



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 05002/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 27 JANUARY 2023
SIGNATURE: ***ML SENYATSI***

In the matter between:

ABSA BANK LIMITED

Applicant

And

PARKER SPENCER RYAN

First Respondent

PARKER GREGORY WAYNE

Second Respondent

Delivered: By transmission to the parties via email and uploading onto Case Lines

The reasons are deemed to be delivered. The date for hand-down is deemed to be 27 January 2023.

REASONS

SENYATSI J:

- [1] On 4 October 2021, I granted summary judgment in favour of Absa Bank against the respondents for payment of R7 788 248.07 plus interest thereon at the rate of 10% (prime plus 3) linked to prime capitalised monthly from 8 September 2021 to date of final payment, both days included.
- [2] I also issued an order declaring the immovable property of the executable with second respondent, known as Erf 3480 Rynfield Extension 75 township, Registration Division, I.R., The Province of Gauteng, measuring 405 square metres held by Deed of Transfer No: T24896/2011 and set the reserve price at R1 023 934.00.
- [3] Furthermore, the order authorised ABSA to issue a writ of attachment, calling upon the Sheriff of the Court to attach the property and sell it in execution. I ordered the respondents to pay the costs on the attorney and client scale.
- [4] The reasons for the order are as set out below.
- [5] The controversy in the summary judgment application was whether there was on paper a version which if it went to trial may establish proper defence to the claim. I concluded, based on the papers filed of record, that there was none.
- [6] The salient facts of the matter are as follows:

6.1. Absa concluded an agreement with TBB Manufacturers Representatives CC (now in liquidation) (“the Principal Debtor”) in terms of which an amount of R4 million was lent and advanced to the latter by way of an overdraft facility.

6.2. The loan facility was secured by Deeds of Suretyship concluded by the respondents in favour of ABSA and they stood as sureties and co-principal debtors with the Principal Debtor

6.3. The loan was, furthermore, secured by mortgage bond registered in favour ABSA by the second respondent over his immovable property.

6.4. The loan facility was disbursed in favour of the Principal Debtor.

6.5 The amount accumulated interest as a result of default in repayment thereof;

6.6. The Principal Debtor was placed in business rescue and later put in liquidation and

6.7. As a consequence, ABSA called up its securities and demanded payment from the sureties after the liquidation when payment was not forthcoming summons was issued which led to the summary judgment application.

[7] The respondents filed appearance to defend and plea in terms of which they concede that the agreement was concluded as averred but state that the

repayment agreed to with one Straaj Ishmael of ABSA was that he could pay R2 000.00 per month. He contends that this was agreed to on 17 June 2015 and that no action would be taken against him. ABSA denied this averment.

[8] The second respondent also contends that he was later informed by ABSA's legal representative Jay Mthobi Inc that the agreed R2 000.00 payment was no longer acceptable and that during December 2019 he experienced the near death of his father and a close friend and that he missed payment.

[9] The existence and validity of the Deeds of Suretyship are also conceded by the second respondent. The respondents do not deny the balance claimed or even question the validity of the certificate of balance save that the amount is over exaggerated.

[10] As a consequence of this plea, ABSA applied for summary judgment.

[11] The issue that requests determination is whether there was in fact and law a plea that could be referred to trial and of course, the answer was negative.

[12] Rule 32(3)(b) of the Uniform Rules regulate summary judgment. The rule requires the defendant to set out in his affidavit sufficient facts which, if proved at trial, will constitute an answer to the plaintiffs claim.¹

[13] At the summary judgment stage of the proceedings it is not for the court to decide any balance of probabilities or determine the likelihood of the deponent's allegations being true or false.

¹ See *Breitenbach v Fiat SA* (Edms) Bpk 1976 (2) SA 226 (T); *District Bank v Hoosain and Others* 1984 (4) SA 544 (C)

[14] In *Maharaj v Barclays National Bank Ltd*², the court held as follows:

“Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or determine whether or not there is a balance of probabilities in favour of one party or the other. All that the Court enquires into is: (a) whether the defendant has ‘fully’ disclosed the nature and grounds of his defence and the material facts upon which it is founded; and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters, the Court must refuse judgment, either wholly or in part, as the case may be. The word ‘fully’ as used in the context of the Rules (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence...At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea, nor does the Court examine it by the standards of pleadings.”

[15] The sub-rule does not require the defendant to satisfy the Court that his allegations are believed by him to be true. It is sufficient if the defendant’s affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial.³

² 1976(1) SA 418 (A) at 426

³ See *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467A

- [16] The Court must be apprised of the facts upon which the defendant relies with sufficient particularity and completeness so as to be able to hold that if these statements of facts are found at trial to be correct, judgment should be given for the defendant.
- [17] Summary judgment is an extraordinary and stringent remedy and it is always necessary to keep this in mind when exercising a discretion whether to grant or refuse it.⁴
- [18] A court must be careful to guard against injustice to the defendant who is called upon at short notice and without the benefit of further particulars, discovery or cross- examination to satisfy it that he has a *bona fide* defence.⁵,
- [19] In the opposing (opposition) to the application for summary judgement, the first respondent contends that the summary judgement is persisted with in a *mala fides* manner. He bases this argument on the fact that the main action is still pending. This cannot be correct because the Rules of this court permit the application for summary judgement by the plaintiff in the main case.
- [20] The respondents also claim that the amount that is contained in the certificate of balance is over exaggerated.
- [21] The respondents further contend in their opposing affidavit through the first respondent that should summary judgment be granted, it will trigger insolvency and sequestration.

⁴ See *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305

⁵ See *Breitenbach v Fiat* (Supra at 227 D - H)

[22] The respondents persisted with their claim that there was an agreement to repay the amount by way of R2 000.00 per month.

[23] Other than the averments referred to above, there was nothing more to discern from the opposing affidavit.

[24] Consequently, the order for summary judgment was granted.

[25] Accordingly, I stand by the order made.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE OF APPLICATION: 4 October 2021

DATE REASONS DELIVERED: 27 January 2023

APPEARANCES

Counsel for the Applicants: Adv N Alli

Instructed by: Jay Mothobi Incorporated

Representation for the

Respondents: Self-represented