IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: **21846/2018**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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NKOSI AJ DATE: 04 APRIL 2024

In the matter between:

FREDERICK CHRISTOFFEL GREEFF Applicant

and

SCENIC ROUTE TRADING 502 CC t/a DEVCO GROUP (IN LIQUIDATION) First Respondent

JAMES OPENSHAW ZERVAS Second Respondent

Delivery:- This judgement was delivered electronically by means of email to the legal representatives of the parties and uploaded on caselines. The judgement is deemed to be delivered on the 5th April 2024.

JUDGEMENT

NKOSI AJ.

INTRODUCTION

[1] This is an opposed application for summary judgement in which the applicant claims payment of R446 079.06, from the second respondent only. The claim arises from the fact that, the second respondent bound himself as surety and co-principal debtor of the first respondent. The applicant does not seek any relief against the first respondent which is in the process of Liquidation.

[2] The applicant alleges that on 26 February 2015, the first respondent entered into a loan agreement with the applicant in terms of which an amount of R690 00.00 was loaned and advanced to the first respondent on 27 February 2015.

[3] On 26 February 2015, the second respondent bound himself as surety and co-principal debtor for payment of all monies due and owing by the first respondent in terms of the loan agreement.

[4] On 22 December 2015, the first respondent made a part repayment of R243 920.94 leaving a balance of R446 079.06. The first respondent failed to pay the balance and consequently the applicant instituted this action against both respondents. However, this application for summary judgement is directed at the second Respondent only.

[5] The summons was issued against the Respondents on 26 March 2018 and served by the sheriff on 23 April 2018. A notice of intention to defend was delivered on 11 May 2018. However, a plea was not timeously delivered and the defendants were placed under bar and eventually barred.

[6] An application to uplift the bar in terms of Uniform Rule 27 was upheld by Mnyovu AJ on 26 January 2023. In terms of the Court order, the plea was to be filed within 5 days from the date of the Court order.

[7] On 27 July 2021 the plaintiff delivered his amended particulars of claim. The plea was only served on 19 June 2023 and the application for summary judgement was served on 10 July 2023. The importance of the aforementioned timelines shall become apparent when the issues raised by the second Respondent, are dealt with.

[8] The second respondent raised several points *in limine* resisting the granting of the summary judgement. I now deal with the points raised; not necessarily in the order in which they are raised.

FAILURE TO COMPLY WITH UNIFORM RULE 32 (2) (C)

[9] Rule 32(2)(c) provides:
"If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgement shall state the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof."

[10] *In Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa*.[1] Brand AJ, confirming the definition of a liquid document, stated that "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".[2]

[11] The alleged indebtedness of the second Respondent to the applicant, is premised on a liquid document referred to by the applicant as a surety agreement which is a consequence of a loan agreement between the applicant and the first Respondent.

[12] The provisions of Uniform Rule 32(2)(c) are couched in peremptory terms and therefore require strict compliance. Counsel for the second Respondent submitted that the application should be dismissed because the applicant failed to annex a copy of the surety and loan agreements to the applicant's affidavit. Counsel for the applicant did not dispute that these liquid documents

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[1] *Twee Jonge Gezellen (Pty) Ltd and another v Land and Agricultural Development Bank of South Africa t/a The Land Bank an Another* 2011(3) SA 1 (CC) (22 February 2011)
[2] *Twee Jonge Gezellen (Pty) Ltd and another* at para 15. Also see *Joob Joob Investment (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009(5) SA1 (SCA); at 10 C-D and *Rich and others v Lagerway* 1974 (4) SA 748 (A) at 754 H.

were not annexed to the said affidavit, however he submitted that, applicant's claim is based on a liquidated claim in money.

[13] I do not agree with applicant's Counsel's submission purely because, such submission negates what is clearly stated in applicant's affidavit namely, that the applicant's claim against the second Respondent is based on a surety agreement. This therefore constitutes a serious contradiction which cannot be ignored because it impacts the fundamental requirement for a successful summary judgement application.

[14] *In Nissan Finance, a product of Wesbank, of First Rand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd*[3], Maier-Frawley J referred with approval to the decision in *Fishereigesellschaft*[4] wherein the Court said:

"As was pointed out in Misid Investments (Pty) Ltd v Leslie 1960 (4) SA 473 (w), at page 474 the applicant in summary judgement proceedings must comply strictly with the requirements of the Rule of Court."[5]

[15] The rationale for strict compliance was mentioned in *Mowschenson v Mercantile Acceptance Corporation of SA Ltd*[6] where the Court said:

"The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgement is an extraordinary remedy, and a very stringent one, in that it permits a judgement to be given without trial."

[16] I am therefore of the view that the applicant's failure to annex the surety and the Loan agreement constitutes a material defect which compels me to dismiss the application.

NON-COMPLIANCE WITH UNIFORM RULE 32(2)(A)

[17] The amendment to Rule 32(2) came into effect on 01 July 2019. As of that date, all applications for summary judgement MUST (my emphasis) be

[3] *Nissan Finance, a product of Wesbank, of First Rand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd and Another* (2022/9914) [2023] ZAGPJAC 303 (5 April 2023)
[4] *Fischereigesellschaft F Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd* 1967(4) SA 105(C).
[5] *Fischereigesellschaft* at p 111 A-B
[6] *Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959(3) SA 362. (W) at p 366

delivered within 15 days after the delivery of the plea for such application to be compliant with the provisions of the amended Rule 32(2).

[18] In *Veldman v Director of the Public Prosecution*[7] Mogoro J said:

"Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and will not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[8]

[19] Applying the principle enunciated in Veldman's[9] case, I do not find any conclusive fact let alone a suggestion that the amended Rule 32(2) is intended to apply retrospectively. In *Standard Bank of SA v Rahme*[10] *and another*, Siwendu J held that the amended Rule 32(2) does not apply retrospectively.

[20] The factual background and the timelines mentioned in the first few paragraphs of this judgement now become relevant to this point *in limine* raised by the second Respondent.

[21] The summons was served on the Respondent on 23 April 2018. A notice to defend the action was delivered on 11 May 2018. The summons and the notice to defend were delivered long before Rule 32(2) was amended. Therefore, the old Rule 32(2) was still in force and applicable.

[22] The pre-amendment Rule 32(2) requires an applicant to deliver the application for summary judgement within 15 days after the delivery of a notice of intention to defend. In terms of the pre-amendment Rule 32(2), once

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[7] *Veldman v Director of Public Prosecutions* 2007(3) SA 210 (CC)
[8] *Veldman v Director of Public Prosecution* at para 25
[9] Vide footnote 7 supra
[10] *Standard Bank of SA Rahme and Another* [2019] ZAGPJHC 287

a plea has been delivered, the option of a summary judgement application is no longer available to the applicant.

[23] The applicant failed to deliver the application for summary judgement then and opted to utilise the amended provisions of Rule 32(2) in launching the application. However, the amended Rule 32(2) does not apply retrospectively. It is therefore my finding that the application for summary judgement constitutes an irregular step and is out of time. The application for summary judgement is therefore, procedurally flawed and ought to be dismissed.

RES JUDICATA

[24] It is a fact that Mnyovu AJ, in an application to uplift the bar brought by the second Respondent, held that:

"It will be in the interest of justice that the second Respondent be given an opportunity to uplift the bar and file his plea, as there are prospects of success (my emphasis), to prove its counterclaim from the plaintiff."
(see caseline 000-14)

The Court's finding on the merits of the matter was not challenged. Although I am not bound by the decision of my Learned Sister, I am of view that she was well placed to make such a decision after considering all the submissions made.

[25] The finding of Mnyovu AJ as it stands, does not give room for a summary judgement application when one considers the legal principle in Boshoff v Union Government[11] wherein the Court said:

"*The civil authorities lay down two requirements for this plea, namely that the proceedings on which reliance is placed must be between the same parties and that the same questions, eadem quaestio, must arise."*

[26] The same question between the same parties arises in this application, whether the second respondent has a *bona fide* defence to this application. The finding by Mnyovu AJ clearly does not dismiss the action but indicates the existence of a *prima facie* defence which has to be ventilated at the trial. It will be ill considered to ignore such finding, more so that, Mnyovu AJ held that:

[11] *Boshoff v Union Government* 1932 TPD 345 at page 348

"I am satisfied that defendant ("second Respondent") has disclosed a bona fide defence"[12]*.* I am persuaded that the point raised by the second Respondent has merit and should be upheld.

FAILURE TO COMPLY WITH PROVISIONS OF RULE 32(2)(a)

[27] Rule 32(2)(a) provides that:

"Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgement together with an affidavit made by the person or by any other person who can swear positively to the facts (my emphasis)".

[28] Counsel for the second respondent argued that, the affidavit on caseline 043-5 to 043-14 is by a female attorney and is unsigned. Further, that the attorney cannot swear positively to the facts of this action. She referred the Court to a number of authorities, which I agree with, to support her contentions.

[29] I have examined the affidavit; it is unsigned and made by a female attorney. However, the purpose of that affidavit was to support the application for default judgment against the respondent which application was later withdrawn.

At caseline 043-15 to 043-33, there is a signed affidavit deposed to by the applicant in support of this application for summary judgement. Having considered its contents, I am satisfied that he does swear positively to the facts which are within his personal knowledge and belief. The veracity of its contents is yet to be tested at the trial, if the matter does proceed to that stage. The point *in limine* should therefore fail.

[30] The last point *in limine* relates to non-compliance with Rule 32(4). I shall not burden this judgement by considering this point which in my view has become moot in light of my findings in the other points raised.

[31] Counsel for the applicant, in his argument against the points *in limine* contended that, the correct approach in this matter, is for Court to first consider the merits of the claim which will prove that the second respondent is

[12] Caseline 000-14 at para 42

indeed indebted to the applicant. The technical and procedural issues raised by the second respondent will therefore become moot. No authority was provided for such contention.

[32] I am of the view that such submission has no merit and remains unsupported by case law and other authorities. For instance, in *Shackleton Credit Management (Pty) Ltd v Microzone Trading CC*[13] Wallis J held:

"The proper starting point is the application. If it is defective then cadit quaestor. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons."

Rule 32(2) provides for prerequisites to be complied with before a Court is enabled to proceed to deal with the *bona fide* defence raised by a respondent.

BONA FIDE DEFENCE

[33] In relation to the issue of merits, the second respondent raised the following defences in his plea;

3.1.1 superannuation
3.1.2 non-compliance with Uniform Rule 17(1) and 18(1); and
3.1.3 the respondent has already paid the applicant.

[34] These defences were extensively dealt with in the affidavit opposing the application for summary judgement. Likewise, the applicant dealt with each ground extensively to demonstrate that they are devoid of any merit. I am satisfied that the defences raised, if proven at the trial, they will constitute valid defences to the applicant's action.[14]

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[13] *Shackleton Credit Management (Pty) Ltd v Microzone Trading CC 88 and Another* (7089/09) [2010] ZAKZPHC 15; 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP) (4 May 2010) at para 25

[14] *Breitenbach v Fiat SA (EDMS) BPK* [1976] 2 ALL SA 208 (T) on page 211

[35] I now come to the conclusion that, having regard to the several findings I made in each subheading mentioned hereinbefore, the application for summary judgement should fail.

[36] I therefore, make the following order;

(i) The application for summary judgement is dismissed.

(ii) The applicant is to pay the costs of the application which cost shall include Counsel's costs.

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NKOSI AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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This Judgment has been delivered by uploading it to the caselines digital data base of Gauteng Division, Pretoria and by email to the attorneys of record of the parties. The deemed date for the delivery is _____