
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 2021/13210

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| (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: NO |
|---|

18 October 2023

DATE

SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

DAVID TEBOGO MAKHUBELA (HLALELE)

First Defendant

MATSHELISO MABEL LINDA MAKHUBELA (HLALELE)

Second defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 18th October 2023.

JUDGMENT

BOTSI-THULARE AJ:

Introduction

[1] This is an opposed application for a summary judgment brought against the first and second defendants David Tebogo Makhubela (Hlalele) and Matshediso Mabel Linda Makhubela (Hlalele) jointly and severally. In this matter the plaintiff (South African Bank of South Africa Ltd) seeks a summary judgment against the defendants for payment of R1 236 667.87 together with interest of 6.85%. based on the certificate of payment.

Background facts

[2] The opposed somewhat convoluted facts stem from the plaintiff's pleadings. The particulars of claims set out that on 2 February 2006, the plaintiff, Modikwana James Thupana, Maria Nthabiseng Thupana (Thupanas) and the defendants entered into a written Home Loan Agreement (the agreement), whereof the plaintiff agreed to advance the sum of R697 000.00 to Modikwana, Maria and the defendants (the parties) repayable over 240 months.

[3] The agreement was to be secured by a mortgage bond. A continuing covering bond was registered over the property in favour of the plaintiff. The other co-debtors ("the Thupanas") were placed under sequestration. The property was then sold by the trustees appointed in the insolvent estate of the Thupanas and the proceeds thereof were utilized to partially satisfy the plaintiff's claim against the estate. The mortgage bond was subsequently cancelled, and the property transferred in the name of the purchaser. There was, however, still a debt remaining.

Issues to be determined

[4] The matter concerns rule 32 of the Uniform Rules of Court which deals with summary judgement. The issues to be determined are as follows:

4.1.1 Whether defendants disclosed a *bona fide* defence in their affidavit?

4.1.2 Whether the plaintiff's claim for summary judgement is based on a liquid claim?

Defendants' submissions

[5] The defendants' plea raises the following defences namely:

5.1. The defendant denies that the claim is based on a home loan agreement. The mortgage bond was cancelled, the bank furnished a letter in this regard. The claim is not based on a liquid document as the amount claimed does not reflect on the original document.

5.2. The defendants contend that the bond account was settled on 26 April 2013.

5.3. The defence of prescription, the defendants contend it does not make sense that the plaintiff took 7 years to claim the alleged debt.

5.4. The default judgment brought against the defendant was granted erroneously.

5.5. The summons issued to the defendants were delivered to the wrong address.

5.6. Plaintiff raised issues that were not pleaded in the particulars of claim.

5.7. The certificate signed by the manager will not constitute prima facie proof for summary judgment.

Law applicable to the facts

[6] Rule 32 of the Uniform Rules of Court applies to summary judgements; however, this is an opposed summary judgment. Where a summary judgment is opposed, rule 32(3)(b) provides that a defendant who wishes to oppose a summary judgment application on the merits, shall:

“satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.”

[7] In *Maharaj v Barclays National Bank Ltd*,¹ Corbett J held that there should be sufficient disclosure of facts by the defendant on the nature and grounds of the defence, and the defence disclosed must be *bona fide* and good in law.

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. 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 to determine whether or not there is a balance of probabilities in favour of the 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 summary judgment, either wholly or in

¹ [1976] 2 All SA 121 (A)

*part, as the case may be.”*²

[8] The court in *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd and another*³ made a finding with regards to the state of the plaintiff in an opposed summary judgment and held that:

*“In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a bona fide defence as requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiffs claim has been clearly established and its pleadings are technically in order.”*⁴

[9] The purpose of a summary judgment was laid down in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*⁵ and the court held that:

“The summary judgment procedure was not intended to ‘shut (a defendant) out from defending’, unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case (supra) at 425G–426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to

² Id p126

³ 1998 (1) SA 679 (O).

⁴ Id at p183

⁵ 2009 3 All SA 407 (SCA); 2009 5 SA 1 (SCA) pars 31–33

pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.”

[10] Considering that this is an opposed application for summary judgment, careful considering must be taken on both the plaintiff and the defendant side, to establish whether the defendant has disclosed a defence which is bona fide and whether the plaintiff has made a clear claim, provided that the plaintiff as a creditor, has complied with the provisions of section 129 of the National Credit Act.⁶ Therefore emphasis will be placed on the parties as per their pleadings.

(i) Liquid documents

[11] On the defence relating to the cancelled mortgage bond due to insolvency and the length of time in which the defendant took to claim, section 11 of the Prescription Act, with reference to mortgage bonds, prescription starts to run after 30 years. In *Botha v Standard Bank*⁷ the court found that:

*“Put differently, the home loan was conditional upon the execution of the bond. Once this was done and the loan was advanced, the bond – not the loan agreement – became the operable contract. This was the agreement from which the debt arose and which the bank relied upon to prove its claim against the insolvent estate...”*⁸

[12] The period of prescription as stipulated in the Prescription Act applies in respect of any debt secured by the mortgage bond including the cancelled mortgage bond. This principle was endorsed in *Botha supra*.

(ii) Cancelled mortgage bond

[13] It is trite law that in a summary judgment a claim must be based on a liquid document.⁹

⁶ Section 129 of National Credit Act 34 of 2005

⁷ *Botha v Standard Bank of South Africa Ltd* [2019] 6 SA 38 SCA. para 10, 18, 23 and 25

⁸ *Id* para 23

⁹ Rule 32 of the Uniform Rules of Court

[14] A liquid document¹⁰ is therefore an amount, either ascertained or capable of speedy and prompt ascertainment. It includes a claim for a specific amount of money wrongfully and unlawfully misappropriated by the defendant and a claim for reasonable remuneration.

[15] The definition of a liquid document was laid down in *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of SA*,¹¹ the court held that:

“In principle, however, a document is liquid if it demonstrates, by its terms, an unconditional acknowledgement of indebtedness in a fixed or ascertainable amount of money due to the plaintiff. Many different sorts of documents have been found to qualify as “liquid” in terms of this definition and therefore sufficient to found provisional sentence. They include acknowledgments of debt, mortgage bonds, covering bonds, negotiable instruments, foreign court orders and architects’ progress certificates.”¹²

[16] Considering *Botha* supra and the Prescription Act, a mortgage bond became an operating contract in which the parties relied on, and it is binding, the definition of liquid documents includes mortgage bond which a party can rely on for summary judgement. Although the mortgage bond was cancelled the debt between the parties is secured by the contract entered between the parties regarding the mortgage bond.

(iii) Certificate of payment as prima facie proof

[17] It was pointed out that the agreement entered into by the parties in terms of Clause 17, 17.1.2 of the agreement, that there is provision for the charging of legal costs. I find it correct to refer to *Nedbank v Botha and Another*¹³ where the court held:

¹⁰ Dr Harms, ‘Civil Procedure: Superior Courts’ The Law of South Africa (LAWSA) (Volume 4 - Third Edition Replacement)

¹¹ 2011 (3) SA 1 CC

¹² Id at para 15

¹³ 2016 JOL 36735 FB

“Where parties agreed in a loan agreement that a certificate of balance is binding on the defendant, then such certificate constitutes prima facie proof of the amount of indebtedness.”

[18] Although the plaintiff's relied on the legal fees as well, the legal fees in this instance are in contrast with the blatantness of a party merely relying on legal fees for summary judgment. The court in *Tredoux v Kellerman*¹⁴, an advocate and his instructing attorney sued for payment of their legal fees, which were rendered for the defendant in a divorce action. The defendant disputed the reasonableness of the fees in a summary judgment application brought against him. The full bench of the Western Cape High Court held that such claims were not liquidated where they involved an enquiry into the nature and extent of the services, and their reasonableness.

[19] In this instance, the parties' legal fees are included in the certificate of payment which constitutes the agreement between the parties and the certificate is binding.

(iv) Creating a new case for summary judgment

[20] During the hearing and argument, the defendants contend that the claim on particulars of claim is based on a home loan agreement, however the summary judgment is based on the legal fees and charges on the agreement.

[21] In terms of Rule 32(2)(b), a plaintiff is required to 'verify the cause of action, identify any point of law relied upon, identify the facts upon which the plaintiff's claim is based upon and explain briefly why the defence as pleaded does not raise any issue for trial'. Thus, in order to comply with subrule 2(b), the affidavit filed in support of the application must contain:¹⁵

- (1) A verification of the cause of action and the amount, if any, claimed;
- (2) An identification of any point of law relied upon;

¹⁴ 2010 (1) SA 160 CPD at para 18

¹⁵ See: Erasmus, 'Superior Court Practice' (2nd edition) at D1-401

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- (3) An identification of the facts upon which the plaintiff's claim is based upon; and
 - (4) A brief explanation as to why the defence as pleaded does not raise any issue for trial.

[22] The learned authors in *Erasmus* submit that a court will have to be satisfied that each of these requirements has been fulfilled before it can hold that there has been proper compliance with sub-rule (2)(b).¹⁶ What must be verified are the facts as alleged in the summons.¹⁷ Further, the deponent to the affidavit in support of the application for summary judgment must verify what has been referred to as a complete or perfected cause of action.¹⁸ As pointed out in *Mphahlele*,¹⁹ 'From the foregoing, it is clear that this requirement of the sub-rule does not provide for a verification of evidence or the supplementing of a cause of action with evidence. It is confined solely to those facts which are already present and as pleaded in the plaintiff's summons (it being trite that a plaintiff in summary judgment proceedings is prohibited from taking a further procedural step in the proceedings by, for example, amending the particulars of claim and then seeking to claim summary judgment).'

[23] The basis of the claim in the particulars of claim and the summary judgment is similar, the plaintiff is relying on the certificate of balance signed between the parties which included the legal fees, the plaintiff is referring to in the affidavit for summary judgment.

Application of facts

[24] In the view of the above, I now turn to consider whether there is *bona fide* defence in terms of rule 32(b) of the Uniform Rules of Court. It is apparent *ex facie* that the defendants deny that they breached a Home Loan Agreement concluded between

¹⁶ *Absa Bank Limited v Mphahlele N.O and Others* (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020) para 15. wherein the requirements of such sub-rule were considered to be peremptory. See, for example, the reasoning employed in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC 2010 (5) SA 112 (KZP)* at 122F-I

¹⁷ See *Erasmus* at D1-402H and read with authorities cited in fn 183 thereof

¹⁸ See *Erasmus* at D1-402H and read with authorities cited in fn 184 thereof

¹⁹ *Id Mphahlele*, par 17

them and the plaintiff on the grounds ventilate above.

[25] To my mind, an order for summary judgement application in itself is a drastic relief. To succeed, a court must be satisfied that the plaintiff's claim has been clearly established and that its pleadings are technically in order as provided above in *Gulf Steel*.

[26] It has been properly explained why plaintiff initially sought summary judgment against the defendants for payment of R 1 236 667.87 together with the interest, which the agreement was cancelled due to insolvency. Accordingly, it was pointed out that the certificate made by the plaintiff's manager constitutes prima facie proof that the amount due and interest are payable. It appears to me that the cancelled mortgage bond, the legal fees all made up part of this certificate.

[27] In this instance, I find that the dispute of the debt that was allegedly fully paid and the reliance on a cancelled mortgage bond has no merits. In order to come to the assistance of the defendant, it is trite that the onus is on the defendant to demonstrate that it has triable defences and that such defences are *bona fide*. I therefore find that, given that the defendants have failed to produce proof of payment, then their conduct renders their defence *mala fide*.

[28] It is not clear from the pleaded facts when and how payments were made, no proof of payments of the amounts referred to above has been provided by the defendant. The defendants have not been open enough to state when, how and where such payments were made.

[29] As may be gleaned from the above authorities, courts are extremely loath to grant summary judgement unless satisfied that the defendant has an unanswerable case. This is because summary judgement is an extra ordinary and very stringent remedy in that it permits a judgement to be given without a trial. It in fact closes the doors of the court to the defendant.

[30] The defendants' opposing affidavit lacks particularity, precision, and comprehension not to the equation of a plea, nonetheless, this is subjecting this court to too much speculation about the defendants real defence and its *bona fides*.

Reasons for decision

[31] For all the reasons given, not least of all, the defendant's failure to comply with the provisions of rule 32(2)b, including failure to make out a cause of action that is recognizable in law, deems their defence not valid.

[32] I am persuaded by the plaintiff's basis of its claim, and in my view, the pleadings were technically correct to justify the relief sought by producing the certificate and outstanding amount owing.

[33] In these circumstances, the defendant's defences would not be sustainable at trial. Consequently, the plaintiff has established a valid claim.

[34] I have no reason to deviate from the above well-established legal principle, instead I have a duty to follow the principles as they are binding on this court.

[35] As a result, the following order is made:

35.1 The plaintiffs' application for summary judgment is upheld.

35.2 The defendants are denied leave to defend the plaintiffs' claims;

35.3 The costs hereof shall be costs in the cause.

MD BOTSI-THULARE AJ

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Plaintiff

Plaintiff's Counsel:

Adv Kerusha Reddy

Instructed by:

Vezi de Beer Inc

Respondent

Respondent's Counsel:

Adv Rethabile Letsipa

Instructed by:

Ledwaba Attorneys

DATE OF HEARING:

01 August 2023

DATE OF JUDGMENT:

18 October 2023