



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- | | |
|-----|------------------------------|
| (1) | REPORTABLE: |
| (2) | OF INTEREST TO OTHER JUDGES: |
| (3) | REVISED |

DATE

SIGNATURE

Case No: 57115/2019

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff/Applicant

(Registration number: 1929/001225/06)

and

WEBSTER

LENYANYABEDI

Defendant/Respondent

(Identity number: 870313 5929 082)

JUDGMENT

MADIBA AJ

[1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of Court. The relief sought is as follows:

1.1 Payment in the amount of R564,016.21

1.2 Payment of interest on the amount of R564,016.21 at the agreed rate of 12,61% per annum from 1 May 2019 to date of payment aforementioned date included.

1.3 An order declaring:

Portion 85 Erf 613 Zandspruit Extension 4 Township Registration Division: IQ, Gauteng Province, measuring: 191 (one nine one) square metres held by Deed of Transfer T47688/2015 subject to the conditions therein/contained.

[2] The summary judgment is resisted on the following basis:

- a. That the applicant failed to verify cause of action and identify the point of law as required by Rule 32.
- b. That the notice in terms of Section 129 of the National Credit Act is defective.
- c. That complex questions of interpretation of the agreement cannot be a subject of a summary judgment application.

Factual Background

- [3] The applicant and respondent entered into a written loan agreement during July 2015 in terms of which a sum of R556,899.00 together with interest at the rate of 12.61% per annum was advanced and lent to the respondent. The capital amount with an additional amount of R111,379.80 were secured by the registration of a mortgage bond passed in favour of the applicant over Portion 85 Erf 612 Extension 4 Township.
- [4] The express terms and conditions of the agreement read with the bond were *inter alia* the following:
- a. That the respondent will effect monthly instalments repayments in the sum of R6501.17.
 - b. In the event of non – payment of the agreed instalment amount, the full outstanding balance due will be payable and the mortgaged property will be declared specially executable.
 - c. That the certificate of a manager of the applicant shall be proof of the respondent's indebtedness to the applicant.
 - d. The respondent shall be liable for all legal costs incurred by the applicant on an attorney and client scale.
- [5] The respondent defaulted on the agreement as he failed to maintain monthly instalment payments as agreed. At the institution of the action, the full outstanding balance due was R564,016.21 plus the applicable interest rate of 12.61% per annum.

[6] The parties' agreement is governed by the National Credit Act 34 of 2005. A notice in terms of Section 129 of the NCA was served on the respondent but he did not respond thereto. Summons was issued against the respondent who entered notice to defend and pleaded to the applicant's action. Summary judgment application was launched against the respondent. An affidavit resisting summary judgment was filed by the respondent.

ISSUES FOR DETERMINATION

[7] Whether the respondent has a *bona fide* defence.

[8] Whether there are triable and mitigating issues raised by the respondent.

Legal Principles Finding Application

[9] Summary judgment is intended to afford a plaintiff who has an action against the defendant who does not have a defence to have a relief without resorting to a trial. In terms of Rule 32(2) (b) the plaintiff has to identify any point in law and facts relied upon which his claim is based. The plaintiff has to briefly explain why the defence pleaded does not raise any issues for trial. It will not be enough to merely state that the defendant did not have a *bona fide* defence. All what the defendant has to do is to at least disclose his defence and the material facts upon which his defence is based with sufficient particularity and completeness to enable the court to make a determination as to whether he has a *bona fide* defence or not.

See **Breitenbach v Fiat SA (Edms) BPK 1976 (2) SA 226 T at 227F**. The onus rests with the plaintiff to show that the defendant does not have a defence on the merits of the case.

- [10] It is trite law that the defendant may raise any legal argument to show that the application does not comply with the requirements for validity of a summary judgment application. The attack on the summary judgment must however be on legal grounds which are reasonable and which should they eventually be proved at the trial, will constitute a defence.
- [11] The respondent contended that the application for summary judgment does not comply with Rule 32 in that the applicant failed to verify the cause of action and the amount and its affidavit does not identify the point of law relied upon. It is submitted that the applicant omitted to state the material facts verifying the cause of action.
- [12] The respondent argues that the allegation that the cause of action is based upon breach in terms of the loan agreement is contrary to the cause of action as contained in the particulars of claim. It is the respondent's contention that it is not enough for the applicant to merely allege that the points taken by respondent are bad in law and that they are based on the misunderstanding of the law and as such, full disclosure of reasons thereof will be narrated during the hearing of the application.
- [13] The amount of R564,016.21 plus interest as claimed, has not been verified according to the respondent. His view is that the applicant was supposed to have confirmed the cause of action which entitled it to the payment of the whole accelerated amount as per its particulars of claim. The further averment of the applicant that it had elected to claim the immediate payment of the full outstanding balance clearly contradicts the averments made by the applicant in its affidavit. It is submitted that the facts herein do not support a cause of

action as the alleged breach does not entitle the applicant to claim the full amount due.

[14] Accordingly, the respondent argues that verification of the cause of action requires the applicant to refer to the facts alleged in its particulars of claim which the applicant omitted to do. The respondent further alleged that the applicant's claim is not based on a liquid document.

[15] On the other hand, the applicant submitted that it did verify its cause of action. The applicant based its confirmation of its cause of action upon the breach of the terms of the loan agreement which it alleged that the respondent is in breach thereof. Consequently, the applicant submitted that it verified that the respondent does not have a *bona fide* defence and merely delays the applicant's case. The applicant submitted that the respondent (defendant) pleas failed to raise any triable issues as it is misplaced and bad in law. The respondent's defences as raised in his plea, are mere technicalities and are excipiable so submitted the applicant. The defences it is argued, failed to go to the root of the applicant's merits. The applicant's attack on the respondent's defence is based on his failure to address the merits of the application and simply relied on pure technicalities.

[16] It is incumbent upon the plaintiff in terms of Rule 32(2)(b) in an affidavit

- (i) to verify the cause of action and the amount if any
- (ii) to identify any point of law relied upon and facts which his claim is based and

(iii) explain briefly why the defence as pleaded does not raise any triable issues.

[17] The plaintiff may verify the cause of action by referring to the allegations contained in the summons and verifying them. In a nutshell, what is required is that all the facts upon which the action is based must be verified. See **All Purpose Space Heating v Schweltzer 1970 (3) 560 (1) at para 563 F – H.**

[18] In complying with Rule 32 (2), the applicant avers that it verified the cause of action that the respondent has not complied with the terms and conditions of the loan agreement and that he has entered the defence for purpose of delaying the applicant's claim. The cause of action purportedly verified as per the applicant's affidavit in support of the summary judgment application, is at cross roads with the cause of action contained in the particulars claim. The defences raised by the respondent are not mere technicalities under the circumstances of this matter. I am not persuaded that the cause of action is properly verified.

[19] The respondent raised a defence to the effect that the notice in terms of Section 129 (1) (a) is defective. The reason being that the applicant failed to draw the default to the attention of the respondent. The default referred to herein is failure to effect monthly instalment of R6501.17. The respondent argued that the full outstanding amount cannot be due and payable as there is non – compliance with the provisions of Section 129 (1) (a) and as such the summons herein were issued in contravention of the National Credit Act.

[20] In its submission the applicant stated that the denial by the respondent of non receipt of Section 129 notices does not raise a triable issue. The applicant

takes the point that the Section 129 notice must be dispatched by registered mail and that the credit provider must make averments that will satisfy a court that Section 129 notice, on a balance of probabilities reached the consumer. What it means is that the credit provider must provide proof that the notice was delivered to the correct post office. It will then be assumed that the notification of the arrival at the post office reached the consumer who would have ensued the retrieval thereof. The said notices are to be delivered at the address as provided by the consumer. The applicant accordingly submitted that even if the requirements of Section 129 were not complied with that will not in itself constitute a *bona fide* defence in the summary judgment application. However, the applicant's view is that it complied with the requirements of Section 129 of the NCA.

[21] Careful reading of the papers herein reveal that the applicant might have misconstrued what defence was raised for in respect of the non – compliance of Section 129(1)(a). All what the respondent raised is that the notice in terms of Section 129(1)(a) was defective as it claimed the full outstanding amount due without drawing the default to the attention of the respondent's in writing. It is apparent that the Section 129 (1) (a) sent to the respondent is defective thus contravening the provisions of the National Credit Act as it plays an important role in the applicant's cause of action.

[22] In **Standard Bank of South Africa v Rockhill 2010 (5) SA 252** at paragraph 17 the court stated that non – compliance with Section 129 (1) (a) is an impediment to commencing any legal proceedings to enforce a credit agreement, it does not constitute a defence in terms of Rule 32 (3) (b). Once

Section 129 (1) (a) is established at a trial stage, the proceedings had to be adjourned and the plaintiff be ordered to complete steps in compliance with Section 129 (1) (a).

[23] According to **Standard Bank of South Africa v Rockhill** Section 130 (4) (b) of the NCA envisages a resumption of the proceedings after the court has ordered that the plaintiff be given an opportunity to comply and the debtor to remedy the default and as such non – compliance with Section 129 (1) (a) cannot be deemed to constitute a defence in summary judgment application.

[24] Despite the court's decision aforementioned that non – compliance with Section 129 (1) (a) does not establish a defence in summary judgment application the court in **Blue Chip 2 (Pty) Ltd v Cedrick Dean Ryneveldt and Others 499/2015 SCA** paragraph 3 said the following:

“In particular where a statute provided that before an action can be commenced or a claim enforced against a debtor, a notice be given then the giving of that notice is essential to the successful pursuit of the claim and proving that it is was given as part of the cause of action.”

[25] It follows therefore that a summons that omits to attach a lawful notice in terms of Section 129 (1) (a) of the NCA does not disclose a cause of action contrary to the provisions of Rule 32 (2) (b) for the applicant to successfully pursue its claim and to enforce it against the respondent, the applicant may draw the default to the attention of the respondent writing. Section 129 (1) (b) (i) of the NCA; provides that any legal proceeding to be embarked on, a notice in terms of 129 (1) (a) is a prerequisite. Having found that the applicant did not verify the cause of action, the applicant's submission that it has complied with

the provisions of Section 129 (1) (a) cannot in my view be sustained. The applicant's submission on the defect of Section 129 (1) (a) is based on irrelevant issues not argued by the respondent.

[26] After careful consideration of issues raised by the respondent regarding the interpretation of the parties' loan agreement, I find that indeed complex issues have been raised by the respondent regarding the said agreement. In the circumstances the issues raised by the respondent in his special pleas are not determinable through summary judgment process as I have doubt as to whether the applicant has an unanswerable case in this matter.

AD Rule 46 (1) and 46 (8) applications

[27] It is apparent that the terms of a loan agreement and the bond are intertwined in this matter. Due to the respondent's alleged breach as alluded above, the applicant seeks a relief that the immovable property herein be declared especially executable and sold. It is to be mentioned that accrual relief such as the confirmation of cancellation of the agreement and other grounds such as declaring immovable property especially executable have been accepted by our courts as competent relief in summary judgment application. The Rule 46 (1) and Rule 46 (8) are dealt with simultaneously with the loan agreement as they constitute almost same issues.

[28] The contentious issue for determination is whether the defendant has raised *bona fide* defences. The applicant submitted that the defendant has not succeeded in disclosing triable issues and therefore issues raised by him, do not constitute *bona fide* defence.

[29] It is contended by the respondent that non – compliance with Rule 32 by the applicant (non verification of the cause of action) and the defective Section 129 as well as the applicant’s persistence with summary judgment application in the face of the complex issues raised in relation to the interpretation of the loan agreement, is fatal to its application.

[30] The respondent contends that it has a *bona fide* defence and has raised triable issues entitling him to leave to defend applicant’s claim. The respondent will avoid summary judgment should he advance facts which can reasonably be argued in a trial. The court is to be satisfied that the respondent has a *bona fide* defence and he need not prove his defence.

[31] In **Maharaj v Barclays Ltd 1976 (1) SA 418 (A)** it was held that in determining whether the defendant has established a *bona fide* defence, the court has to enquire whether the defendant has with sufficient particularity disclosed the nature and grounds of his defence and the material facts upon which his defence is based. The defendant does not have to establish his *bona fides*, it is the defence which must be *bona fide*. All what he has to do is to swear to the defence which is competent in law in a manner which is not inherently or seriously unconvincing. See **Standard Bank South Africa Ltd v Friedman 1999 (2) SA 456 (C) at 462 G.**

[32] The defendant must set out facts which, if proved at a trial will constitute an answer to the plaintiff’s claim. It is expected of the applicant on the other hand, to convince the court that he has made out a case for summary judgment. Since summary judgment is an extraordinary, stringent and drastic remedy, it calls for strict compliance with the prerequisites as provided for in

Rule 32 (2) (b). See **Gull Steel (Pty) Ltd v Rack Hire BOP (Pty) Ltd 1998 (1) SA 679 (O)** at 683 H.

[33] Even before the court can consider whether the defendant has established a *bona fide* defence, it must be satisfied that the plaintiff's claim has been clearly established and that his pleadings are technically in order. Non – compliance with the aforesaid requirement may result in the court refusing to grant summary judgment even if the defendant has failed to put up a defence or has put up a defence which did not meet the standard required. See **Gull Steel (Pty) Ltd** supra at 684 D.

[34] The applicant averred that the special pleas raised by the defendant do not constitute any issues for trial as they are misplaced and technical which do not amount to *bona fide* defences. It is argued on behalf of the respondent that the application for summary judgment was not necessary in view of the special pleas raised as applicant should have known that the respondent's defences are *bona fide* and raised triable issues.

[35] The courts are vested with an unfettered discretion which has to be exercised judicially when considering summary judgment applications. Summary judgment will be granted in the event where the plaintiff has made out an unanswerable case against the defendant who simply wants to unnecessarily delay the plaintiff's case. In **Maharaj** supra, the court held that in deciding whether or not to grant summary judgment, the principle is that the court has to look at the matter and all the documents that are properly before it.

[36] The applicant's cause of action which constitutes its foundation in this application is under attack. Issues and aspects of law and facts raised herein

cannot in my view, be ventilated in an application of this nature before this court. In my view the defences raised by way of special pleas which are contested cry out for evidence that needs to be thoroughly and properly interrogated as well as the submissions made by the applicant.

[37] The defences raised by the defendant are in my view not merely technical in nature but calls for an answer. I cannot say without reservations that the applicant's case is not answerable. The issues and defences raised in the opposing affidavit amount to *bona fide* defences of being sustained by the respondent at the subsequent trial.

COSTS

[38] The respondent seeks a punitive costs order against the applicant. It is argued by the respondent that the applicant knew that the special pleas pleaded entitles the respondent to defend the action. Costs on attorney and client scale will only be awarded in appropriate and exceptional circumstances. A punitive cost order may be awarded in the event *inter alia*, that a litigant has been dishonest, reckless, vexatious, frivolous and fraudulent.

[39] Considering the facts in this matter it cannot be said that there is a flagrant disregard of the Rules applicable in summary judgment application by the applicant.

[40] I therefore make the following order:

40.1 Leave to defend is granted.

40.2 Applicant to pay costs of the application.

S.S. MADIBA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON	: 7 MARCH 2022
FOR THE PLAINTIFF/APPLICANT	: ADV. PSAJ JACOBSZ
INSTRUCTED BY	: HACK, STUPEL AND ROSE ATTORNEYS
FOR THE DEFENDANT/RESPONDENT	: ADV. P MBANA
INSTRUCTED BY	: SA MANINJWA ATTORNEYS
DATE OF JUDGMENT	: 18 MAY 2022