**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL, LOCAL DIVISION, DURBAN**

**CASE NO: 6149/2015**

In the matter between –

**ALBARAKA BANK LIMITED** Applicant

and



**FEROZE SHEIK, N.O.** First Respondent

**SHEIK SULTAN, N.O.** Second Respondent

**RAEESA FEROZE SULTAN SHEIK, N.O.** Third Respondent

**SHEIK SULTAN** Fourth Respondent

**AZUELENE INVESTMENTS CC t/a SABENZA BRUSHWARE** Fifth Respondent

**FEROZE SHEIK** Sixth Respondent

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## FILING NOTICE

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To: **The Registrar of the above Honourable Court**
DURBAN

And to: **Zain Fakroodeen & Associates**
Applicant's Attorneys
213 Musgrave Road
DURBAN
Ref: Mr Randeree/DN/04 A014 055A)

Received without prejudice
this 16 day of 11 20 15
Time 11:30 am pm.
For ZAIN FAKROODEEN & ASSOC.

SIRS

**KINDLY TAKE NOTICE** that the Sixth Respondent files evenly herewith his affidavit opposing summary judgment set down for hearing on 23 November 2015.

KPH

Dated at DURBAN on this the 13TH day of NOVEMBER 2015.

1st, 2nd, 3rd, 4th and 6th Respondents Attorneys
**BILAAL BASHIR & ASSOCIATES**
1605 Nedbank House
30 Ingcunce Road (Albert Street)
Durban 4001
C/O : MESSENGER KING
Suite 801, 8th Floor
Esplanade Garage
127 Margaret Mncadi Avenue
Durban 4001

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| **SHEIK SULTAN** | Fourth Respondent |
| **AZUELENE INVESTMENTS CC t/a SABENZA BRUSHWARE** | Fifth Respondent |
| **FEROZE SHEIK** | Sixth Respondent |

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**SIXTH RESPONDENT'S AFFIDAVIT RESISTING SUMMARY JUDGMENT SET DOWN FOR HEARING ON 23 NOVEMBER 2015**

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I, the undersigned, **FEROZE SHEIK**, do hereby make oath and say –

1. I am a major male businessman and cited in this action in my representative capacity as the first respondent and in my personal capacity as the sixth respondent. I accordingly depose to this affidavit in my said respective capacities.

1.1 I am duly authorised to the extent it may be necessary, to depose to

this affidavit on behalf of the second and third respondents in their representative capacities and on behalf of the second respondent in his personal capacity.

1.2 I annex hereto their confirmatory affidavits marked **"A"** and **"B"** respectively.

1.3 The fourth respondent and I are Muslims by faith and so is the third respondent who is cited herein in her representative capacity.

2. The facts contained herein are within my personal knowledge and belief, save where the context clearly indicates the contrary, true and correct.

3. I shall for sake of convenience hereinafter refer to the parties as cited in the summons.

4. I have read and considered the Summons in terms of which this action was instituted, the Particulars of Claim annexed thereto, the Notice of Application for Summary Judgment and the affidavit of **Joshna Panday** ("**Panday**"), delivered in support thereof and respectfully reply thereto in the terms set out hereunder.

5. I deny that my co-defendants and I are liable to the plaintiff in the amount claimed and/or on the date pleaded and intend to put the plaintiff to the proof thereof at the trial of this matter.



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6. As will emerge for what is set out hereinafter not only is the plaintiff's action premature; its entire cause of action is manifestly bad in law.

7. To put matters in their proper prospective, I shall deal firstly with preliminary issues, then in turn, with points in limine, the ***Musharaka*** finance agreement and the applicable Islamic rules thereto and finally with the defence on the merits.

**PRELIMINARY ISSUES**

**NOTICE TO DEFEND FILED ON BEHALF OF THE FIFTH DEFENDANT**

8. I begin with the notice to defend filed on behalf of the fifth defendant. It would be observed that the defendants' erstwhile attorneys Gattoo attorneys of Johannesburg filed an appearance to defend on behalf of all the defendants including the fifth defendant *viz*, **Azulene Investments CC t/a SabenzaBrushware**.

9. I submit that, save for the notice to defend delivered on behalf of the fifth defendant that was erroneously filed for reasons I will refer to hereunder, the notice to defend filed on behalf of the remaining defendants remains valid.

10. I am advised that at the time the notice to defend was caused to be filed on behalf of the fifth defendant the said attorneys were unaware of the following intervening impediments –

10.1 the fifth defendant who is cited herein as a close corporation had

on 13 June 2013, changed its *legal persona* from a ***close corporation*** to a ***company***.

10.1.1 in evidence of the aforegoing, I annex hereto marked **"C"** the 'Registration Certificate', as recorded and issued by the Companies and Intellectual Property Commission (CIPC),

10.2 upon the statutory conversion referred to in 10.1.1 *supra*, the fifth defendant's legal status changed and became known as -

[i] **Azulene Investments (Pty) Limited**;

[ii] a company with limited liability duly registered and incorporated in accordance with the laws of the Republic of South Africa, bearing registration number 2013/061886/07 ('the company').

10.3 moreover and prior to the filing of the notice to defend on behalf of the fifth defendant (dated 31 August 2015) the fifth defendant was placed in provisional liquidation in the hands of the Master of the High Court, Durban.

10.3.1 I annex hereto marked **"D"**, a copy of the Certificate of Appointment of Provisional Liquidator, issued by the Master of the High Court, Durban on 24 August

2015.

10.3.2 As will be observed from annexure **"D"**, one **Johnine Winsome Maddocks** ('**Maddocks**') has been appointed by the Master as the provisional liquidator for the fifth defendant (in liquidation).

11. As a consequence of the aforegoing intervening impediments, and the lack of *locus standi*, the notice to defend on behalf of the fifth defendant was filed erroneously and is therefore accordingly hereby withdrawn. Further Gattoo attorney's mandate to represent the first, second, third, fourth and sixth defendants in this action has been terminated.

11.1 I annexed hereto marked **"E"** a copy of the notice of withdrawal.

**JOINDER – LIQUIDATOR**

12. I am advised that by virtue of the fact that the fifth defendant is in liquidation, the plaintiff is now under a legal duty to join **Maddocks***nominee officio* as provisional liquidator in the estate of *Azulene Investments (Pty) Ltd (in liquidation).*

13. Further I am advised that in terms of s.386(4)(a) of the Companies Act 61 of 1973 (Act), the said **Maddocks** is empowered *inter alia*, 'to bring or defend in the name and on behalf of the company (in liquidation) any action or other legal proceedings of a civil nature'.

14. It is clear therefore that as liquidator, the said **Maddocks** has an interest in the litigation. Accordingly any failure on the part of the plaintiff to now join the said liquidator in this action shall constitute a material non-joinder.

**IN LIMINE- POINT ONE**

**DEPONENT'S KNOWLEDGE AND AUTHORITY**

15. I now turn to deal with the plaintiff's application for summary judgment and in particular to, the affidavit deposed to by **Panday** who described herself as the 'Litigation Manager' of the plaintiff and responsible for overseeing the collection of outstanding debts.

16. I am advised, and respectfully submit, that **Panday** in her capacity as Litigation Manger could have no direct and positive knowledge of all of the facts on which the plaintiff relies for its cause of action. Her purported verification of the cause of action and the amount claimed and her averments to the effect that the respondents have no *bona fide* defence to the action and that the respondents have caused intention to defend to be delivered solely for the purpose of delay hence not only lack cogency but also, in my respectful submission, have no probative value whatsoever as I will demonstrate.

17. I submit that the said **Panday** –

[a] is unable to swear positively to the correctness of the balances (if any) or to the rate of profit-ratio or any negotiations and/or arrangements that

may have been concluded between the plaintiff and the trust defendants or any of the defendants for that matter as such information would fall within the scope of the management of the plaintiff bank and not the legal department;

[b] was not present on any occasion when the original contact was entered into or during its performance;

[c] played no role in its performance;

[d] had no communication at any stage either with me or subsequently with the any of the defendants personally, by telephone, by facsimile or by e-mail;

[e] was never the addressee of any correspondence, I or the defendants had with the plaintiff;

[f] was never the author of any correspondence addressed to me or the defendants.

18. Further I submit that at all times material all my interactions with the plaintiff bank whether on behalf of the defendant trustees and/or on behalf of the fifth defendant (during the term of my employment with the fifth defendant as its manager) was with one **Shaouna Adams** and **FerozaAllijan** and other representatives of the plaintiff bank but never with **Panday**.



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**IN LIMINE - POINT TWO**

**CERTIFICATE OF BALANCE**

19. The relevance of the aforegoing becomes clear when regard is had to the Certificate of Balance compared against the amount claimed in the plaintiff's summons.

(a) I draw the court's attention to page 2 of the plaintiff's application for summary judgment to be read together with the Certificate of Balance (ABL7) signed by **Panday.**

(b) It would be observed that the amount allegedly claimed by the plaintiff against the trust defendants (which appears on page 2 of the application for summary judgment) is the sum of:

**R 966 355.49**
(nine hundred and sixty six thousand three hundred and fifty five rand and forty nine cents).

(c) This amount appears inconsistent with the amount reflected in the Certificate of Balance *viz*;

**R 958 459.49**
(nine hundred and fifty eight thousand four hundred and fifty nine rand and forty nine cents).

(d) the difference between these two amounts is the sum of

**R 7896.00**,

20. The plaintiff's difficulties however, do not end there as will be observed from annexure **"F"**, a copy of a 'statement' of the plaintiff' bank which clearly reflects the balance due as at **2 August 2014** as being –

**R 890.989.14**
(eight hundred and ninety thousand nine hundred and eighty nine rand and fourteen cents).

21. The purpose of the certificate of balance, I am advised, is to create an evidential onus on the defendants to negate the plaintiff's allegations as to the quantum and the cause of any debt in any proceedings in which it seeks to make recovery. It is clear *ex facie* the Certificate of Balance compared with annexure **"F"**, that the amount allegedly due to the plaintiff is totally inconsistent with the amount claimed in the application for summary judgment and in fact, the plaintiff's summons. The Certificate of Balance is in the circumstances fatally defective and consequently of no evidential value and therefore no reliance can be placed thereon.

22. The deponent (**Panday**) I submit carelessly purported to confirm the inaccurate contents of a carelessly drafted summons. I accordingly deny the conclusions reached by the deponent.

23. Furthermore I am advised that at paragraph 3 of **Panday's** affidavit, she alleged that she has 'access to the **Respondents'** records' *(my emphases)*, plural meaning more than one respondent. Given that there are **six** 'respondents', it is therefore unclear precisely which of the 'respondents' records and files she makes reference to. I say so as only the **first, second** and **third defendants** are parties to the ***Musharaka*** agreement with the plaintiff bank in respect of this action.

24. Moreover and significantly at paragraph 4 of the said affidavit, **Panday** confirms under oath no less, the truthfulness of the Certificate of Balance, which as I have already demonstrated is fatally defective and consequently of no evidential value and therefore no weight can be placed thereon.

25. I am advised that the verifying affidavit represents the cornerstone of the summary judgment procedure, which permits the granting of a final judgment without full pleadings or a trial. The deponent to the verifying affidavit is required to swear positively to the facts verifying the cause of action, and the amount claimed, if any, and that in his or her opinion, the defendant does not have a *bona fide defence* to the action and, that the notice of intention to defend has been delivered solely for purposes of delay. The purpose of the verifying affidavit is to satisfy the court that the plaintiff's cause of action is not only valid but also unimpeachable and, that any defence to it is likely to be spurious and raised solely for the purpose of delay. I am advised that courts are reluctant to grant summary judgment unless satisfied that the plaintiff has an unanswerable case.

26. In the circumstances, I submit that I have successfully demonstrated the plaintiff had failed to tender conclusive proof not only of the averments contained in the Certificate, but also of the legal nature of the document itself. The certificate therefore cannot stand as *prima facie* proof of the substance of its contents and therefore must fail.

27. I submit that **Panday's** verifying affidavit is fatally defective and consequently falls terribly short of the requirements. Accordingly in the circumstances the application for summary judgment falls to be dismissed with costs.

28. It is my respectful submission that the foregoing shortcomings and defects in the application for summary judgment are fatal thereto, warranting the dismissal of the application with costs on this score alone.

**IN LIMINE POINT THREE**

**SECTION 129 NOTICE IN TERMS OF NATIONAL CREDIT ACT 34 OF 2005**

29. I now turn to deal with the s.129 notice in terms of the National Credit Act 34 of 2005 ("NCA").

30. At the outset my co-defendants and I deny receipt of the purported s.129 notice and further deny due 'delivery' of such notice within the meaning of the NCA. Moreover it is instructive to note that the amount allegedly due in terms of the said notice is once more inconsistent with the Certificate of Balance.

31. It is worthy of mention that the amount sought in the s.129 notice dated 27 January 2015, is the sum of **R70 115.46** being the arrear as at ***'OCTOBER 2014'***. Notwithstanding that no precise date when the alleged arrears fell due is stated in the notice, the amount in any event is clearly inconsistent with what is sought to be claimed in the summons. I am advised a s.129 notice is peremptory and must set of fully the nature of the plaintiff's claim. The s.129 notice is further defective for want of vagueness and falls to be set aside.

32. Significantly however, I draw the court's attention to paragraph 2 of the s.129 notice (annexed to the papers), which makes reference to the

**'Purchase of Equity Musharaka Finance Agreement dated 29th June 2012 (coupled with addendums *(sic)* and/or allied agreements thereto'**

*(my underlying and bold for emphases).*

33. It is instructive to note that the **addendums***(sic)* and/or **allied agreements** referred to in the said notice (which ought to form part and parcel of the plaintiff's claim) have not been pleaded in the plaintiff's summons, nor are same annexed to the plaintiff's papers, bearing in mind that one of the salient terms of the ***Musharaka*** agreement [which I will explain in more detail hereunder] is the periodic sale of the bank's share to the trust defendants.

34. Such sale is required to be firstly agreed between the parties and reduced to writing setting out the precise terms of the sale including *inter alia*, the cost of shares at a given time, the bank's profit, mode of payment etc. Such allegations I am advised were clearly not pleaded in the plaintiff's particulars

of claim. It is instructive at this point to note the express terms of clause 1.5 of the ***Musharaka*** Agreement which states that –

> *"1.5 The parties have, as a consequence of such offer to purchase agreed to enter into a Diminishing Musharaka agreement, consisting of the following separate and independent transactions, each such transaction to be concluded at the relevant appropriate stage...."*

35. I now turn to deal with the ***Musharaka*** Agreement but before I do so I interpose to point out that it is common cause that the plaintiff is a registered bank and credit provider that provides *Islamic* banking and other related banking services to its customers.

36. The dispute between the parties has its origin in the written agreement concluded on 29 June 2012, titled **"Purchase of Equity Musharaka" Finance Agreement"** ("***Musharaka***").

**MUSHARAKA**

37. ***Musharaka*** is a word of Arabic origin which literally means sharing. In the context of business and trade it means a joint enterprise in which all the partners share the profit or loss of the joint venture or partnership.

38. ***Musharaka*** is not a conventional agreement or financial instrument. It has its roots in Islamic commercial law and because of its peculiar nature and character, it would be useful for me to briefly explain, ***Musharaka*** as a

finance model and its key features as a financial instrument within the context of Islamic *Shari'ah*l aw. I do so hereunder.

## ISLAMIC SHARI'AH LAW

39. *Shari'ah* law is the law of Islam that governs Muslims. It is derived from the

Holy Qùran and the Sunna (the path of and teachings of the Holy prophet Muhammed (PBUH).

40. As a legal system, the *Shari'ah* law regulates all aspects of a Muslims day-to-day life, including *inter alia*, politics, economics, commerce, banking, business etc.

41. *Shari'ah* law forbids the payment or earning of interest (*Al-Riba*), which is considered akin to usury. Islam has termed interest as an unjust instrument because it results in injustice.

42. There are two main forms of ***Musharaka*** financing *namely*:

(a) Permanent ***Musharaka*** and;

(b) Diminishing ***Musharaka***

## DIMINISHING MUSHARAKA IN ISLAMIC BANKING

43. I shall for present purposes limit my discussion to **Diminishing *Musharaka*** (this being the plaintiff bank's finance model in the present action).

44. Diminishing Musharakah is a financial model through which the bank enters with a client into a partnership in which they both invest in the equity capital required to finance a project, and possibly also participate in the management; both share in the profits according to a pre-determined basis or in losses according to their investment.

45. The client makes rental payments based on the level of equity held by the bank, with each payment, the bank's equity reduces followed by a reduction in the rental calculated on the reducing equity. The client purchases the bank's equity by the capital repayments, accordingly, its share is progressively increasing and the bank's equity is diminishing until the bank has no equity and thus the client acquires complete ownership. Similarly, the rental payments keep reducing with the bank's diminishing equity in the asset until no further rental payment has to be made.

46. There are generally three separate and distinct agreements which form part and parcel of a **Diminishing *Musharakah*** Agreement.

[a] **The first agreement** [or commonly referred to as the master agreement] is between the bank and client where a bank and its client participate either in the joint ownership of a property or an equipment, or in a joint commercial enterprise. The parties' ownership will be according to the investment ratio or capital contribution each party makes in the venture.

[b] **The second agreement** is rental agreement between the bank and the client, in terms whereof the client pays rent to the bank for using its share. The

bank can only rent the property according to the level of its investment share.

[c] **The third agreement** is a share buy-back agreement. The client agrees to purchase the share the bank holds in that partnership. The bank's shares is divided into 'X' number of units that the client will purchaser from time to time on an agreed price and within an agreed period, until the client purchases the entire shareholding of the bank in the partnership and becomes the sole owner of the property.

## ISLAMIC SHARI'AH RULES RELATING TO MUSHARAKA AGREEMENTS

47. The following rules are applicable in terms of Shari'ah law to ***Musharaka*** agreements.

Management of Musharaka

- *Each partner has a right to take part in Musharaka management.*
- *The partners may appoint a managing partner by mutual consent.*
- *One or more of the partners may decide not to work for the Musharaka, and work as a sleeping partner*
    - *If one or more partners choose to become non-working or silent partners. The ratio of their profit cannot exceed the ratio which their capital investment bears.*

Asset of Musharaka

- *All assets of Musharaka, are jointly owned in proportion to the capital of each partner.*

Capital of Musharaka

- *All partners must contribute their capital in terms of money or species at an agreed valuation.*
- *Share capital in a Musharaka can be contributed either in cash or in the form of commodities. In the latter case, the market value of the commodities shall determine the share of the partner in the capital.*

Distribution of Profit

- *The ratio of profit distribution must be agreed at the time of execution of the contract.*
- *The ratio must be determined as a proportion of the actual profit earned by the enterprise and not as a percentage of partner's investment or a lump sum amount.*
- *A sleeping partner cannot share the profit more than the percentage of his capital.*

Rules for Loss

- *In the case of a loss, all the Muslim jurists are unanimous on the point that each partner shall suffer the loss exactly according to the ratio of investment.*
  *There is a complete consensus of jurists on this principle. Profit is based on the agreement of the parties, but loss is always subject to the ratio of investment.*

Termination of Musharaka:

*Musharaka, is deemed to be terminated in any one of the following events:*

*(i) Every partner has a right to terminate the Musharaka at any time after giving his partner a notice to this effect, whereby the Musharaka will come to an end. In this case, if the assets of the Musharaka are in cash form, all of them will be distributed proportionately according to the share between the partners. But if the assets are not liquidated, the partners may agree either on the liquidation of the assets, or on their distribution or partition between the partners as they are.*

*(ii) If any one of the partners dies during the Musharaka the contract of Musharaka with him stands terminated. His heirs in this case, will have the option either to draw the share of the deceased from the business, or to continue with the contract of Musharaka.*

*(iii) If any one of the partners becomes insane or otherwise becomes incapable of effecting commercial transactions, the Musharaka stands terminated.*

**THE PLAINTIFF'S MUSHARAKA AGREEMENT**

48. It is not disputed that on or about 29th June 2012 a written ***Musharaka*** Agreement was concluded between the plaintiff and the trust defendants. I pause to make mention that at the time of concluding the ***Musharaka*** agreement, the plaintiff was represented by **Reyaz Karodia** and not **Panday**,

reaffirming the point made earlier that **Panday** was not a party to the agreement nor, did the said **Panday** play any part in its performance.

49. I set out briefly the circumstances giving rise to the concluding of the ***Musharaka*** agreement.

50. The ***Sheik Sultan Trust*** (*Trust*), is the registered owner of certain immovable property described as –

> Portion 127 (of 50) of Erf 234 of Springfield, Registration Division FT Province of KwaZulu-Natal, in extent 1074 (one thousand and seventy four) square metres and held under Deed of Transfer No. T13012/2006 and physically situated at 153 Alpine Road, Durban, KwaZulu-Natal (the property)

51. The Trust defendants [all duly appointed trustees of the trust], required capital for purposes of expansion and approached the plaintiff bank for finance.

52. The plaintiff bank engaged Roper & Associates to prepare a valuation report on the trust property. I annex hereto the first two pages of the said valuation report marked **"G1"** and **"G2"** respectively.

53. It would be observed that in terms of the valuation report the then market value of the trust property was **R1 370 000.00**.

54. The plaintiff bank agreed after having taken into consideration the value of



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the trust property to conclude a "**Purchase of Equity Musharaka Finance Agreement**" (ABL2) with the Trust represented by me.

55. The plaintiff bank used the following formula for the purposes of establishing the share value in the trust property.

| | | | |
|---|---|---|---|
| Market value (as per valuation report) | R1 370 000.00 | = | 100 % |
| Purchase price paid by plaintiff's | R 960 000.00 | = | 70.07% |
| Value of shares retained by Trust | R 410 000.00 | = | 29.93% |

56. It is instructive to note that that was **no** capital contribution made by the trust defendants at the commencement of the ***Musharaka***, the amount of R410 000.00, represented the value of the shares retained by the Trust as can be seen from the above formula.

57. To fully appreciate the defences raised herein, it is necessary for me to reproduce the salient terms of the **Purchase of Equity Musharaka Finance Agreement** concluded between the plaintiff bank and the Trust.

**OWNERSHIP IN THE PROPERTY**

58. The relevant clause with regard to ownership of the Trust property is found at clause 3.3, which states –

> *"3.3 The parties accordingly agree that the property shall be treated by the parties inter se as a Musharaka asset,*

*which shall be deemed to be held by them in trust as co-owners in undivided shares, with effect from the commencement date".*

59. In other words as at the commencement date of the ***Musharaka*** (i.e. 29 June 2015), the undivided shareholding in the Trust property was as follows-

(i) The plaintiff bank holding **70.07 %;**

(ii) The Trust holding the remaining **29.93 %.**

**PROFIT AND LOSS**

60. As explained ***Musharaka*** is in fact, a form of a partnership agreement, where each partner shares profits and losses and the provisions relating thereto are found at clause 4, which states –

*"4.1 The parties agree that they will share the profits and losses of the Musharaka at all times in proportion to their respective undivided shares in the common property.*

*4..2 The term "Losses" for the purposes of paragraph 4.1 above shall be limited to Losses arising from market fluctuations, and Losses attributable to act of God or vis major or similar unavoidable catastrophe but excludes losses due to breach of contract, negligence, or other misconduct as contemplated in paragraph 5 below".*



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61. Simply put, all profits accrued and losses suffered are to be shared by each partner in proportion to his respective undivided shares. I shall return to this aspect shortly hereunder.

62. It is instructive to note that, a separate section in the agreement provides specifically for expenses and it can be found at clause 9, which states –

> *"9.1 All expenses arising out of, or incidental to, the joint ownership of the Musharaka property shall be borne by the parties in proportion to their respective undivided share in the property;*
>
> *9.2 The term "expenses" shall include, but not limited to, rates and taxes, insurance, and maintenance".*

63. Since the commencement of the ***Musharaka***, the trust defendants have paid and in fact continue to pay the rates and taxes over the property. To date an amount of **R27 504.20** was paid to the municipality. I annex hereto marked **"H"** a detailed ledger in that regard.

64. In terms of clauses 9.1 and 9.2 respectively all expenses arising out of, or incidental to, the joint ownership of the ***Musharaka*** property shall be borne by the parties in proportion to their respective undivided share in the property and such expenses includes rates.

65. The plaintiff has to date failed to tender any amounts towards these expense. Further and in addition there was and remains costs in respect of

maintenance of the partnership property, which once again the plaintiff has not contributed any amounts towards. All of this clearly indicates that the plaintiff ***Musharaka*** agreement was drafted simply to appear to be compliant with *Shari'ah* law when in fact it is nothing more than a conventional interest bearing loan agreement disguised with the cloth of Islam.

**INSURANCE**

66. The agreement provides at clause 11 thereof that the property shall be insured.

Clause 11 states –

*"11.1 The parties agree that the common property…..shall be insurance at replacement value….*

*11.2 For that purpose, the bank shall appoint the client, as agent, for a nominal fee of R100.00 on behalf of both parties, to procure such insurance upon conclusion of this agreement".*

67. As a matter of law, Islam prohibits (*Haram)* insurance of any form, notwithstanding, the plaintiff, an Islamic Bank no less, which claims to follow Islamic law, insists on such forbidden act. At any rate, I might add that the property was insured. The plaintiff I submit has failed to even tender the nominal fee of R100.00.

**TERMINATION OF MUSHARAKA**

68. The termination clause in the ***Musharaka*** agreement is found at clause 10 which states –

> *"10.1 The bank shall be entitled at any time to terminate this agreement, in the event of the client breaching any terms hereof, or, otherwise by giving the client one calendar month's written notice of its intention to terminate the Musharaka"*

clause 10.2 states –

> *"10.2 In the event of the termination of the Musharaka for any reason whatsoever, the following shall apply:*
>
> *10.2.1 the bank and the client shall endeavour to reach agreement, within 30 days as from the date of termination on the acquisition by the client of the bank's undivided pro rata share in the common property, at the fair market value thereof, and upon terms and conditions which are mutually agreed;*
>
> *10.2.2 in the event of the bank and the client failing to reach agreement as contemplated in paragraph 10.2.1 above, then the property shall be sold in the open market by public auction or private treaty. The net proceeds of such sale, after payment of all debts and Liabilities including amounts owing by any one party, shall be distributed amongst the parties in proportion to their*

*respective undivided shares in the common property at the time of the termination of the Musharaka;..."*

**NOTICE OF TERMINATION**

69. It is quite clear from clause 10.1 that the parties agreed that the plaintiff was entitled at any time to terminate the agreement for whatsoever reason by giving the defendants **one calendar months' notice** of its intention to do so.

70. The plaintiff I submit, despite being contractually obliged, failed to give the defendants the required notice of its intention to terminate ***Musharaka*** in terms of clause 10.1.

71. As a consequence of such failure on the part of the plaintiff, the defendants were denied an opportunity in terms of clause 10.2.1 to engage with the plaintiff and reach agreement as regard the acquisition of the plaintiff's undivided pro rata share in the property.

72. It submitted that, the provision in clause 10.1 are peremptory as it requires the plaintiff to first give the defendants one calendar months' notice of its intention to terminate and affording the defendants 30 days from date of such notice to engage with it for the purposes of acquisition of its share in the property. It is therefore clear that the operation of clause 10.2.1 will come into effect, 30 days after the date of plaintiff's notice of its intention to terminate and not before.

73. The plaintiff it would seem violated the terms of ***Musharaka*** agreement and instituted legal proceedings in circumstances where it was not permitted to do so before it complied with peremptory provisions of the agreement.

74. The plaintiff cannot distance itself from the terms of the ***Musharaka***. The terms of the ***Musharaka*** creates obligations and rights. The plaintiff was obliged to give the defendants due notice of its intention to terminate and the defendants had the right to engage the plaintiff for the purposes of purchasing its shares in the ***Musharaka***. The plaintiff clearly failed to do so.

75. In the circumstances I submit that the plaintiff's action is premature for want of compliance with the peremptory terms of the ***Musharaka.***

**ARBITRATION**

76. The agreement provides for disputes to be referred to arbitration. Indeed clause 12.1 provides –

> *"12.1 The parties agree to refer any dispute, difference controversy or claim arising out of or relating to this contract, or the breach, termination, invalidity, performance, or interpretation thereof, to be settled and determined by arbitration to be held in Durban, in accordance with the provisions set ....."*

77. The agreement further stipulates and prescribes at clauses 12.2 to 12.7, the procedures which are to be followed in arbitration. Significantly however,

clause 12.8 states –

*12.8* *If the Bank elects to institute legal proceedings in respect of any such dispute, controversy or claim, referred to above, then, the bank shall be deemed to have waived its right to invoke arbitration as the method of resolving such dispute, in terms of the abovementioned provisions".*

78. In effect, notwithstanding clause 12.1, the plaintiff it would seem is entitled in terms of clause 12.8, to institute legal proceedings.

79. Not only are these clauses mutually destructive, they violate the defendants' rights to refer the matter to arbitration, such right having been expressly agreed between the parties.

80. Such conflicting provisions of the agreement I am advised are *contra bonos mores* and goes against public policy and good banking practise. Above all, it goes against the teachings of and the fundamental principles of Islam and the laws of *Shari'ah.*

81. The plaintiff in flagrant breach of a dispute settlement mechanism prescribed and stipulated in the ***Musharaka*** agreement, instituted legal proceedings against the defendants.

82. Moreover and in circumstances where the rules of *Shari'ah* law provides that *in case the co-owner fails to honour his undertaking regarding the periodic payment and purchase or sale of units as the case may be, the asset shall be sold in open market and the co-owner aggrieved by such failure shall be entitled to the loss or gain as the difference between the market price and the*

*price agreed in the undertaking. The co-owner shall also be entitled to recover the outstanding rental for the whole period that the other owner has actually used the asset.*

83. The plaintiff cannot, on the one hand purport to be a bank founded on Islamic principles and operating within the strict confines of *Shari'ah* law and on the other behave in the oppressive manner it has, trampling over the rights of the defendants and making a mockery of the arbitration clause, but more significantly, the laws of *Shari'ah*. The plaintiff's conduct is not only immoral but impermissible. Islam does not condone such high handed and oppressive conduct and neither does any democratic society.

84. Clearly there are substantive disagreements between the parties. The plaintiff was contractually obliged under the arbitration clause to refer the dispute to arbitration, instead however, it elected at its peril, to go by way of litigation. Accordingly it is submitted that the defendants are entitled to apply for a stay of proceedings pursuant to s.6 of the Arbitration Act No. 42 of 1965, which they intend to do at the appropriate stage.

85. Further the plaintiff has advanced no cogent reasons in its papers nor demonstrated that "good cause" exists why arbitration will not suffice as a method for resolving the dispute. Again demonstrating its heavy handed conduct.

86. The defendants expressly record herein that they have <u>not</u> abandoned their rights to refer this matter to arbitration. Accordingly the dispute falls to be