NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 7417/09

In the matter between

LIBERTY GROUP LTD **PLAINTIFF**

and

SHAAZURA INVESTMENTS CC **FIRST DEFENDANT**

MOHAMMED SHAAZ MOOSA **SECOND DEFENDANT**

JUDGMENT

Delivered on: 15 September 2016

MOODLEY J:

[1] In this action an insurance company sues a brokerage and its surety for repayment of commission advanced to the brokerage.

[2] The plaintiff, Liberty Group Ltd (Liberty) advanced commission to the first defendant, Shaazura Investments CC (Shaazura) on premiums received by Liberty on contracts issued pursuant to proposals submitted by Shaazura. The payment of

commission was advanced in terms of a Broking agreement entered into by the parties, which was deemed to have commenced on 4 April 2006. A relevant material term of the Broking agreement was that if any of the policies subsequently lapsed or were cancelled or reduced or terminated within the period mentioned in the agreement, Shaazura would become liable to repay to Liberty the commissions advanced for those policies.

[3] In 2005 the second defendant, Mohammed Shaaz Moosa (Mr Moosa), signed a deed of suretyship in terms of which he bound himself jointly and severally as surety and debtor *in solidum* with Shaazura for payment to Liberty, on demand, of all sums of money which Shaazura was at any time indebted to Liberty. The material terms of the suretyship are not disputed and therefore do not bear repetition except to note that the suretyship remains in full force and effect until all indebtedness, commitments and obligations of Shaazura to Liberty are fully discharged and no liquidation or insolvency, whether provisional or final, or any payments or dividends received by Liberty, will prejudice the rights of Liberty to recover the full sum remaining owing by Shaazura from Mr Moosa.

[4] By December 2007 Shaazura had become indebted to Liberty in a sum in excess of R700 000, being advanced commission which had become repayable to Liberty in accordance with the Broking agreement, because policies written by Shaazura had been reduced, terminated, cancelled, or lapsed. Negotiations took place between representatives of Liberty, in particular Mr Craig Ebersohn the manager of its Pietermaritzburg branch, and Shaazura, represented by Mr Moosa, to resolve the repayment of the debt.

[5] On 19 June 2008 Mr Moosa signed a 'Deed of Settlement' ('the agreement') in terms of which Shaazura, the debtor, acknowledged that it was indebted to Liberty in the sum of R700 000, in respect of the repayment of advanced commissions in terms of the Broking agreement and schedule of commission. The material terms of the agreement were inter alia:

1. Shaazura was obliged to liquidate the capital sum and interest by way of monthly repayments over a period of 16 months;

2. The first payment in the sum of R49 203.35 was due and payable on or before 1 June 2008;
3. The subsequent payments were payable on or before the last day of every succeeding month until the debt was paid in full;
4. The monthly installments were to be debited from Shaazura's commission account held with Liberty;
5. In the event of default of payment by Shaazura, Liberty was entitled to apply for a judgment against it for the full amount outstanding together with interest and costs without further demand, or a court order for payment of the judgment debt in installments, or an emoluments attachment order or a garnishee order;
6. Penalty interest on the arrear amounts would be payable at the same rate of interest as charged on the capital debt; and
7. Shaazura would pay commission and legal costs on an attorney and own client scale if an attorney recovered any outstanding amount of the debt.

[6] However Shaazura failed to make any payment in accordance with the agreement. Consequently in August 2009 Liberty instituted the present action against the defendants alleging that Shaazura had breached the agreement by failing to make any payment which had fallen due and the full debt had become due, owing and payable; and that Mr Moosa was bound, under the terms of the suretyship, to discharge Shaazura's indebtedness to Liberty.

[7] Liberty seeks judgment against the first and second defendants, jointly and severally, the one paying the other to be absolved, for payment in the sum of R838 024.43, interest and costs on an attorney and own client scale. Although the agreement had not been signed by Liberty, Liberty has contended that as the agreement was an acknowledgement of debt, its signature was not required in order to be valid and binding on the defendants.

[8] Both defendants initially defended the matter and raised two special pleas. But at the commencement of the trial Mr *Steyn*, who represented Liberty, handed up a letter dated 11 November 2014 from the liquidators of Shaazura, confirming that

the company was in liquidation and that the liquidators would abide by the court's decision.[1]

[9] Mr Moosa withdrew one special plea but persisted with his defence on the merits and his special plea that the agreement was not valid, and denied that any payment was due to Liberty by the defendants.

[10] In his plea, Mr Moosa contended that the agreement constituted an offer by Shaazura but there had been no acceptance of the offer by Liberty, because Liberty or its representatives had failed to sign the agreement. Shaazura had subsequently withdrawn its offer to Liberty. Therefore the agreement had not been concluded, and was, accordingly, null and void and Liberty has no claim against the defendants arising from the agreement.

[11] Alternatively, should the agreement be found to be valid and binding on the defendants, Mr Moosa pleaded that Liberty had failed to comply with paragraph 3 of the agreement, in that it had unilaterally closed Shaazura's commission account, in which there were funds, and further failed to debit the account with the monthly installments, although it was an implied, alternatively tacit, term of the agreement that Shaazura would continue to have a commission account with Liberty, into which further funds generated by the policies sold by Shaazura would be transferred. The defendants had therefore not breached the agreement and were not liable for payment of any monies to Liberty, although the certificate of indebtedness reflecting the capital debt, interest and costs claimed by Liberty was not disputed by the defendants.

[12] The terms of the Broking agreement and the suretyship were not in dispute. It is common cause that:

1. By June 2008, the parties had agreed, after discussions between Mr Ebersohn and Mr Moosa, that advanced commission in the sum of R700 000 was repayable to Liberty by Shaazura;[2]

[1] Exhibit C: letter from Manci Knoop Financial Services to the defendants' attorneys.
[2] As reflected on page 1 of the Deed of Settlement (annexure A to the particulars of claim).

2. Negotiations took place between representatives of Liberty and Mr Moosa in respect of the repayment of advanced commission;
3. Pursuant to the negotiations, the agreement was drafted by Ms Chantal Muldoon, the Head of legal services for Liberty;
4. Mr Moosa signed the agreement on 19 June 2008; but the agreement was erroneously dated 19 June 2007;
5. The agreement was not signed by or on behalf of Liberty; and
6. No instalments were debited from Shaazura's commission account with Liberty.

Issues for Determination

[13] The two issues for determination are:

1. Whether Liberty has proved on a balance of probabilities that the agreement is a valid contract and enforceable against the defendants; and
2. Whether Liberty was *mora creditoris* in that it had made it impossible for Mr Moosa to comply with the terms of the agreement by failing to enable its computer system to process new business written by Mr Moosa and to receive commission from existing policies.

Liberty bears the *onus* on the first issue and the defendants on the second.

Liberty's Case

[14] Liberty called two witnesses. The first, Mr Craig Ebersohn, who was the Branch Manager in Pietermaritzburg from March 2008, testified that he had dealt with Mr Moosa after the advanced commissions in the sum of R700 000 had become repayable by Shaazura. Liberty assisted brokers who were similarly indebted to it, to liquidate their liability either by way of payment in cash or by negotiating an agreement with the broker, in terms of which the broker would sign an acknowledgment of debt and undertake to settle his liability by generating new business and paying off the debt through the commission earned.

[15] In a similar vein, an agreement was negotiated with Mr Moosa in respect of the R700 000 due by Shaazura to Liberty. Mr Ebersohn testified that he had held numerous meetings with Mr Moosa to negotiate and resolve the payment of the debt because he held the view that an agreement would be mutually beneficial: Liberty would get new business and Shaazura would generate income and settle the monies owed to Liberty in accordance with the agreement. The Regional Manager, Mr Grant Hopkins, had also met with Mr Moosa on one occasion, together with Mr Ebersohn to discuss why the defendants had not written new business. Mr Moosa had expressed his intention to settle the debt and it was agreed that the debt would be settled through the commission earned on new business written by Mr Moosa.

[16] Mr Ebersohn subsequently negotiated the terms of the agreement with Mr Moosa but the agreement was prepared by the Debt Management Department and Ms Chantal Muldoon, who provided Mr Ebersohn with legal support. To his recollection, the agreement had been signed by Mr Moosa in his presence in Liberty's boardroom and then sent to the Debt Management Department, whose responsibility it was to acknowledge receipt of the agreement and attend to the signing of the agreement by Liberty.

[17] Mr Ebersohn testified that clause 3 of the agreement, which provided that commission earned by the broker would be set off against the debt owing, reflected the intention of the parties that Mr Moosa would earn commission while the debt was being liquidated. To his knowledge, once an acknowledgment of debt was signed by the broker, the terms of the settlement would be captured onto Liberty's system so that commission generated by the broker, if any, would be set off against the debt and any excess paid to the broker.

[18] He therefore believed that Liberty would have ensured that the commission account and code remain open while the broker was earning commission. However even if the code were closed or terminated, commission from existing policies would be generated and flow into the commission account, although no new business could be submitted. The commission code was only terminated when the defendants failed to pay or submit new business. However the instalments payable in terms of the

agreement could not be debited from Shaazura's commission account because it had a negative balance.

[19] After the agreement was signed, Mr Ebersohn had regular interaction with Mr Moosa, who despite promises to write new business, failed to do so. Pursuant to correspondence between Ms Muldoon and Mr Hopkins on 14 July 2008 about the failure of the defendants to make payment or generate new business, he was requested by Mr Hopkins to hold a serious discussion with Mr Moosa and place him on terms to pay, failing which legal proceedings would be instituted. Mr Ebersohn duly met with Mr Moosa and recorded his discussions at the meeting in an email dated 15 July 2008 to Ms Muldoon and Mr Hopkins.

[20] But concerted attempts to recover the debt from the defendants failed, and the matter was handed over to the legal department at Liberty's head office with instructions to terminate the contract and to proceed with legal action for recovery of the debt.

[21] Under cross-examination Mr Ebersohn described the settlement reached between the parties as 'standard protocol' which had been explained to Mr Moosa. To his understanding, although entitled 'Deed of Settlement' because it was indicative of the settlement reached by the parties, the agreement was effectively an acknowledgment of debt by the defendants.

[22] Although he conceded that he may have erred in his recollection of where the agreement was signed, Mr Ebersohn remained adamant that Mr Moosa had signed the agreement because it reflected the negotiations between the parties: the defendants had agreed on the manner in which the debt was to be liquidated, Liberty's legal department prepared the agreement and Mr Moosa had committed himself to the repayment in accordance with the terms of the acknowledgment of debt by signing it.

[23] Mr Ebersohn persisted that, although the defendants code had previously been suspended as reflected in an email dated 12 December 2007 from Mr Hopkins, the code was open to enable Mr Moosa to write new business. He was of the view

that Nassar Hoosen (Mr Hoosen), a broker consultant who had been allocated to the defendants in order to facilitate an amicable resolution and to process new business written by Mr Moosa, would have brought any problem with the code or commission account to his attention, as he was aware that Mr Ebersohn was monitoring the debt and had to report regularly to Liberty's head office. However neither Mr Hoosen nor Mr Moosa advised him that there was a problem with the code or that Mr Moosa had been unable to submit new business.

[24] Ms Muldoon testified that in June and July 2008 she worked in the Debt Management Department and dealt with brokers on commission-related issues. She had no direct communication with Mr Moosa but Mr Ebersohn requested her to prepare an acknowledgement of debt because Shaazura was going to pay a large debt in installments. She prepared the agreement[3] which was sent to Mr Ebersohn for completion and subsequent return to the head office.

[25] Ms Muldoon obtained the figures for the debt owing to the plaintiff, as reflected in clause 2 of the agreement, from the commission statement of the first defendant. The monthly installments and period over which the payment was to be effected were usually proposed by the Branch Manager and the debtor together because they would know the rand value of the business submitted by the broker. The repayment period and the monthly installment reflected in clause 3 were provided to Ms Muldoon who then prepared the agreement and sent it to the Branch.

[26] Although Ms Muldoon was aware that the original agreement was returned to head office and filed, she did not know why Liberty had not signed the agreement. She had however, on the basis of the agreement, created a loan account in respect of the capital debt with a commencement date of 30 June 2008 and an end date of 30 September 2009. The loan was referred to as a 'New aod loan'. The monthly installment was reflected on the commission account as a debit to be paid by the broker either by way of cash or commission.

[3]Annexure A to the particulars of claim, pages 16 -20.

[27] Ms Muldoon personally monitored the accounts and sent several emails to Messrs Hopkins and Ebersohn when no payment into the commission account or by the debtor was reflected on the system. She disputed that Mr Moosa was prevented from submitting new business because the commission code was suspended or closed, stating that the code would not have been suspended because there was money due by the broker.

[28] Ms Muldoon also disputed that the defendants' offer to pay had not been accepted as Liberty did not sign the agreement, stating that Liberty's acceptance was demonstrated by the opening of the loan account and the opportunity afforded to the defendants to make monthly payments. She pointed out that Mr Moosa only became aware of the status of the account after the Branch Manager requested them to terminate the account on 1 August 2008.

[29] Ms Muldoon confirmed that she had instructed Ms Elaine Odendaal, the Contracting Manager responsible for the opening and termination of codes, per email at 4:01pm on 1 August 2008 to terminate all commission codes for Mr Moosa, and Ms Odendaal had in turn instructed her administrator per email shortly thereafter on the same day, to 'terminate the whole brokerage and all sub-codes. Total commission and handed over. Also put it on hold'.[4] Suspension of a commission code would be effected by the Contracting Department on the instructions of the Branch Manager.

[30] Ms Muldoon explained the difference between 'suspension' and 'termination' in the context of the brokers. If a code was 'suspended' the broker was still active, but the code was closed to new business. Brokers were 'terminated' when they no longer wrote business for Liberty.

[31] Ms Muldoon acknowledged that according to the email from Mr Hopkins dated 16 April 2008 the defendants' code had been suspended. But she persisted that the code would have been changed if the broker had been given an opportunity to offset

[4] Exhibit A pages 34-35.

commission against his debt, after he signed the acknowledgment of debt, although the opening of the loan account on its own would not have affected the suspension.

Application for Absolution

[32] At the end of Liberty's case Mr *Bezuidenhout* applied for absolution from the instance of the defendants. He submitted that Liberty had failed to prove a valid contract. The document relied on by Liberty was a settlement agreement and not an acknowledgment of debt; therefore the ordinary principles of contract applied and the contract would only have been concluded when the defendants offer of repayment was accepted and both parties appended their signatures for which provision was made on the agreement. The agreement was not signed by Liberty. The defendants were consequently not bound by the terms thereof as there was no contract.

[33] Mr *Steyn* opposed the application on behalf of Liberty, contending that there was no statutory or legal requirement that the agreement had to be signed by Liberty to be valid and binding on the defendants. The liability of the defendants to Liberty was not disputed and the agreement was prepared to reflect the arrangements Mr Ebersohn had negotiated with Mr Moosa for the repayment of the sum due to Liberty. Liberty made the offer by preparing the agreement and the debtor accepted the offer to repay the admitted debt on the terms set out in the agreement when he signed it. Further an acknowledgment of debt does not require acceptance by the creditor, nor was there a counter-offer requiring acceptance by Liberty. The terms of the agreement were implemented by Liberty and the defendants account monitored. Mr *Steyn* contended that there was sufficient evidence to sustain Liberty's case.

Ruling

[34] When absolution from the instance is sought at the close of the plaintiff's case the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought

to) find for the plaintiff.[5] The application was refused as I was satisfied that on a reasonable consideration of Liberty's case, there was sufficient or *prima facie* evidence to avert a ruling of absolution.

The Defendants' case

[35] Mr Moosa, who had become a broker for Liberty in 2006, admitted that monies had become repayable to Liberty by December 2007 and that the impugned agreement embodied the result of his various negotiations with Liberty. He had had discussions with Mr Hoosen and Mr Ebersohn's predecessor, but had only met with Mr Ebersohn on two occasions: when Mr Ebersohn took up his post as Branch Manager and when he met Mr Ebersohn and Mr Hoosen about the debt.

[36] Mr Moosa had signed the agreement which Mr Hoosen brought to his office, because Mr Hoosen had told him that Liberty required the agreement to decide whether to accept the defendants' offer or not. He therefore understood that, in accordance with clause 3.1 of the agreement, Liberty had to accept his offer that he be allowed to write business and the commission generated from that business be utilized to pay off the debt. However he did not receive the requisite confirmation from Liberty that he could write new business.

[37] When Mr Moosa handed the signed agreement to Messrs Ebersohn and Hoosen at a restaurant, Mr Ebersohn advised Mr Moosa that he did not have the authority to make a decision on the agreement and had to await confirmation from head office. Thereafter Mr Moosa had no further discussions with Mr Ebersohn and dealt only with Mr Hoosen. He did not receive any written communication from Liberty, although he had advised Liberty that the code which had been suspended had to be opened to enable him to submit new business.

[38] At the time when he signed the agreement Mr Moosa was not writing business because his clients had been told that his broker code had been cancelled

[5] This test was first formulated in these terms by De Villiers JP in *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173, and was approved by the Appellate Division/Supreme Court of Appeal in *R v Shein* 1925 AD 6 at 9. See also *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H.

and subsequently, Mr Hoosen had repeatedly advised him that his code was suspended. Further Mr Hoosen and another broker approached his clients to write new policies, which affected the commission generated by his 'good business'. Therefore although he had written new business, he could not submit the proposals to Liberty and lost the business to other brokers, and did not earn commission to comply with his undertaking to pay the debt.

[39] Although he made numerous requests for the suspension to be uplifted, Mr Moosa did not receive any notification nor was he informed that the suspension had been uplifted. Initially he was advised that the Branch was waiting for the decision by head office. But it became apparent to him that his existing client database was being eroded by other brokers. He was nevertheless shocked when informed by his attorney that his code had been terminated.

[40] Under cross-examination Mr Moosa confirmed that the value of his indebtedness had initially been in dispute but after negotiations he and Mr Ebersohn had agreed on the sum of R700 000. He also confirmed that the terms recorded in the agreement, inter alia in respect of the debt owed by Shaazura and the repayment in instalments, accorded with the terms he had agreed to with Mr Ebersohn. But he persisted that Mr Ebersohn had told him that he would forward the agreement to Liberty's head office; and if his proposals were accepted, he would receive confirmation from the head office.

[41] The defendants did not call further witnesses.

Argument

[42] In their closing arguments, counsel reiterated and supplemented the arguments presented in the application for absolution.

[43] Mr *Steyn* submitted that even on the Mr Moosa's own version that he made proposals to Liberty, by preparing the agreement in accordance with those proposals Liberty had accepted the defendants' offer, and would therefore have not reserved the right to accept or reject the offer. However as the agreement was an

acknowledgment of debt incorporating the terms of repayment, had it emanated from the defendants, Liberty would have the election to accept or reject the terms of repayment. But as the document had been prepared by Liberty and submitted to the defendants for signature, Liberty would and could not have reserved the right to accept or reject the agreement.

[44] On the other hand Mr Ebersohn's evidence that he negotiated the settlement with Mr Moosa and forwarded the agreed terms to the Debt Management Department so that the agreement could be prepared incorporating the agreed terms was corroborated by Ms Muldoon. Once the agreement was signed Liberty demonstrated the acceptance of the terms of the agreement by creating a loan account to enable the repayments to be credited against the debt owed by the defendants and monitoring the repayments. Although Mr Moosa has pleaded that the offer was withdrawn when Liberty failed to accept his proposal he has not testified how and when the offer was withdrawn.

[45] In respect of the defence of *mora creditoris,* Mr *Steyn* submitted that the defendants had failed to discharge their onus to prove that Mr Moosa had made a valid tender to comply with their obligations under the agreement by submitting new business and that he was prevented by the failure of Liberty to co-operate and enable him to earn commission by uplifting the suspension on his commission code and/or account. Nor had the defendants made any demand on Liberty to open or uplift the suspension of the code, even if there had been an oversight on the part of Liberty. He submitted in conclusion that Liberty was entitled to the relief sought.

[46] Mr *Bezuidenhout* contended in response that Liberty's cause of action was the breach of the agreement and not an acknowledgment of debt and that only in argument had Mr *Steyn* described the agreement as 'a settlement agreement incorporating an acknowledgment of debt and terms of repayment'. He pointed out that it is apparent from the format and content of the document that it is a settlement agreement and therefore requires both parties to sign before it becomes a valid and binding contract. Although it was the intention of the parties to record their discussions in writing, when Mr Moosa signed the contract he became the offeror. Therefore Liberty was required to accept the offer by signing the agreement and Mr

Ebersohn confirmed that the agreement was sent to Liberty's head office for signature. The agreement also made no provision for payment in the event that insufficient commission was generated to meet the repayment. He submitted that Liberty had therefore failed to discharge its onus to show that the agreement was valid.

[47] Mr *Bezuidenhout* submitted further that Liberty had presented no evidence confirming that the code was opened after it was suspended in 2007. Ms Muldoon had testified that the opening of the loan account did not affect the code. Further given the distinction between suspension and termination of the codes, the termination did not preclude the failure to uplift the suspension as alleged by the defendants. He concluded with the submission that the action consequently fell to be dismissed with costs.

Evaluation:

[48] Although Mr Ebersohn's memory failed him in respect of where the agreement was signed by Mr Moosa, he was confident about his negotiations and discussions with Mr Moosa before and after the agreement was signed and his motivation for negotiating the terms for repayment of the debt by the defendants. His objective was a mutually beneficial arrangement, which enabled the defendants to earn commission and pay off the debt. The same resolution was suggested by Mr Hopkins, in his email dated 16 April 2008:

> 'What I am wanting to try and achieve is that we work with this broker who has shown that he is wanting to resolve the debt by instituting an AOD with a payment of R50 000 per month until the debt is paid off. The broker has suggested that if he is able to pay more back monthly he would do this but does need to live at the same time. He has business to submit to us but due to the fact that we have suspended his code he is not able to do so.
> … as far as I can ascertain the broker wants to resolve this debt and I would like to suggest we work with him and put an AOD in place and monitor it on an ongoing basis until the debt has been paid.'

[49] Mr Ebersohn also testified that Mr Hopkins held a meeting with Mr Moosa, at which he was also present where the same resolution was discussed and Mr Moosa was asked to explain why no new business was forthcoming from him. Mr Moosa had advised them that he would write business but failed to do so. This evidence remained undisputed, and it was put to Mr Ebersohn that according to Mr Moosa, the meeting took place before the agreement was signed. Mr Moosa confirmed that the agreement correctly recorded the terms he had agreed to with Mr Ebersohn.

[50] Therefore Mr Moosa would have been aware that the terms of settlement were acceptable to Liberty and that there was no need for Mr Ebersohn to receive any authorization or confirmation to finalise an acknowledgment of debt on the suggested terms. Further Mr Moosa conceded that Mr Ebersohn capped the debt at R700 000 without his authority being called into question, and it was not put to Mr Ebersohn that he did not have the authority to settle and agree to the terms of repayment. Ms Muldoon also confirmed that the terms of repayment were agreed to by the Branch Manager and the broker, and her evidence that once Liberty received the agreement signed by the defendants, she captured the details, opened the loan account and monitored the payments is also in accordance with the resolution and terms proposed by Mr Hopkins.

[51] Mr Ebersohn's testimony that he met Mr Moosa on several occasions and communicated with him regularly in order to finalise the indebtedness and terms of repayment and to query his failure to write new business and pay the instalments as undertaken, was not disputed under cross-examination. Nor was it put to Mr Ebersohn, who confirmed that Mr Hoosen was appointed to facilitate the resolution and process the new business written by Mr Moosa, that, except for two occasions, it was only Mr Hoosen and not Mr Ebersohn who met with Mr Moosa. Mr Ebersohn's evidence was only disputed when Mr Moosa testified.

[52] Mr Ebersohn testified that he had 'engaged personally with Mr Moosa on an ongoing basis' and that Mr Moosa had expressed a commitment to settle the debt, although he had repeatedly experienced difficulty getting hold of Mr Moosa subsequent to the signing of the agreement. In response to Mr Hopkin's email on 14

July 2008 requesting Mr Ebersohn to have a 'serious discussion with Shaaz', on 15 July 2008, Mr Ebersohn emailed Mr Hopkins and Ms Muldoon stating:

> 'I expressed the seriousness and importance of him settling this debt and he acknowledged this and expressed his commitment to supporting us. He is attending training the ELM products on Thursday at our branch and has existing funds he intends to channel to us in this regard. I will however make contact/see him again and monitor the state on an ongoing basis.'

[53] In a later email dated 1 August 2008 to Ms Muldoon and copied inter alia to Mr Hopkins, Mr Ebersohn wrote:

> 'Repeated attempts to convince Shaaz Moosa to settle his outstanding debts have proven to be unsuccessful. Numerous promises to either submit new business or deliver a cheque have come to nothing! As per our agreement with him, and unless he responds within the next hour, please ensure his code is closed to new business and he is handed over for legal action! Please ensure swift action in this regard and keep us informed as to progress.'

[54] The aforegoing emails corroborate Mr Ebersohn's assertion that he met with Mr Moosa personally on several occasions, and despite many unsuccessful attempts to contact him, he discussed his failure to pay several times directly with Mr Moosa who responded with numerous promises to pay as undertaken.

[55] On the other hand, Mr Moosa's denial of Mr Ebersohn's testimony and his own version of his limited interaction with Mr Ebersohn is unconvincing in several respects.

[56] Although he admitted that Mr Ebersohn entered into negotiations with him about the repayment of the debt, Mr Moosa alleged that all communication with Liberty, except for two occasions when he met Mr Ebersohn, was only through Mr Hoosen. Yet it was pointed out to Mr Moosa under cross-examination, that the meeting with Messrs Hopkins and Ebersohn took place before the agreement was signed which constitutes a contradictory admission of a further interaction with Mr Ebersohn.

[57] Mr Moosa refused to admit that Mr Hoosen had no authority except to act as a conduit of information between Mr Moosa and Mr Ebersohn and that discussions with Mr Hoosen did not lead to the conclusion of any agreement, stating that he believed that Mr Hoosen was ‘influential’. But he admitted that the agreement contained the terms he had agreed to with Mr Ebersohn, not Mr Hoosen.

[58] Mr Moosa testified that Mr Ebersohn had entered into negotiations with him about the debt because he knew that the defendants had good business and influential clients. But when asked if Mr Ebersohn had expressed the desire to keep him in business, Mr Moosa backtracked, replying that he had informed Mr Moosa that he would put his case forward to the head office, which would revert to him. Yet it is apparent from the evidence and the correspondence furnished by Liberty that Liberty accommodated the defendants’ constraints by agreeing that they could liquidate their acknowledged debt in instalments.

[59] Mr Moosa confirmed that the value of his indebtedness was agreed with Mr Ebersohn at R700 000, but alleged that he proposed the terms of repayment reflected in the agreement and that Mr Ebersohn had advised him that he had to forward the agreement to the head office for confirmation and instructions, or he would have opened the code. This alleged response by Mr Ebersohn was not put to him during cross-examination, although Mr Moosa insisted that he had instructed his counsel accordingly. Further, it is apparent from the oral evidence and the emails furnished to the court, that Mr Ebersohn, as Branch Manager, could not ‘open the codes’ as suggested by Mr Moosa.

[60] Mr Moosa confirmed that Liberty had through Mr Hoosen presented the agreement to him which was in accordance with his proposals to Liberty, but added that Mr Hoosen had told him that he needed to get confirmation that the debt was R700 000. When reminded of his earlier testimony that he had agreed the debt at R700 000 with Mr Ebersohn, Mr Moosa conceded that he had, but refused to admit that Mr Ebersohn could therefore not have said that he needed confirmation of the debt by head office, responding that Mr Ebersohn must have said so ‘in passing’. Similarly Mr Moosa testified that he was specifically advised by Mr Hoosen that he could not submit business because the code was not opened but subsequently

alleged that Mr Hoosen had advised him that a response was awaited from head office.

[61] Having agreed that Liberty's head office had accepted the debt at R700 000 and was 'happy' with the terms of repayment because the debt and the repayment terms were recorded in the agreement, and that he had no quibble with any of the other terms in the agreement, Mr Moosa evaded a direct response to the logical proposition that his proposals had therefore been accepted by Liberty, responding that, to his knowledge, the agreement was a settlement agreement, not an acknowledgment of debt and he would be able to write business to pay off the debt. When pressed to admit that even on his version that he had made proposals to Liberty, his confirmation that the agreement contained all his proposals indicated the head office at Liberty had accepted his proposals, Mr Moosa simply responded that Liberty was supposed to open the codes.

[62] Mr Moosa alleged that he was not aware that Liberty would uplift the suspension on receipt of the agreement and that he had unsuccessfully attempted to get hold of Mr Ebersohn to confront him about being unable to write business. But when asked if he had written to Mr Ebersohn or anyone at Liberty advising them that he could not pay because he was unable to submit his business, Mr Moosa responded that he could not contact Mr Ebersohn and was referred to Mr Hoosen, who always facilitated any interaction with Mr Ebersohn.

[63] It was only at this late stage that Mr Moosa alleged that Mr Hoosen had stopped communicating with him because Mr Hoosen and other brokers were diverting his business. He was unable to explain why Liberty would take away his business when it had negotiated a settlement with him which was dependent on the business he wrote. Further this version of his existing and prospective business being eroded by other brokers and that Liberty was sabotaging his prospects of earning commission by redirecting his clients, was not put to Mr Ebersohn who specifically testified that Mr Hoosen as the broker consultant, would have known if there were problems with the submission of new business and communicated the difficulty to him. Nor did Mr Moosa explain why he did not communicate directly with Mr Ebersohn if Mr Hoosen was undermining his business. Instead he offered a

garbled response that Mr Ebersohn may not have been aware of what was taking place although he would have attended meetings with Mr Moosa's clients; or he may not have directed business away from Mr Moosa intentionally; or he may have been guided by Mr Hoosen.

[64] This version, in my view, was a further late fabrication by Mr Moosa, a view that was fortified by his response when questioned about his failure to discover his proposals for new business, that the issue was not whether his 'business was being accepted or not'. However when he subsequently conceded that his case was that he had business which he could not submit and that Mr Hoosen did not take his proposals, he alleged that he had not discovered the proposals because the dispute was 'whether the document was an acknowledgment of debt or a settlement agreement'.

[65] Mr Moosa confirmed that paragraph 10.2.5 of his plea viz 'Plaintiff unilaterally closed the First Defendant's commission account not allowing further funds to be transferred thereto' was in accordance with his instructions and referred to the closure in December 2007. However as the 'closure' occurred before he signed the agreement, his allegation is inconsistent with his further plea that due to the conduct of Liberty in closing the account, he could not comply with clause 3 of the agreement.[6] Mr Moosa also acknowledged that the account may not have been terminated or closed but suspended, but he had considered suspension and closure to be the same. Nevertheless, it was undisputed that even if the account were suspended, the commission generated by existing business would have flowed into the account. But Ms Muldoon who monitored the accounts reported that there were no funds in Mr Moosa's account to debit, which was reflected in the statements of the commission account. However in his affidavit opposing summary judgment[7] Mr Moosa alleged that Shaazura had earned commission but Liberty failed to debit the commission account; he did not allege that Liberty had closed and failed to open his commission code.

[6] Paragraph 10.2.6 of the plea.
[7] Paragraph 5 of the defendants' affidavit.

[66] Mr Moosa disputed that there was no commission because he did not earn any, insisting that there was commission from earlier business. This allegation was contradictory to his version that Mr Hoosen and other brokers were eroding his 'good business' and his clients were advised that his commission code was closed. Mr Moosa's belated allegation that Mr Hoosen and other brokers eroded his business was, in my view, an attempt to explain his failure to generate commission to liquidate the debt, although he may have generated substantial commission prior to 2007. Being independent, the defendants were not restricted to submitting business only to Liberty; and there was no bar to the diversion of existing business to frustrate the recovery of the debt by Liberty. A few debits and credits are reflected on the defendants' commission account,[8] which indicates that there was activity on the account. Therefore commission from existing business could not have been blocked.

[67] Finally, after vacillating between being unable to submit proposals online and Mr Hoosen's role in not submitting his proposals because of the awaited response from Liberty, Mr Moosa admitted that it was possible that Liberty had opened the commission code but, because he was not informed by Liberty that the code was open, he did not know the account was operational. His response was not consistent with his allegation that he had been unable to submit his proposals online to Liberty and that he was advised by his clients that his commission code was closed.

[68] The agreement was signed by Mr Moosa in June 2008. By July 2008 there was already communication between Liberty's head office personnel and the Branch Manager about Mr Moosa's failure to meet the repayments. But there is no reference in their correspondence to any communication from Mr Moosa about the alleged impediment created by a suspended code, only that he had repeated his promises to pay and had failed to pay.

[69] Although Mr Moosa alleged that he made numerous requests to Liberty to open the code, he failed to specify to whom and how these requests were made. Had he been bona fide in his attempts to meet his repayments as undertaken and was being frustrated by Liberty, it is highly improbable that he would not have told Mr

[8] Statements : Exhibit A51 – A100

Ebersohn that he was experiencing difficulty in submitting new business or that he would have remained silent in anticipation of a confirmation or refusal from Liberty's head office, especially when Mr Ebersohn was vigorously pursuing him to elicit compliance with his repayment obligations.

[70] And therein lies the rub! And the motive for Mr Moosa's denial that Mr Ebersohn communicated with him regularly both before and after the agreement was signed by him. Had he admitted that Mr Ebersohn was in regular communication with him, Mr Moosa would not have been able to explain or justify his failure to inform Mr Ebersohn of the problems he allegedly experienced in submitting new business and to confront him about the suspended code. Nor would Mr Moosa have been able to rely on his version that Mr Ebersohn advised him that he had to await communication of acceptance from head office, because when Mr Ebersohn asked him to comply with the agreement, he could have placed his obligation to comply in dispute by responding that he was awaiting confirmation of acceptance by Liberty.

[71] Under cross-examination Mr Ebersohn was referred to an email dated 14 August 2008, from Gerings, Liberty's attorneys and asked why Mr Moosa would sign another acknowledgment of debt if one was already in place. In the aforesaid email, Gerings advised Liberty that Mr Moosa had proposed settlement on the basis that he registered a mortgage bond over his immovable property as collateral security, paid monthly instalments of R10 000, and :

> '3. He(Mr Moosa) would like Liberty to re-open his contract for submitting new business, whereby commission earned on such new business could be controlled by Liberty either by means of a retention agreement or crediting commission against the debt on an as an(d) when basis;
> 4. He can then look at also increasing the amount being paid back to Liberty if he is in a position to submit such new business;
> 5. In the event that he defaults then Liberty would have the aforesaid security against his property and could proceed to exercise its rights to call up such security;
> 6. If he sells (t)he said immovable property then he would have to arrange for the necessary financial guarantees/undertakings to be produced prior to Liberty agreeing to uplift such security.

7. He would be prepared to sign an acknowledgement of debt to regulate the above arrangement'.

[72] This email records the *further* (my emphasis) settlement proposals[9] from Mr Moosa, after Liberty terminated the defendants' commission code when he defaulted with payment in terms of the agreement. There was clearly no complaint by Mr Moosa about the obstructions to his submission of new business or the failure of Liberty to confirm that it had accepted his settlement proposals as recorded in the agreement. Nor did he inform the attorney that his business was being poached or query why no commission was generated from existing business. To the contrary, he made further settlement proposals and offered to furnish security, and indicated that he would sign an acknowledgement of debt '*to regulate the above arrangement'* (my emphasis).

[73] Having considered the conspectus of evidence, I am satisfied that on a balance of probabilities the evidence of Mr Ebersohn is to be preferred to the version offered by Mr Moosa. Mr Ebersohn's evidence is corroborated by the correspondence I have already referred to. Further Ms Muldoon testified undisputed that Mr Moosa only became aware of the status of the code after termination and Mr Hoosen did not report any problems with the code to Mr Ebersohn. In comparison, the absence of a cogent and consistent explanation of his failure to pay his debt from Mr Moosa and his vague and contradictory evidence about his communication with Liberty, and Mr Ebersohn in particular, undermine the credibility of his version. Mr Moosa has also not explained what precluded him from contacting Mr Hopkins, who had engaged with him about the debt, or from making enquiries with Liberty's head office directly if he was undermined and frustrated by Mr Hoosen or unable to contact Mr Ebersohn. Despite his allegation that he withdrew his offer to Liberty, Mr Moosa did not testify when and where he withdrew his 'offer of settlement' and to whom his withdrawal was communicated. Mr Moosa's proposal to Gerings is also inconsistent with his allegation that he had withdrawn his offer to Liberty as recorded in the agreement.

[9] Mr Moosa confirmed that he had made settlement proposals when the agreement was negotiated with Mr Ebersohn.

[74] I am consequently satisfied that, contrary to his assertions, Mr Moosa did not inform Liberty at any time that he could not submit new business because he *did not* (my emphasis) submit new business and therefore was not aware that the code may not have been open.

[75] I am also satisfied that Mr Moosa did not await confirmation from Liberty but considered himself bound by the terms of the agreement which he had negotiated, because he repeatedly promised to pay and did not raise any objection to the validity or implementation of the agreement by Liberty when Mr Ebersohn confronted him with his failure to pay, nor did he remind Mr Ebersohn that he was waiting for confirmation from Liberty. Similarly he did not mention any of his alleged difficulties or reservations to Gerings. It was only when Liberty instituted the action against the defendants that Mr Moosa opportunistically grasped at his proffered defence of the invalid contract, alternatively the closed code, to avoid paying the debt he admitted he owed to Liberty.

The Nature and Validity of the Agreement

[76] The appropriate starting point in the determination of whether the agreement is an acknowledgement of debt which does not require the signature of the plaintiff as creditor as contended by Liberty, or whether it is a settlement agreement which requires the signature of both parties and is therefore invalid and unenforceable against the defendants because Liberty did not sign the agreement as contended by the defendants, is the current approach to interpretation of contracts.

[77] In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*[10] Lewis JA stated:

> '[24] …The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded. …

[10] 2013 (5) SA 1 (SCA) (footnotes omitted).

> [25] In addition, a contract must be interpreted so as to give it a commercially sensible meaning:…'

[78] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[11] Wallis JA stated:

> 'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise". Accordingly it is no longer helpful to refer to the earlier approach.'

[79] The factual matrix and 'relevant and admissible context, including the circumstances in which the document (the agreement) came into being, have already been set out in detail.

[80] In my view, the context in which the agreement was prepared indicates that the parties had intended that the agreement record the nature and extent of the debt as already agreed, and the acknowledgement by the defendants of their indebtedness to Liberty, which it does. Clause 2 of the agreement reads:

> '2. Acknowledgement of Debt
>
> The Debtor acknowledges that he is indebted to the Creditor in the amount of R700 000.00 (Seven Hundred Thousand rand only), (referred to as "the debt"), which is advanced commission for policies canvassed by the Debtor, which policies have since were lapsed, cancelled, reduced or terminated within the period mentioned in the Agency agreement and the Schedule of Commission.'

[11] 2014 (2) SA 494 (SCA) para 12.

[81] Therefore despite the nomenclature ‘‘Deed of Settlement’, Shaazura unequivocally acknowledged its lawful indebtedness to Liberty in the agreement, as pleaded in paragraph 4 of the particulars of claim. The remaining material terms of the agreement relate inter alia to the repayment of the debt, interest, costs, non-variation of the agreement.

[82] Consequently the only ‘commercially sensible meaning’ I am able to ascribe to the agreement, is that it was intended to be an acknowledgement of debt which incorporated the other terms agreed on by the parties. I am fortified in my conclusion by the evidence of Mr Ebersohn that Liberty assisted brokers to liquidate their indebtedness to it by negotiating an agreement in terms of which the broker would sign an acknowledgment of debt and undertake to settle his liability by generating new business and paying off the debt through the commission earned. As only a debtor has to acknowledge his indebtedness and confirm his undertaking to pay, the signature of the creditor is not essential to create a valid and binding agreement, even if the agreement contains an undertaking to pay.

[83] This precept may be demonstrated as follows: a loan agreement in terms of which a creditor loans and advances money to a debtor is signed by both parties, because it imposes obligations and entails performance by both parties. But when the debtor furnishes security for the loan by registering a mortgage bond, the bond documents are signed only by the debtor and are binding on and enforceable against him. The debtor acknowledges his indebtedness to the creditor and the extent thereof in the mortgage bond, which also records the rate of interest, the terms of repayment, consequences of breach by the debtor etc. Were the creditor to sue on the bond, no objection would be raised that he is relying only on portions of the mortgage bond, or that he is alleging that the acknowledgment of debt portion in the bond is severable from the provisions for payment, because only the debtor signed and executed the bond.

[84] I am therefore unable to find merit in the reliance by the defendants on *Kotzé v Suid-Westelike Transvaalse Landbou Koöperasie*[12] to sustain the argument that by

[12] 2005 (2) SA 295 (SCA).

alleging that the agreement is an acknowledgement of debt, Liberty is attempting to rely on a portion of the agreement which is not severable from the whole, and therefore requires the acceptance by and signature of Liberty as creditor. The argument is also contrary to the view expressed in *T.W. Lyne & Co v Benjamin Orchard*[13] where the plaintiff, who held a note recording an acknowledgment of debt and a promise from the debtor to pay in monthly instalments, submitted that he had sued on the acknowledgment of debt, and not on the promise to pay and sought provisional judgment for the sum on the acknowledgement of debt. The court noted that there was an acknowledgment of a debt and an offer to pay, but there was no evidence that the offer had been accepted. However as the plaintiff proceeded on the acknowledgment of debt, and not on the promise to pay, the court granted judgment for the full debt.

[85] Although Liberty relies on the written agreement, a question that arises is whether it was a condition precedent that the acceptance of the terms agreed verbally would not be effective unless embodied in a written agreement to be signed by the parties? There is no evidence of such a condition. To the contrary, although Mr Moosa alleged that by signing the agreement he had made an offer to Liberty, he nevertheless agreed, and it was never disputed, that the parties were *ad idem* and had reached *consensus* on the material terms as recorded in the agreement. As already noted, no dispute was raised with Liberty about the failure to confirm its acceptance when Mr Moosa made numerous promises to pay or even when he agreed to sign a further acknowledgement of debt. On the other hand Liberty proceeded to open the loan account and implement the terms of the agreement. It may safely be concluded from the conduct of the parties that the written agreement embodied the terms of the verbal agreement which the parties intended to be binding.

[86] In *De Bruin v Brink*[14] Blaine J explained:

> ‘An agreement to confirm in writing the written terms of a contract implies that what was arranged prior thereto was merely introductory and provisional, and of no

[13] 1872 NLR 2.
[14] 1925 OPD 68 at 73.

binding force: and on that account furnishes very strong evidence of intention that the writings containing the terms and the confirmation should alone form the contract. But no such implication would, I think, arise merely from an agreement to embody in a written document terms which had been previously verbally arranged, as such an undertaking would be quite consistent with an intention to be bound by the verbal agreement, while a condition requiring confirmation in writing of written terms would not.'

[87] Innes CJ in *Woods v Walters*[15] stated:

'The parties may of course agree that their contract shall not be binding until reduced to writing and signed, and if they so agree there will be no *vinculum* between them until that has been done. But the mention of a written document during the negotiations will be assumed to have been made with a view to convenience of record and facility of proof of the verbal agreement come to, unless it is clear that the parties meant that the writing should constitute the contract…It follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of a written document, lies upon the party who alleges it.'

[88] Consequently the argument that the process of signing a written bipartite contract where the first party to sign makes an offer and the other by his signature accepts, is applicable to the agreement and that the *vinculum iuris* would have only been created when Liberty signed the agreement, does not find favour with me. Further, the evinced intention of the parties to be bound by the verbally agreed terms, together with the absence of proof by Mr Moosa that Shaazura withdrew its offer, is fatal to the defendants' plea that Shaazura had merely made an offer to Liberty by signing the agreement, which offer was withdrawn when Liberty did not sign the agreement.

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[15] 1921 AD 303 at 305-306. See also In *Goldblatt v Fremantle* 1920 AD 123 at 128-9 where Innes CJ similarly held: 'Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. At the same time it is always open to parties to agree that their contract shall be a written one; and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction.' (References omitted).

[89] In the premises, I am satisfied that Liberty has discharged its *onus* and established its cause of action in proving that the agreement is a valid and binding agreement, of which the defendants are in breach.

Mora Creditoris

[90] When the non-performance or the failure by a debtor in performing his contractual obligations timeously is attributable to the creditor, the creditor is held to be in mora. The essence of *mora creditoris* is the creditor's failure to co-operate with the debtor to the extent necessary to enable the debtor to perform. However the debtor must tender performance and there can be no breach of contract by *mora creditoris* before any demand for co-operation from the creditor has been made by the debtor.[16] The onus lies on the debtor to establish that the creditor failed to co-operate, despite demand, which prevented or delayed his due performance.

[91] In the light of my finding that Mr Moosa did not submit new business or inform Liberty that the code was closed or request Liberty to open the code, it must follow that the defendants have failed to discharge the onus on them to prove, on a balance of probabilities, that their failure to comply with their obligations under the agreement was attributable to Liberty, who made their performance impossible by not allowing Mr Moosa to submit new business proposals, and their defence of *mora creditoris* must fail.

Costs

[92] There is no reason why costs should not follow the results. In terms of clause 14 of the agreement, the defendants agreed to pay legal costs on the scale as between attorney and own client. I have also considered the submissions by Mr *Bezuidenhout* in respect of the costs of the adjournment reserved on 12 February 2012, and am of the view that the reserved costs should be costs in the cause.

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[16] R H Christie *The Law of Contract* 6 ed (2011) at 533; *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens; Qwa Qwa Regeringsdiens v Martin Harris & Seuns OVS (Edms) Bpk* 2000 (3) SA 339 (SCA) paras 17-19. See also *Government of the Republic of South Africa v York Timbers (Ltd) (1)* [2001] 2 All SA 51 (A) para 60: '*Mora creditoris* arises only where the debtor's performance requires the co-operation of the creditor which it refuses, despite demand for it.'

Order

[93] The following order do issue:

Judgment is granted against the defendants, jointly and severally, the one paying the other to be absolved, for:

1. Payment in the sum of R838 024.43.

2. Interest thereon calculated at 2% above the prime interest rate prevailing from time to time, calculated from 20 August 2009 to date of final payment.

3. Costs of suit on an attorney and own client scale.

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MOODLEY J

APPEARANCES

Date of Hearing:	12-14 November 2014
Date of Judgment:	September 2016
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