



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES

DATE: DECEMBER 2023 SIGNATURE:

CASE NO: 054829/2022

HEARD ON: 11 October 2023

JUDGMENT: 14 December 2023

In the matter between:

CANDICE ALISON MAY N.O.

PLAINTIFF / APPLICANT

and

WILGEHEUWEL AFTREE-OORD (PTY) LTD

DEFENDANT / RESPONDENT

JUDGMENT

STRIJDOM AJ

A. INTRODUCTION

1. This is an application for summary judgement against the defendant for payment of the sum of R960 000.00 and interest therein at the prescribed rate *a temporae morae* from 2 October 2021 to date of payment.¹

2. The plaintiff's claim is based on a breach of contract concluded between the late Ms Claudia Walker and the defendant for the purchase of a life right in respect of Unit 68 of the Wilgeheuwel Retirement Village upon payment of a loan amount by Ms Walker ('the agreement').² Ms Walker complied with her obligation and this is not disputed by the defendant.

¹ Caselines: 02 – 13 Notice of motion

² Caselines: 01 – 11 Annexure 'POC 2'

3. The defendant has opposed the application on the following grounds:

3.1 The plaintiff has not complied with the peremptory provisions of Rule 32 (2)(b) rendering the application defective.

3.2 This court lacks jurisdiction to entertain this application (The issue of jurisdiction was not pursued by the defendant).³

3.3 The defendant raises a special plea that the plaintiff has not set out a cause of action against the defendant.

3.4 The defendant denies that the full New Consideration was received from the New Occupant and contends that it has no knowledge of the correspondence dated 7 December 2021 that was sent to the plaintiff.

3.5 The defendant contends that the plaintiff is not entitled to interest on the debt claimed.

³ Cselines: 10 – 2 Practice note.

THE SALIENT FACTS

4. On or about 22 March 2017 and at Roodepoort, the late Ms Claudia May Walker ('Ms Walker') entered into a written agreement with the defendant in terms of which Ms Walker (defined as 'the Occupant') acquired a life right in respect of Unit 68 of the Wilgeheuwel Retirement Village on payment to the defendant (defined as 'the Developer') of an interest – free loan in the amount of R960 000.00 (defined as 'the Loan Amount').

5. Clause 14.3 of the agreement provides that:

3.2.1 If Ms Walker as the Occupant is deceased, the estate must hand over Unit 68 to the Developer within (30) days to enable the Developer to market the Unit.

3.2.2 The Developer shall after (30) days from receipt of the New Consideration from the New Occupant make payment equal to the Loan Amount as per clause 3 of the agreement, minus commission and any outstanding costs.

3.2.3 Once the Developer enters into a new agreement with a new Occupant, the right of the Occupant or their estate to repayment is limited to the Loan Amount as per clause 3 of the agreement.

6. 'New Occupant' is defined in the agreement as a person who in future will be the signatory to a life right agreement in respect of Unit 68.

7. The agreement came into full force and effect and Ms Walker took occupation of Unit 68 at the Wilgeheuwel Retirement Village in May 2017.

8. On 22 June 2021, Ms Walker passed away.⁴

9. On 2 September 2021, a New Occupant was secured and the New Consideration was paid in respect of Unit 68 of the Wilgeheuwel Retirement Village as envisaged in clause 14.3 of the agreement.

10. Written correspondence was received on 7 December 2021 confirming the fulfilment of the conditions in clause 14.3 and that repayment of the Loan Amount

⁴ Caselines: 01 – 27 Annexure POC 3.

is due to the plaintiff a copy of which is annexed to the particulars of claim as annexure 'D'.⁵

11. The plaintiff is the duly appointed executrix of the deceased estate of Mrs Claudia May Walker in her capacity as the nominee of FNB Fiduciary. Until such time as payment of the Loan Amount is received, the plaintiff is unable to finalise the winding up of Ms Walker's estate.

12. It was submitted by the defendant that there is a material dispute of fact on the papers.

13. In this matter the defendant attempted to create a dispute of fact where, in my view, there are none. The courts were enjoined to adopt a robust approach to such dispute of fact.

14. 'It is necessary to make a robust common – sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it would be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over –

⁵ Caselines: 01 - 53

fastidious approach to a dispute raised in the affidavit.¹⁶

15. I have carefully perused the affidavits and after considering the nature and extent of the alleged factual disputes arising from the affidavits, I concluded that there are no material dispute of facts and that the court can decide the issue of fact on the affidavits.

PLAINTIFF'S ALLEGED FAILURE TO COMPLY WITH RULE 32(2)(b) AND (c)

16. The defendant contends that the plaintiff has failed to comply with Rule 32(2)(b) in verifying the cause of action and amount. The defendant further contends that the notice of application for summary judgement does not state the date on which the application will be heard as required in terms of Rule 32(2)(c).

17. The deponent to the affidavit in support of summary judgement alleges that she is in a position to verify the plaintiff's cause of action and amount owing due to

⁶ Soffiantini v Mould [1956] 4 ALL SA 171 (E) 175; 1956 (4) SA 150 (E) 154 E - H
Prinsloo v Shaw, 1938 AD 570.

the reliance she has placed on the documents relating to the defendant that are at her disposal and to which she has access. She has familiarised herself with the documents.⁷

18. The deponent is in a position to verify the cause of action and amount owing based on the fact that she is duly appointed executrix of the deceased estate of the late Ms Walker and is duly authorised to bring this summary judgement.

19. Verification is done simply by referring to the facts alleged in the summons.⁸ It is unnecessary to repeat the particulars. It is trite that all the facts supporting the cause of action must be verified.

20. The plaintiff has also verified the amount claimed. The Loan Amount of R960 000.00 is described in paragraph 4.1 of the supporting affidavit.⁹

21. In my view the plaintiff has verified the cause of action and the amount claimed. I must agree with the plaintiff that the reference to amounts owing is merely a typographical error and is neither misleading nor creates any uncertainty when the facts supporting the applicant's claim are read in a composite fashion.

⁷ Caselines: 02 - 16 para 3

⁸ Strydom v Kruger 1968 (2) SA 226 (G W) at 227 A - B; All Purpose Space Heating Co of SA (Pty) Ltd v Sweltzer 1970 (3) SA 560 (D)

⁹ Caseline: 02 - 16 para 4.1 and 02 - 16 paras 4.7 - 4.8.

22. Although the notice of application does not reflect the date of the hearing, the plaintiff caused a notice of set down to be served on the defendant in each instance when a date was allocated for hearing (initially on the unopposed roll and subsequently on the opposed roll).

23. The defendant was informed well in advance of any allocated hearing dates by way of the notices of set down. The defendant had adequate notice of the hearing. The non-compliance with Rule 32(2)(c) is in my view not fatal to the plaintiff's application and the purpose has been achieved by way of the notices of set down.

24. There has been no prejudice to the defendant who has at all times had adequate notice of the hearing dates and has not been hampered in its ability to oppose the application. Condonation is granted for the non-compliance of Rule 32(2)(c).

THE DEFENDANT'S SECOND SPECIAL PLEAS: NO CAUSE OF ACTION

25. The defendant contends that the particulars of claim do not contain any averment regarding receipt of the full New Consideration from the New Occupant and

therefore, does not set out a cause of action.¹⁰

26. The plaintiff has pleaded in paragraph 7 of the particulars of claim as follows:

26.1 On or about 2 September 2021, a New Occupant was secured, and the New Consideration was paid in respect of Unit 68 of the Wilgeheuwel Retirement Village, as envisaged in clause 14.3 of the agreement.

26.2 The conditions in clause 14.3 of the agreement were therefore fulfilled on this date;

26.3 The correspondence confirming the fulfilment of the conditions in clause 14.3 and that repayment of the Loan Amount is due to the plaintiff are annexed to the particulars of claim.

27. In my view the aforementioned email from the defendant constitutes an acknowledgement that the suspensive conditions have been satisfied and that the plaintiff is entitled to payment. I am persuaded that the necessary averments

¹⁰ Caselines: 01 – 59 paras 3 – 5 and 01 – 76 paras 21 - 30

have been made in the particulars of claim to sustain the plaintiff's cause of action against the defendant.

28. Rule 32(3)(b) requires that the defendant must depose to facts, that if accepted as the truth or proved at the trial, with admissible evidence, would constitute a defence to the plaintiff's action.

29. The defendant's opposing affidavit is comprised of bare denials and no substantive defence has been put forward in circumstances where written confirmation has been tendered as part of annexure 'POC 7' to the particulars of claim in support of the plaintiff's contention that the conditions in clause 14.3 of the agreement have been fulfilled and that the plaintiff is entitled to repayment of the Loan Amount.

30. On a conspectus of all the evidence before me I concluded that the defendant does not have a bona fide defence to the plaintiff's claim.

31. The defendant contends that the plaintiff is not entitled to claim interest on the Loan Amount as it is not provided for in the agreement.¹¹

¹¹ Caselines: 01 – 78 para 28 opposing affidavit

32. It was held in the case of **Land Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Others**¹² that *mora* interest is not payable in terms of an agreement but constitutes compensation for loss of damage resulting from a breach of contract, specifically *mora debitoris*.

33. In the result, summary judgement is granted.

34. The draft order marked "X" is made an order of court.

STRIJDOM J J
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

Appearances:

For the Plaintiff: Adv A Kolloori
(Instructed by: FLUXMANS INC)

For the Defendant: Adv Vergano

¹² [2013] 4 ALL SA 385 (SCA)

(Instructed by: CASPER LE ROUX INC)