thus saving borrowers millions in mortgage payments. SA Home Loans with its lower interest rates is the perfect example of the above scenario and Sanlam and other lenders will soon follow in their steps."

The amount of these securitisation are staggering and shocking. It starts from 250 million in 1989 and reaches 2.9 Bn in 2009. Today, the securitisation figures are most likely double the figures above.

Had there been benefit to reap from these securitisations, like lesser interest, cost and fees, once could easily say that this principal meets the people's needs and there are true benefit, but

to date there has only been an increase in cost, so much so that it is common knowledge that credit comes at a heavy price because a selected few reap the benefits of profiteering.

Investigating the financial lives of the poor (Focus Note: Financial Instruments of the Poor) , a study conducted by www.financialdiaries.com[6] shows that;-

- Households used, on average, 17 different financial instruments over the course of a year.
- A composite household portfolio, based on all 166 households, would have an average of 4 savings instruments, 2 insurance instruments and 11 credit instruments.
- The same composite household portfolio would have about 30% formal instruments and 70% informal instruments.
- Rural households use as many financial instruments as urban ones.
- A larger volume of transactions went through formal instruments than informal ones, although this is distorted by payroll banking transactions.

IN RESPECT TO PARAGRAPH 1(1.6). /…

[6] Rutherford, S (2002): "Money Talks: Conversations with Poor Households in Bangladesh about Managing Money Paper No. 45, Finance and Development Research Programme Working Paper Series, Institute for Development Policy and Management, University of Manchester.
Ruthven, O. (2002): "Money Mosaics: Financial Choice & Strategy in a West Delhi Squatter Settlement" Journal of International Development 14, 249-271.
Ruthven, O. and Kumar, S. (2002): "Fine-Grain Finance: Financial Choice and Strategy Among the Poor in Rural North India" Paper No. 57, Finance and Development Research Programme Working Paper Series, Institute for Development Policy and Management, University of Manchester.

IN RESPECT TO PARAGRAPH 1(1.6).

The grounds of this paragraph is squarely focused on the 'business of the bank' and therefore needs elaboration on:

The Banks Act, 1990 (Act No. 94 of 1990) , defines "the business of a bank" *to include* [means]--

a) the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question;

b) the soliciting of or advertising for deposits;

c) the utilisation of money, or of the interest or other income earned on money, accepted by way of deposit as contemplated in paragraph (a)-

    i) for the granting by any person, acting as lender in such person's own name or through the medium of a trust or a nominee, of loans to other persons;

    ii) for investment by any person, acting as investor in such person's own name or through the medium of a trust or a nominee; or

    iii) for the financing, wholly or to any material extent, by any person of any other…

business activity conducted /…

business activity conducted by such person in his own name or through the medium of a trust or a nominee;

d) the obtaining, as a regular feature of the business in question, of money through the sale of an asset, to any person other than a bank, subject to an agreement in terms of which the seller undertakes to purchase from the buyer at a future date the asset so sold or any other asset; or

e) any other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice in the Gazette declared to be the business of a bank, but does not include--

aa) the acceptance of a deposit by a person who does not purport to accept deposits on a regular basis and who has not advertised for or solicited such deposit: Provided that-

i) the person accepting deposits as contemplated in this paragraph shall not at any time hold deposits from more than twenty persons or deposits amounting in the aggregate to more than R500 000; and

ii) a person and any person controlled directly or indirectly by the first-mentioned person (whether such control is through shareholding or otherwise) or managed by such first-mentioned person, and a subsidiary of such last-mentioned person, who accepts deposits as contemplated in this paragraph shall for the purposes of subparagraph (i) of this proviso be deemed to be one person;

bb) the borrowing of money /…

bb) the borrowing of money from its members by a co-operative subject to such conditions as may be prescribed;

cc) any activity of a public sector, governmental or other institution, or of any person or category of persons, designated by the Registrar, with the approval of the Minister, by notice in the Gazette, provided such activity is performed in accordance with such conditions as the Registrar may with the approval of the Minister determine in the relevant notice;

dd) any activity contemplated in paragraph (a), (b) or (c)--

i) performed by any institution registered or established in terms of, by or under any other Act of Parliament and designated by the Minister by notice in the Gazette; or

ii) performed in terms of any scheme authorized and controlled by, and conducted in accordance with the provisions of, any other Act of Parliament and so designated by the Minister, provided such activity is performed in accordance with such conditions as the Minister may determine in the relevant notice;

ee) [deleted by the Banks Amendment Act, 2007 (Act No. 20 of 2007)];

ff) the effecting, subject to the provisions of any other Act of Parliament and to such conditions, if any, as the Registrar may from time to time determine by notice in the Gazette, of a money lending transaction directly between a lender and a bank as borrower –

through the intermediation /…

through the intermediation of a third party who does not act as a principal to the transaction (hereinafter in this paragraph referred to as the agent), provided the funds to be lent in terms of the money landing transaction are entrusted by the lender to the agent subject to a written contract of agency in which, in addition to any other terms thereof, at least the following matters shall be recorded:

i) Confirmation that the agent acts as the agent of the lender; and

ii) that the lender assumes, except in so far as there may in law be a right of recovery against the agent, all risks connected with the administration of the entrusted funds by the agent, as well as the responsibility to ensure that the agent executes the instructions as recorded in the written contract of agency; or

gg) the activities, set forth in subparagraphs (A) and (B) hereunder, of a person (hereinafter in this paragraph referred to as the mandatory) that--

i) is a natural or juristic person registered in terms of, or a juristic person established by or under, any other Act of Parliament and the main business activities of whom or of which are regulated or controlled in terms of, by or under such other Act of Parliament; and

ii) has been designated by the Registrar by notice in the Gazette, which mandatory, for purposes of effecting a money lending transaction with a bank--

A) accepts money from the mandatory in terms of a prescribed contract of mandate; and

in the execution of the /…

B) in the execution of the mandate, and subject to such conditions as the Registrar may determine in the notice referred to in subparagraph (ii) above, deposits such money into an account maintained by the mandatory with a bank, irrespective as to whether or not such money is so deposited together with money so accepted by the mandatory from the other mandators.

Considering the above, it becomes apparent and clear why the Respondent acted with reservation when asked and confronted about securitisations and to bring forth the documents the Applicant had requested. Had it done so, in truth and transparency, the Respondent would (and the Applicant holds the contention that same must be done in a trail court) have disclosed its contributory / participation in the securitisation process; opening a whole new can of worms.

IN RESPECT TO PARAGRAPH 1(1.7).

This ground, although self-explanatory, requires investigation, possible under the same grounds as what the Learned Judge Willis elected to do in Slip Knot Investments 777 (Pty) Limited V Project Law Prop (Pty) Limited and Others, that is to appoint an *amicus curiae* to make submissions to the trail court on the issue presented herein and hereinafter; Further-

Consideration should also /…

Consideration should also be given to sections 1(1) and (2) of the Prescribed Rate of Interest Act, No. 55 of 1975, the new section 2A introduced by the Prescribed Rate of Interest Amendment Act, No. 7 of 1997 and the helpful judgment by Thring J on the subject in the MV Sea Joy case.

Should these findings be held to be prejudice and to the negative to the Applicant, it will follow suite that the case will find its way into the public domain, demanding the further development of the common law principals and public policy, so too, it will follow into an investigation into the Respondent dealings and a possible investigation by the Competition Tribunal.

IN RESPECT TO PARAGRAPH 2.

In this case before the court, the applicant for a mortgage bond is required to sign and give as security a deed to be passed onto and in favour of a bank, the Respondent. This security is not only used as such, it is in fact also used to raise the money which the applicant is wanting to borrow (securitisation).

In the matter /…

In the matter Bank of Lisbon & South Africa v Ornelas and Another (53/85) [1988] ZASCA 35; [1988] 2 All SA 393 (A) (30 March 1988) the Learned Judge, in similarity, touches this issue on page 26 and 27; "the respondents were suppliants for an overdraft (or its increase); they had not equal bargaining power with the Bank; standard forms with standard terms were used by the Bank; the Bank stipulated for security far beyond its needs; the respondents never actually contemplated that the security would cover anything but the overdraft. These facts go beyond, mere unreasonableness of the contract per se (cf Paddock Motors v Igesund 1976(3) SA 16(A)). In my view it would offend the sense of justice of the community, to allow the Bank to use the strict wording of the documents, to retain the securities after payment of the overdraft. I find support for this in the views expressed by BOTHA J in Rand Bank Ltd v Rubenstein (1981(2) SA 207(W)) and that of the judge a quo in the present matter."

When considering this case, one needs to be reminded that it was adjudicated on prior to the 1996 Constitution, where the development of the common law was left much to the discretion of the trial judge. The Constitution now mandates and enforces the principal whereby the High Court and all its divisions are encouraged to develop the common law.

The *exceptio doli generalis* constitutes a substantive defence, based on the sense of justice of the community. As such it is closely related to the defences based on public policy (interest) or boni mores (cf Ismail v Ismail 1983(1) SA 1006(A),1025F-1026C).

The exceptio doli generalis /…

The *exceptio doli generalis* "has been accepted as part of our law and applied as such for a considerable period of time, both by Provincial Divisions as well as the Appellate Division"

Moreover, the twin concepts of freedom of contract and *pacta servanda sunt* have, during this century, increasingly come under assault as a result of inter alia rampant inflation, monopolistic practices giving rise to unequal bargaining power, and the large-scale use of standard form contracts (often couched in small print).

The American authors, Calamari and Perillo (Contracts 2d 1970 para 9-39), sighted by the Learned Judge at page 12 elaborate on the considerations of the *exceptio doli* as follows"… This section is intended to make it possible for the courts to police explicitly against contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract." And further on page 13, "… by sighting from the findings of FAGA JA as follows, "Daar is egter vertakkings van die reg waarin uit die aard van die saak die beginsels elasties moet wees omdat dit alleen aangedui kan word in woorde waarvan die toepassing in grensgevalle soms moeilik mag wees, maar dit in sigself kan geen rede wees om 'n andersins gesonde remedie uit ons reg te weer nie".

The Learned Judge acknowlages /…

The Learned Judge acknowledges, as the Applicant agrees, that there are several statutory remedies available to the defendants. However, "is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, e.g., if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy .... " (per HEFER JA: Benson v S A Mutual Life Assurance Society 1986(1) SA 776(A), 783 D-E). And (Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984(4) SA 874(A)). In delivering the judgment of the Court, RABIE CJ points out :- "Omdat opvattings oor wat in die openbare belang is, of wat die openbare belang vereis, nie altyd dieselfde is nie en van tyd tot tyd kan verander, kan daar ook geen numerus clausus wees van soorte ooreenkomste wat as strydig met die openbare belang beskou kan word nie. Dit sou dus volgens die beginsels van ons reg moontlik wees om te sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang is indien die omstandighede van die betrokke geval sodanig is dat die Hof daarvan oortuig is dat die afdwing van die betrokke ooreenkoms die openbare belang sou skaad." (891 H-I). and contunues "Die belangrike vraag is dus nie of 'n oor= eenkoms van so 'n aard is dat dit ab initio ongeldig is nie, maar of dit 'n ooreenkoms is wat die Hof, gesien die vereistes van die openbare belang, nie behoort af te dwing nie." (895 D-E).

A resolve is formulated /…

A resolve is formulated by the Learned Judge at page 28 "The Court may reduce a stipulated penalty" to such an extent as it may consider equitable in the circumstances" (Act 15 of 1962, section 3 - reinstating the common law [The Conventional Penalties Act No. 15 of 5 as at March 1962]). Not only contracts against public interest or public policy are subject to control by the Court, but also those offending the *boni mores*." …~… "In this field reference must be made to the sense of justice -("regsgevoel") of the community..."

In our law, it is required that requisite, of good faith has not as yet absorbed the principles of the *exceptio doli* nor has the concept of *contra bonos mores* as yet been specifically applied in this field. To deny the *exceptio* right of place would-leave a vacuum. Therefore, and in these premises it is important for these considerations to be duly adjudicated on.

At paragraph 20 the Learned Judge comments *boni mores* that "… what happened here was that a new defence, not specifically described in our authorities, was thus accepted on the ground of "natural justice" ...~… "To that extent the law was modified…" …~… "to enforce a grossly unreasonable contract may in appropriate circumstances be considered as against public policy or *boni mores*."

IN RESPECT TO PARAGRAPH 2(2.1) /…

IN RESPECT TO PARAGRAPH 2(2.1).

The Respondent is a member of SASF and the steps so illustrated on its website coexist with the Act, in particular defined in the Banks Act, 1990 (Act No. 94 of 1990), Designation of an activity not falling within the meaning of "The Business of a Bank" (Securitisation Schemes) AND Notice No. 2 Dated 1 January 2008, South African Reserve Bank.

Further comment to paragraph 2(2.1) subparagraphs (2.1.1 to 2.1.6) needs no further explanation other than to mention that the process is one of intrigue complication that manifest the principal that all these transactions cannot take place without the Respondent giving some sort of mandate which authorises these securitisations, driven by profiteering.

IN RESPECT TO PARAGRAPH 2(2.2).

Through securitisation, individual borrowers do not have access to a competitive market, cost and interest are more influential because securitisation is controlled by two groups;

(1) associated companies within the banking organisation; and

(2) groups whom rely on the banking groups to securitise on their business.

These dynamics do /…

These dynamics do not give the borrowers the scope and abet to negotiate better deals among 'non-existing competitors'. To the contrary, Your Lordship, these actions are no more than a breeding colony for an infestation designed on profiteering and engineered to push social-economical platforms to higher peaks of misery among South Africans wherein the very borrower ends-up paying the ultimate price; deprivation of their right to own property.

It is plausible that there is as much as a 7% interest difference that can be saved by the public, which could result in the Respondent and other banks withdrawing the majority of their proceedings in this court and elsewhere.

These premises need be examined, possibly to the extent that a complaint be lodged, through these proceedings to the Competition Tribunal whom has the statuary empowerment to adjudicate on these matters.

IN RESPECT TO PARAGRAPH 3.

The Court ought to have held that, in view of the Mortgage Bond, ad paragraph 1.1.3 and annexure to the Respondent's founding affidavit, promissory notes, bills

of exchange (accepted /…

of exchange (accepted or endorsed), do form part of acceptable payment instruments and the Court should have given consideration or abbreviated on its finding in this regard, as opposed to outright dismissing the Applicants reference to these structures and payment.

IN RESPECT TO PARAGRAPH 4.

The Court erred in finding that because the Applicant's "defence raised is baseless", its considerations fall aside and therefore had dismissed all material facts irrespective of its technical involvement or difficulty to voice. Further examination of these facts would have disclosed the very nature of the Applicant's defence and articulation of what seems to be the norm, is in fact against public policy.

The Constitutional Court in South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others 2007 (1) SA 523 (CC) held: "A Court, therefore, must be independent and impartial. The power recognised Section 173 is a key tool for Courts to ensure their own independence and impartiality. It recognised that Courts have the inherent power to regulate and protect their own process.

A primary purpose /…

A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that Courts, in exercising this power, must take into account the interests of justice.

When Courts exercise the power to regulate their own process, it is inevitable that that power will affect those rights entrenched in chapter 2 of the Constitution. "A court must regulate the way proceedings are conducted and this will inevitably affect both the right to a fair trial (Section 35 of the Constitution) and the right to have disputes resolved by Courts (Section 34)."

Courts are bound by the provisions of the Bill of Rights and therefore bear a duty to respect those rights. In exercising the power, therefore, they must take care to ensure that those rights are not unjustifiably attenuated.

The Court a quo had not taken into account which the Applicant had so attempted to bring forth in these proceedings. A re-look and examination of these presentations would clearly show, valid defences and exceptions to the Respondent's case.

IN RESPECT TO PARAGRAPH 5. /…

IN RESPECT TO PARAGRAPH 5.

When one person stands in relation to another in a position of confidence involving a duty to protect the interests of that other person, he or she is not allowed to make a secret profit at the other's expense, or to place himself or herself in such a position that his or her interests conflict with his or her duty. Such a claim may arise because of a breach of contract or in delict as the case was in Daewoo Heavy Industries (SA) (Pty) Ltd v Banks [2004] 2 All SA 530 (C), 2004 (4) SA 458 (C), Da Silva v CH Chemicals (Pty) Ltd [2009] 1 All SA 216 (SCA), 2008 (6) SA 620 (SCA)

To establish a breach of a fiduciary duty, the Applicant must allege facts from which the existence of such a duty can be deduced. For instance, the Applicant can rely on the relationship between principal and agent, of a guardian to a ward, director to a company or a solicitor to a client. It is not necessary to define the fiduciary duty.

To succeed, one needs to make the necessary allegations concerning the particular duties imposed by the duty, in other words, the scope and ambit of the duties imposed on the Respondent, in this case the duties are implied (duties that derive ex lege) and arise in the context of the contract that defines the relationship between the parties.

A fiduciary relationship /…

A fiduciary relationship prevents an agent from entering into any transaction that would cause his or her interests to clash with his or her duty. For instance, an agent employed to buy cannot sell his or her own property; an agent employed to sell cannot buy his or her own property. In addition the agent cannot make any profit from his or her agency other than the agreed remuneration. As the case was in Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 180, Bellairs v Hodnetl1978 (1) SA 1109 (A) 1130F, Low v Shedden [2001] 2 All SA 171 (C) and Ganes v Telecorn Narnibia Ltd [2004] 2 All SA 609 (SCA), 2004 (3) SA 615 (SCA).

Within these premises the Respondent stands as fiduciary to the Applicant and within these writings, the Applicant has shown that the Respondent had in fact contravened the fiduciary it held with the Applicant.

IN RESPECT TO PARAGRAPH 6.

The Uniform Rules of Court, Rule 32(2) proscribe:

>>(2) The Plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any,

claimed and stating that /…

claimed and stating that in his opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof. [Subrule (2) substituted by GN R1262 of 30 May 1991.]

In was held in the matter of FirstRand Bank Ltd v Beyer 2011 (1) SA 196 (GNP) after an analysis of Rule 32(2) of the Uniform Rules of Court clearly shows that the court, before it can grant summary judgment, must, from the facts set out in the verifying affidavit itself, be able to make a factual finding that the person who deposed to the affidavit was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any, and be able to form the opinion that there was no *bona fide* defence available to the defendant, and that the notice of intention to defend was given solely for the purpose of delay. Companies, firms and other legal personae, like the plaintiff, can only {*c*...} speak and act through a representative, and therefore the deponent on behalf of such a company or legal persona has to state unequivocally that the facts were within his personal knowledge and furnish particulars as …

to how the knowledge /…

to how the knowledge was acquired by him so as to enable the court to assess the evidence put before it, and to make a factual finding regarding the acceptability of the supporting affidavit for summary judgment purposes. See Paragraphs [9] and [19] at 200A - C and 203A - B.

It is clear that strict compliance with the provisions of rule 32(2) it is required for a summary judgment to become a final judgment unless reversed on appeal. A summary judgment is an extremely extraordinary and drastic remedy, often referred to as a draconian measure. It shuts the mouth of the defendant finally. A party who seeks to avail himself of this drastic remedy must comply strictly with the requirements of the rule. (Paragraph [11] at 200D - E.)

It is so that the court has the power to condone mere technical non-compliance with the provisions of rule 32(2), but cannot condone non-compliance with the safeguards built into Rule 32(2) for the benefit of defendants, for instance regarding hearsay evidence and the doing away with, or the relaxation of the test to be applied by every court, considering an application for summary judgment to be able, on the evidence adduced in the affidavit, to make a factual finding that the deponent was a qualified deponent, otherwise it would make a mockery of the said safeguards. See Paragraph [17] at 202E–G.

>> In the proceedings before /…

941 >> In the proceedings before Acting Judge Bava of this Honourable Court, the learned
942 Judge held that the averments contained in the Respondents founding affidavit needs further
943 examination and support. Therefore the Respondent was ordered to support the founding
944 affidavit of Jacob Dekker by additional affidavits or evidence;-

945

946 >> Furthermore, Jacob Dekker is an employee of the Respondent, a duly register limited
947 company which enjoys legal juristic personality. It is therefore a requirement that an employee
948 be authorised by special resolution passed by the Directorship in which such authority passed
949 onto Jacob Dekker to dispense with such affidavit. Such resolution was not annexed and to date
950 had not been presented[7]. **See Land and Agricultural /…**

[7] 'the business of a bank' means-
(a) the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question; [Para. (a) substituted by s. 1 (f) of Act 9 of 1993 and by s. 1 (e) of Act 26 of 1994.]
(b) the soliciting of or advertising for deposits;
(c) the utilization of money, or of the interest or other income earned on money, accepted by way of deposit as contemplated in paragraph (a)-
(i) for the granting by any person, acting as lender in such person's own name or through the medium of a trust or a nominee, of loans to other persons;
(ii) for investment by any person, acting as investor in such person's own name or through the medium of a trust or a nominee; or
(iii) for the financing, wholly or to any material extent, by any person of any other business activity conducted by such person in his or her own name or through the medium of a trust or a nominee; [Para. (c) substituted by s. 1 (h) of Act 19 of 2003.]
(d) the obtaining, as a regular feature of the business in question, of money through the sale of an asset, to any person other than a bank, subject to an agreement in terms of which the seller undertakes to purchase from the buyer at a future date the asset so sold or any other asset; or
(e) any other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice in the Gazette declared to be the business of a bank, but does not include-
(aa) the acceptance of a deposit by a person who does not purport to accept deposits on a regular basis and who has not advertised for or solicited such deposit: Provided that-
(i) the person accepting deposits as contemplated in this paragraph shall not at any time hold deposits from more than twenty persons or deposits amounting in the aggregate to more than R500 000; and
(ii) a person and any person controlled directly or indirectly by the first-mentioned person (whether such control is through shareholding or otherwise) or managed by such first-mentioned person, and a subsidiary of such last-mentioned person, who accepts deposits as contemplated in this paragraph shall for the purposes of subparagraph (i) of this proviso be deemed to be one person; [Sub-para. (ii) substituted by s . 1 (j) of Act 19 of 2003.] [Item (aa) amended by s. 1 (i) of Act 19 of 2003.]
(bb) the borrowing of money from its members by a co-operative subject to such conditions as may be prescribed;

See Land and Agricultural Development Bank of South Africa t/a The Land Bank v The Master and Others 2005 (5) SA 235 (c) – "*in terms of s 33 of Land and Agricultural Development Bank Act 15 of 2002 for recovery of moneys owing to Bank not constituting management of 'the day to day affairs of the Bank' as contemplated in s 18 of Act - Board or chief executive officer should therefore provide court with authority to institute such litigation by properly authorised resolution in terms of s 16 of Act*" – In comparison see the definition of "The business of a bank" as defined in the Bank Act, 94 of 1990, as amended.

Therefore, your Lordship /…

(cc) any activity of a public sector, governmental or other institution, or of any person or category of persons, designated by the Registrar, with the approval of the Minister, by notice in the Gazette, provided such activity is performed in accordance with such conditions as the Registrar may with the approval of the Minister determine in the relevant notice;
(dd) any activity contemplated in paragraph (a), (b) or (c)-
(ee) (i) performed by any institution registered or established in terms of, by or under any other Act of Parliament and designated by the Minister by notice in the Gazette; or
(ii) performed in terms of any scheme authorized and controlled by, and conducted in accordance with the provisions of, any other Act of Parliament and so designated by the Minister, provided such activity is performed in accordance with such conditions as the Minister may determine in the relevant notice; [Para. (ee) substituted by s. 1 (e) of Act 42 of 1992 and deleted by s. 1 (r) of Act 20 of 2007.]
(ff) the effecting, subject to the provisions of any other Act of Parliament and to such conditions, if any, as the Registrar may from the time to time determine by notice in the Gazette, of a money lending transaction directly between a lender and a bank as borrower through the intermediation of a third party who does not act as a principal to the transaction (hereinafter in this paragraph referred to as the agent), provided the funds to be lent in terms of the money lending transaction are entrusted by the lender to the agent subject to a written contract of agency in which, in addition to any other terms thereof, at least the following matters shall be recorded;
(i) Confirmation that the agent acts as the agent of the lender; and
(ii) that the lender assumes, except in so far as there may in law be a right of recovery against the agent, all risks connected with the administration of the entrusted funds by the agent, as well as the responsibility to ensure that the agent executes the instructions as recorded in the written contract of agency; or [Para. (ff) substituted by s. 1 (e) of Act 42 of 1992, by s. 1 (g) of Act 9 of 1993 and by s. 1 (d) (ii) of Act 55 of 1996.]
(gg)the activities, set forth in subparagraphs (A) and (B) hereunder, of a person (hereinafter in this paragraph referred to as the mandatary) that-
(i) is a natural or juristic person registered i n terms of, or a juristic person established by or under, any other Act of Parliament and the main business activities of whom or of which are regulated or controlled in terms of, by or under such other Act of Parliament; and
(ii) has been designated by the Registrar by notice in the Gazette, which mandatary, for purposes of effecting a money lending transaction with a bank(A) accepts money from the mandator in terms of a prescribed contract of mandate; and
(B) in the execution of the mandate, and subject to such conditions as the Registrar may determine in the notice referred to in subparagraph (ii) above, deposits such money into an account maintained by the mandatary with a bank, irrespective as to whether or not such money is so deposited together with money so accepted by the mandatary from other mandators. [Para. (gg) added by s. 1 (d) (iii) of Act 55 of 1996.]

Therefore, your Lordship, a Court cannot condone non-compliance with safeguards built into Rule 32(2) established for the benefit of Defendants. This was, with respect, an oversight of the Court, a quo, analysis of the facts.

IN RESPECT TO PARAGRAPH 7.

The Court ought to have taken passages of the fact there exists a real possibility that the Respondent could lack *locus standi* due to the allotment that the Respondent could have surrendered its real right, cessioned and/ or alternatively securitised their rights as security for the loan it took out on behalf of the Applicant. This matter has been raised and found to be the position where financial institution like the Respondent, loses such right to act as Plaintiff similar to these proceedings. Submissions to this statement, were annexed as "O" to the Applicants affidavit in the court file.

IN RESPECT TO PARAGRAPH 8.

The learned Judge failed to adhere to procedure requirements where the Applicant had requested from the Respondent that it produces statements,

accounts of settlement /…

accounts of settlement and certificate of balance, had never been produced or presented to the Applicant or the Court.

IN RESPECT TO PARAGRAPH 9.

These proceedings could have best been addressed by hearing the matter in a trial, wherein the full scope of applications and submissions could have been tested by calling of expert witnesses, and cross examination of such evidence.

CLOSURE

Onus is on Respondent to satisfy Court after considering facts admitted and facts in dispute… It is the Respondent who chooses to come to court on motion and he must bear the risk inherent in a dispute of fact on paper.

INTERESTS OF JUSTICE:

The Applicant contends that this case raises issues of public interest and importance concerning the "banks business of loans and securitisation" which could amount to contraventions of Section 1 read with Section 78 of the Bank Act, which prescribes "undesirable practice". It emphasises the urgent need to ensure, in the interests of the general public and the credit market, that forfeitures amounting to arbitrary deprivations of property should not occur where the bank has doubled on its profits, infringed on the fiduciary relationships between banker and client and secret transactions through securitisations and profiteering.

These arguments can be found in ample South African and International case law, of which one stands out above the other:- Slip Knot Investments 777 (Pty) Limited v Project Law Prop (Pty) Limited and Others (36018/2009) [2011] ZAGPJHC 21 (1 April 2011). At paragraph 11 on page 6 the Learned Judge sites Innes J finding in Reuter v Yates, as follows: "*It comes to this - in deciding whether the defence of usury has been sustained, and whether the lender has taken such an undue advantage of the borrower, has so practised extortion and oppression, that his conduct, being akin to fraud, disentitles him to relief, the Court will examine all the circumstances of the case.*

It will not only look /...

It will not only look at the scale of interest which has been stipulated for, but will have regard to the ordinary rate prevalent in similar transactions, to the security offered and the risk run, to the length of time for which the loan was given, the amount lent, and the relative positions of the parties.".

And at the endnote 15 of page 9 of the Learned Judge, a remark is made that "Since time immemorial, our common law has set its face against exploitation in the levying of interest. A most illuminating discussion on this aspect can be found in an historical survey by Grové, Die gemeenregtelike beheer van woeker in die Suis-Afrikaanse Reg, De Jure, 1989 (22), 233 and Die gemeenregtelike beheer van woeker in die Suis-Afrikaanse Reg (vervolg), De Jure, 1990 (23),118."

The Applicant takes favour in relation to the prospects of success in this appeal, but goes further, and the Applicant admits, that the matters sought to be advanced in this Court are of importance to the public, lawgivers and natural justice to advance common law.

Within this appeal, your Lordship, the Applicant has shown in essence that he does not only have a valid re-dress, the Applicant has also shown valid defences, one in person and others in public interest and notwithstanding a legal remedy in civil delict.

Thank you, my Lord.

APPEAL GROUNDS:

TAKE NOTICE FURTHER that this application for leave to appeal is brought in terms of section 20(4)(b)[8] read with section 20(1)[9] of the Supreme Court Act 59 of 1959 and rule 49(1)[10] of the Uniform Rules of Court[11].

TAKE NOTICE FURTHER that the applicants' ground of appeal are the following-

1. The Court erred in finding that the 'written loan agreement' between the parties are sound in money (*liquid*) for the following reasons-

    1.1 The Respondent challenged the Applicant to show, intern alia, that it was the possessor of such 'money' to afford the loan to the Respondent, whereupon the Respondent failed to answer or dismounted its obligation to present such proof and only tendered argument, that it is irrelevant to these proceedings by reasoning that a benefit had been received by the Applicant in terms of a written agreement. The opposite is more predominant, as it is tried law that one cannot lend which one does not possess. Thus, being the argument presented to Court;

[8] Act 59 of 1959 as amended. 20(4)(b) - [No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except- (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.]

[9] 20(1) – [An appeal from a judgment or order of the court of a provincial or local division in any civil proceeding or against any judgment or order of such a court given on appeal shall be heard by the appellate division or a full court, as the case may be.

[10] Rule 49(1) [(1)(a) When leave to appeal is required, it may on a statement on the grounds therefor be requested at the time of the judgment or order.] – [(1)(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.

[11] Supreme Court Act, 59 of 1959, as amended – GN R981 in GG 33689 of 19 November 2010 [with effect from 24 December 2010]

1.2 It is a financial truth that financial institutions, like the Respondent, had acquired financing through securitisations or similar processes. This fact is supported by referencing that the Respondent is and has been affiliated to the "South African Securitisation Forum", SASF; membership to SASF are open to "*all professional participants in the securitisation industry (whether individuals or institutions), including issuers, originators, dealers, arranging banks, underwriters and other financial intermediaries, investors, servicers, guarantors, rating agencies, trustees, information technology specialists, lawyers, accountants and academics.*"[12]. The Respondents, though its membership to SASF is or has utilised these alternative methods of financing loans through promissory notes;

1.3 A material fact placed before the Court by the Applicant was, that the Respondent show that it had acted as the true lender of money, sounding in notes, and that it was the owner or possessor of such money prior to subsequent agreements with the applicant;

1.4 Having regard to the facts contained above, the Responded acted throughout the loan procedure, its written agreement and records before this Honourable Court as the owner to such monies lent to the applicant. Given the facts so presented before the Honourable Court of first instance werenever allowed to be tested, in so far the learned Judge mentions in his judgment that "*What the bank does with its documents and payments made to the seller should not be the concern of the respondent.*" and further "*With regard to the third ground, which is denied by the applicant, the*

[12]http://www.sasf.co.za/membership.htm

respondent failed to produce any proof of payment as stipulated in the agreement.";

1.5 Within the premises, the Court had erred in considering that the Respondent could have acted as an intermediary between the Applicant, the Respondent and another, therefore in violation of its premises as being the one that loans and fiduciary owing to the Applicant. This notwithstanding that such third party securitisation attracts expenses and possible profiteering from "documents" dealt with by the Respondent in cart-blanch;

1.6 A further point that fails entry into the Courts judgment, considering the aforementioned, is that the Respondent had a duty to inform the Applicant that its loan does not derive from its safes, but rather from the compounding of securitisations of the Applicant's personal loan application;

1.7 Lastly, whether there arises an obligation between the Respondent and another though securitisation raises serious concerns as to what effect, implication or financial impact it might have in the overall interest rate, cost and/ or recovery of the loan unto the Applicant.

2. The learned Judge failed to consider that the freedom of contracting finds its limitations in the dictates of public policy, especially as manifested in the Constitution. Agreements that are contrary to public interest, as in this regard, are founded on the false perception that banks, like the Respondent, allude through its public advertisements and press media that it loans what it possesses and negates to

inform the borrower that it will retain what is loaned from another at a price that could effectively equate to expensive borrowing.

2.1 The aforementioned is best presented by following the processes explained by SASF on their website, of which the Applicant is a member:

2.1.1 "Step1: - The lender, also called the originator (typically a financial institution), makes a loan to a borrower (the obligor). AND - The loan amount is transferred to the obligor and the obligor directs all repayments of the loan to the originator."

2.1.2 "Step 2: - The loan is "warehoused" or kept by the originator, until the originator has a sufficient volume of similar loans."

2.1.3 "Step 3: - The originator sells the loans to a special purpose vehicle (SPV) – a legal entity created by the originator."

2.1.4 "Step 4: - The special purpose vehicle (SPV) pays for the loans by simultaneously selling - certificates, representing ownership of the loans, to investors. - The funds obtained from investors are passed to the originator. - A credit rating agency rates the securities issued by the SPV."

2.1.5 "Step 5: - A servicer is appointed, which provides administration for the duration of the issue. - The duties of the servicer include servicing the loans in the SPV and servicing problem loans. - In many cases, the originator performs the role of servicer. - A trustee can also be appointed to ensure that investors are paid in accordance with the terms of the securities and to monitor the performance of the servicer."

2.1.6 "Step 6: - In this final step, the borrower is instructed to make payments to the servicer and direct all inquiries to the servicer if the originator does not perform the role of servicer."

2.2 From the aforementioned, consideration should be given that there are several steps in these procedures and therefore attract additional cost and expenses, unbeknown and hidden to the borrower.

3. The Court ought to have held that, in view of the Mortgage Bond, ad paragraph 1.1.3 and annexure to the Respondent's founding affidavit, promissory notes, bills of exchange (accepted or endorsed), do form part of acceptable payment instruments and the Court should have given consideration or abbreviated on its finding in this regard, as opposed to outright dismissing the Applicants reference to these structures and payment.

4. The Court erred in finding that because the Applicant's "*defence raised is baseless*", its considerations fall aside and therefore had dismissed all material facts irrespective of its technical involvement or difficulty to voice. Further examination of these facts would have disclosed the very nature of the Applicant's defence and articulation of what seems to be the norm, is in fact against public policy.

5. It is a material fact that when debt arises, one expects to be treated in full transparency; in fact legislation proscribes such requirements, so much so, to assist the public to make informed decisions and not be profiteered on. Case law in this regard shall be presented at trial.

6. The Court ought to have held that the affidavit of Jacob Dekker, wherein testimony is made that he has personal knowledge of the Applicant's conduct be tested, in its alternative be examined as this averment was contested, in that Jacob Dekker does not nor could have had any first-hand knowledge of the Applicant's application, correspondence and alike; notwithstanding that Jacob Dekker could have abbreviated on his knowledge of the Applicant's written agreement or its securitisation. A ruling by Acting Judge Bava had concluded that the averments by Jacob Dekker be supported by additional evidence, that to date under these proceedings have not been attained.

7. The Court ought to have taken passages of the fact there exists a real possibility that the Respondent could lack locus standi due to the allotment that the Respondent could have surrendered its real right, cessioned and/ or alternatively securitised their rights as security for the loan it took out on behalf of the Applicant. This matter has been raised and found to be the position where financial institution like the Respondent loses such right to act as Plaintiff similar to these proceedings. Submissions to this statement were annexed as "O" to the Applicants affidavit in the court file.

8. The learned Judge failed to adhere to procedure requirements where the Applicant had requested from the Respondent that it produces statements, accounts of settlement and certificate of balance, had never been produced or presented to the Applicant or the Court.

9. These proceedings could have best been addressed by hearing the matter in a trial, wherein the full scope of applications and submissions could have been tested by calling of expert witnesses, and cross examination of such evidence.

TAKE NOTICE that the applicant submits, with respect, that there is a reasonable prospect that another Court might come to a different conclusion in respect of all the above-mentioned issues.

THE COURT A QUO JUDGMENT

MABESELE J:

[PAGE 2] This is an opposed application for the repayment of the sum of R890 111, 30 and ancillary amounts due under a home loan agreement as secured by a mortgage bond. An order is also sought that immovable property, erf 926 Summerset Extension18, Midrand, registration division J.R, serving as security under the bond be declared executable.

The applicant is the Standard Bank of South Africa Limited, registration number 1962\00738\06, a limited liability company duly registered and incorporated in accordance with the company laws of the Republic of South Africa and having its principal place of business at 5 Simmonds Street, Johannesburg.

The respondent is Tellinger Michael Julius, an adult male with identity number 6005135020082, having chosen his *domicilium citandi et executandi* at 43-2nd Avenue, Linden, Gauteng.

The respondent appeared in person. The reason, according to the respondent, being that no legal practioner would present his case better than him.

[PAGE 3] It is common cause between the parties that on or about 26 February 2007 the applicant and the respondent concluded a written home loan agreement in terms of which, inter alia, the applicant loaned the sum of R828 015,00 to the respondent.

The terms of the home loan, inter alia, were the following:

(i) A mortgage bond would be registered in favour of the applicant over the property described as 926 Summerset Extension 18, Midrand.

(ii) The respondent was obliged to pay all amounts that were due and payable free of any deduction or set-off.

(iii) If the respondent fails to pay any instalment due in terms of the home loan, the applicant could claim immediate repayment of the outstanding balance by giving written notice to the respondent.

(iv) A certificate signed by any of the applicant's managers whose appointment need not be proved would, upon its mere production, be sufficient proof of any amount due and payable by the respondent unless the contrary is proved.

[PAGE 4] Pursuant to the conclusion of the home loan on 16 November 2007 a continuing covering mortgage bond was registered by the respondent in favour of the applicant over the property.

In terms of the mortgage bond:

(i) The respondent declared that he was lawfully indebted and bound to the applicant in the sum of R 828, 015.00, together with an additional sum of R 207 003.75.

(ii) The respondent acknowledged and declared that a certificate signed by any of the applicant's managers whose appointment need not be proved would, on its mere production, be sufficient proof of any amount due and payable by the respondent in terms of the mortgage bond unless the contrary is proved.

(iii) The respondent acknowledged and declared that if he failed to observe or perform any provision in terms of the mortgage bond or failed to pay any sum which may be legally claimable by the applicant or failed to perform any other obligation on due

date or at all, then all amounts secured by the mortgage bond would, at the applicant's option become immediately due and payable in full and the applicant was

[PAGE 5] entitled to institute proceedings for the recovery thereof and for an order declaring the property executable.

(iv) The respondent would not be entitled to set off any indebtedness owing to the applicant, from time to time, against any amount owing by the applicant to the respondent.

In breach of the terms of home loan and the mortgage, the respondent failed to make any payment since November 2010 with the result that as at 2 February 2011, the respondent was in arreas in the sum of R 56 862,48.

The respondent was advised of default during or about November 2010.

The respondent admits that the property is registered in his name and that he enjoys the benefits thereof. Notwithstanding this, the respondent opposes the application on the following grounds:

Firstly, there is no proof that the applicant paid any money to the seller (of the property)

[PAGE 6] Secondly, the applicant, without disclosing to him, made a substantial profit in the international market from the documents which he signed. Therefore, the applicant is not entitled to recover any balance from him.

Thirdly, despite him not owing the applicant he nevertheless paid the applicant by means of bill of exchange via registered mail.

The first and second grounds raised by the respondent have nothing to do with a loan agreement which was concluded by the applicant and respondent. What the bank does with its documents and payments made to the seller should not be the concern of the respondent.

With regard to the third ground, which is denied by the applicant, the respondent failed to produce any proof of payment as stipulated in the agreement. Moreover, one fails to understand how possible that the respondent would pay the applicant while the respondent is denying that he is indebted to the applicant.

The defences raised by the respondent are clearly baseless.

Therefore, the applicant is entitled to its claim.

[PAGE 7] In the result, I make the following order.

1 The applicant is entitled to recover from the respondent an amount of R 890 111.30 and the interest at the rate of 9% per annum from 2 February 2011 to date of payment.

2 The property described as 926 Summerset Extension 18, Midrand, be executable.

3 The respondent is ordered to pay costs on the attorney and own client scale.

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[i] Ordinarily seigniorage is only an interest-free loan (for instance of gold) to the issuer of the coin or paper money. When the currency is worn out, the issuer buys it back at face value, thereby balancing exactly the revenue received when it was put into circulation, without any additional amount for the interest value of what the issuer received. Historically, seigniorage was the profit resulting from producing coins. Silver and gold were mixed with base metals to make durable coins. Thus the British "sterling" was 92.5% pure silver; the base metal added (and thus the pure silver retained by the government mint) was (less costs) the profit, the seigniorage. USA gold coins were made from 90% gold, 7% silver, and 3% copper; one can easily see the seigniorage. Currently, under the rules governing monetary operations of major central banks (including the central bank of the USA), seigniorage on bank notes is simply defined as the interest payments received by central banks on the total amount of currency issued. This usually takes the form of interest payments on treasury bonds purchased by central banks, putting more dollars into circulation. However, if the currency is collected, or is otherwise taken permanently out of circulation, the back end of the deal never occurs (that is, the currency is never returned to the central bank). Thus the issuer of the currency keeps the whole seigniorage profit, by not having to buy worn out issued currency back at face value.

[ii] Similar to, but not exactly the same as.