



**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU NATAL DIVISION, PIETERMARITZBURG**

**CASE NUMBER: 16473/2022**

**In the matter between:**

**BRIDGEMENT (PTY) LTD**

**PLAINTIFF**

**And**

**VHA ACCOUNTING SOLUTIONS**

**FIRST DEFENDANT**

**VIDYANTH BHOLA**

**SECOND DEFENDANT**

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**JUDGMENT**

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**P C BEZUIDENHOUT J:**

[1] Defendants filed their heads of argument the day before the hearing of the said application but together with it filed an application for condonation for the late filing of the heads of argument. This was not opposed by Plaintiff and accordingly condonation was granted.

[2] The claims result from various loans made by Plaintiff to First Defendant. Second Defendant was the surety in respect of each of these loans. It is contended by

Plaintiff that in respect of the these loans there are certain amounts which are still owing although certain payments were made and accordingly it claims the amount of R 141 390.21 in respect of claim A, R 668 478.92 in respect of claim B, R 2 999.98 in respect of claim C, R 11 161.25 in respect of claim D and R 193 636.29 in respect of claim E together with interest at 7% per annum on the outstanding amounts together with costs of suit.

[3] The defence raised by Defendants is that such amounts are not owing. It has admitted that the said agreements were entered into and that First Defendant received the money. It is however contended in their plea that all amounts were repaid and in their opposing affidavit that only an amount of R 267 277.31 is still owing but that it is not payable at this stage. The only issue between the parties accordingly appear to be the amount which is owing in respect of the said loans.

[4] In respect of each of the said loans Plaintiff has attached a statement of account setting out what amounts were paid and over what period this occurred. The agreements in respect of each of the loans is also attached to the summons together with a certificate of indebtedness in respect of each of the said loans which in terms of the agreement in paragraph 5 shall be proof of the amount that is owing for the purposes of summary judgment or any other proceedings. The agreements are exactly the same in respect of each of the loans that were granted.

[5] It is submitted on behalf of Plaintiff that in Defendants plea in respect of the claims it admits that it borrowed the said amount but denies that there is any amount owing to Plaintiff as it has paid all the said amounts. In claim B it denies Plaintiff was entitled to finance costs but that the full capital amount together with interest at the legal rate was repaid. Accordingly in terms of its plea it is contended that the full amount of the loans have been repaid to Plaintiff.

[6] However in the answering affidavit filed on behalf of First and Second Defendants it is admitted that a total sum of R 911 000.00 was borrowed from Plaintiff in respect of the loan accounts but that the indebtedness at this stage is only the sum of R 267 277.31 which is not due and payable. It is contended that an amount R 678 383.94 has been paid to Plaintiff in respect of the loans. There is therefore at this stage nothing payable. Attached to the affidavit is a summary of the alleged payments in respect of each of the loans totaling R 911 000.00. The interest that was payable, and all the payments made which is the sum of R 267 277.31 which then leaves a balance of R 678 383.94. This schedule is totally different to that which is set out in the affidavit as having being paid. Further it is contrary to what is set out in the plea where it specifically states that there is nothing due owing and payable, as all has been repaid.

[7] It is submitted that it is not only these contradictions referred to above but that Defendants failed to set out in their affidavit or plea what the terms of the agreement are which they denied. It was accordingly merely bold, vague and sketchy averments and did not show any *bona fide* defence. It was submitted that the defence was a sham, that there was no *bona fide* defence and due to the errors between the opposing affidavit, the plea and the reconciliation schedule that was attached that there are so many errors that it can only be construed as a sham and therefore not a *bona fide* defence.

[8] It was submitted on behalf of Defendants that it sufficient if a defendant swears to a defence valid in law in a manner which is not inherently and seriously unconvincing. It is submitted that the matter should go to trial as there is a dispute whether Defendants are in arrears with the repayments of the loans or not. It was submitted that Defendants are not required to persuade the Court of the correctness of the facts stated by them or where facts are in dispute that there is a preponderance of probability in their favour. Plaintiff has to satisfy the Court that Defendant has no defence on the merits and not as

before where that Defendants had to show Defendant had no *bona fide* defence. A full defence has been raised and Defendants have set out what is owing in terms of the loan agreements. It would be prejudicial to Defendants to be denied an opportunity to have their defence properly tested in trial proceedings if summary judgment is now granted.

[9] The relevant portions of Rule 32 dealing with summary judgment are as follows:

“Rule 32

(2)

- (a) within fifteen (15) days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.
- (b) the plaintiff shall, in the affidavit referred to in sub-rule (2)(a) verify the cause of action and the amount, if any claimed, and identify any point of law relied upon and the facts upon which the claim is based and explain briefly why the defence as pleaded does not raise any issue for trial.

(3) The defendant may;

- (a) give security to the plaintiff to the satisfaction of the court hearing judgment including costs which may be given or
- (b) satisfy the court by affidavit (which shall be delivered five (5) 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 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 materials factors relied upon therefore.” (my underlying)

Just as in the previous Rule 32 Defendant must show it has a *bona fide* defence.

[10] In *Breitenbach v Fiat South Africa Edms Bpk 1976 (2) SA 226 (TPD)* referring to the previous Rule 32(3)(b) it held that the defendant in the opposing affidavit must show he/she has a *bona fide* defence to the action and such affidavit or evidence shall disclose fully the nature and grounds of the defence and peculiar facts relied upon therefore. In the present Rule 32(3)(b) it still states that the defendant must show that he or she has a *bona fide* defence to the action.

[11] In *Breitenbach* it was held that if the defence is averred in a manner which appears in the circumstances to be bold, vague or sketchy it would constitute material for the court to consider in relation to the requirements of *bona fide's*. It further sets out that the discretion that has to be exercised should be based on material before the court. At 230 F it held:

“The court *a quo* dealt crisply with the problem before it in these terms: ‘the applicant (as the plaintiff) has set out very fully the nature of his claim in the particulars of claim. The defendant (as Respondent) in opposing the application for summary judgment has alleged in very vague terms that he has in fact paid whatever he owes to the plaintiff. The facts referred to in the respondent’s affidavit are so vague that the court is not in a position to ascertain whether the respondent has in fact a *bona fide* defence as alleged. In these circumstances the plaintiff is entitled to summary judgment.’”

[12] In *Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 AD* it was held at 425 that the defendant must show that he has a *bona fide* defence to the action. It further held at 426 B that the defendant had to show that the defence was *bona fide* and good in law. It continued at 426 E that the defendant is not expected to formulate its 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.

[13] In the present Rule 32 application for summary judgment can only be made after a plea has been filed. Accordingly the portion in the judgment in Maharaj to which I have just referred where the precision of a plea is not required can accordingly no longer, in my view, be applicable. The precision of a plea is now vital in assessing summary judgment because it is in terms of what is stated in the plea that the court has to exercise its discretion whether to grant summary judgment or not. One would expect the correct defence to be pleaded and to be done in detail.

[14] I was referred by counsel for Defendants to the matter of Standard Bank of South Africa v Rahme and Another 2019 (ZADPJHC287) (3 September 2019) where it was held in paragraph 8:

“Other than the procedural change, the amended Rule appears to raise the bar and onus for securing summary judgment. By implication the plaintiff must satisfy the court that the defendant has no defence on the merits when under the old Rule it was enough to show defendant lacks a *bona fide* defence. On this call because of the change of onus as well as other grounds dealt with below I depart from Grant AJ’s conclusion that the retrospective application does not impair substantive rights of obligations of powers.”

[15] I was referred by counsel for Plaintiff to the matter of Tumileng Trading CC v National Security and Fire (Pty) Ltd 2026 SA 624 (WCC). In paragraph 13 it was held:

“That means that the test remains what it always was, has the defendant disclosed a *bona fide* (i.e. in apparently genuinely advanced as distinct from sham) defence. There is no indication in the amended Rule that the method of determining that has changed. The classical formulation in Maharaj and Breitenbach v Fiat as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application.

Defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally recognisable defence on the face of it, and that the defence is genuine or *bona fide* summary judgment must be refused. The defendants' prospects of success are irrelevant."

[16] I have considered both these judgments and the previous Rule 32 and the amended Rule 32. I am not in agreement with the judgment in the matter of Standard Bank v Rahme as I can find no basis why it is found that the bar and onus for securing summary judgment has been raised. I am in agreement with the judgment in the matter of Tumileng Tradings CC v National Security and Fire (Pty) Ltd that the test remains as it always was in the case of Breitenbach and Maharaj. This, in my view, is further fortified by the fact that both in the previous Rule 32 and the present Rule 32 it refers to "*bona fide's*". It still requires that Defendant must prove a *bona fide* defence to the action. In my view there is accordingly no raising the of the bar on Plaintiff but the test remains as it always was except that the plea must now be considered where previously there was no plea but merely the opposing affidavit. Further the requirement of the decision in Maharaj v Barclays Bank that the affidavit need not be as precise as the plea as set out above cannot, at this stage, be the standard because a plea has to be filed and it is on the basis of that plea that the application for summary judgment is brought that Plaintiff then sets out the basis upon which it contests what is set out in the plea and at the end of the day on which the Court has to exercise its discretion. In my view the present Rule 32 in actual fact requires a plea that is well drafted and not merely an affidavit as before.

[17] In the present matter in the plea that was filed by Defendants, they refer to each of the agreements admitting that the agreements were entered into but in each of them stating that no amount is owing and that all of the amounts have been paid in full. This is done by way of a bare statement. It does not set out when the said payments were made, how they were made and the basis upon which it is contended that the full amount has been repaid. The plea is accordingly vague and is not a full disclosure to

Court. If the amounts were paid in full then it should have been very easy for Defendants to provide the information in that regard.

[18] This issue is however further complicated by the fact that in the opposing affidavit it is contended that an amount of R267 277.31 is due to Plaintiff but is not payable at this stage. It also does not provide detail as to when payments were made etc. However a schedule of payments is attached not indicating when it was paid but merely the totals where it sets out that an amount of R 668 478.92 is due to Plaintiff. Accordingly the versions which are presented by Defendants are bold and unsubstantiated but further contains contradictions between the plea and the affidavit and the schedule attached to the affidavit. In my view a consideration of these factors does not disclose that there has been a full disclosure by Defendants. It does not indicate *bona fide's* and accordingly Defendants have failed to indicate that they indeed have a *bona fide* defence sustainable in law to Plaintiff's claim.

Order:

I accordingly grant summary judgment against First and Second Defendants jointly and severally the one paying the other to be absolved in terms of paragraphs 1, 2, 3, 4, 5, 6 and 7 of the notice of application for summary judgment.

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**P C BEZUIDENHOUT J.**

**JUDGMENT RESERVED:**

**12 OCTOBER 2023**

**JUDGMENT HANDED DOWN:**

**17 OCTOBER 2023**

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