

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION**



Case No: 71053/2016

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




Signature

23 /1/ 2023

Date

In the matter between:

UMMI PROPERTIES (PTY) LTD

(Registration number: 1993/001976/07)

Applicant

and

ABSA BANK LIMITED

Respondent

JUDGMENT

SARDIWALLA J

[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 R1 016 066.29

1.2 Interest on the sum of R1 016 066.29 at the rate of 10,25% per annum a *tempore morae*, to wit, 29 September 2016, to date of payment in full, both days inclusive.

1.3 Costs of suit between attorney and Client;

1.4 Further and/or alternative relief.

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

2.1 There is a dispute of fact relating to the Plaintiff's claim which dispute can only be resolved at trial.

2.2 The Plaintiff's claim had prescribed or, at the very least, a substantial portion thereof. The basis for this contention is so far as the Plaintiff alleges that the incorrect interest rate was charged such claims would have prescribed on the dates on which the interest was charged, if found to be incorrect.

2.3 The Plaintiff is estopped from claiming any amount on the basis of its conduct, inter alia, relating to the correspondence between the parties:

2.4 The Plaintiff signed documents, emanating from itself, such as audited financial statements, in terms of which the interest rate charged by the Defendant, and the Plaintiff's debt towards the Defendant, is stated.

2.5 The Plaintiff is still indebted towards the Defendant.

2.6 The Plaintiff was, during March 2013, still indebted to the Defendant, the Plaintiff was aware of such indebtedness and the remaining period of the loan.

2.7 The Plaintiff represented to the Defendant that the amount indebted, the remaining period of the loan, is accepted by the plaintiff and consequently, the Plaintiff would be estopped from relying on the claim as pleaded in its particulars of claim.

2.8 The Plaintiff bound itself as surety and co-principal debtor for the other debts of its director, Kevin Denton and Denton is still substantially indebted to the Defendant.

2.9 It is further illustrated by the Defendant that the Plaintiff has been aware that the Defendant relies on contentions which would justify leave to defend and, notwithstanding this knowledge, proceeded to apply for summary judgment.

Factual Background

[3] The applicant and respondent entered into two mortgage loan agreements for ten years over the property described in the summons. The first contract (the "first loan agreement") one of bond finance in the amount of R10, 5 million commenced on 20

December 2002, which agreement terms and conditions were accepted on 4 February 2004 by Jonathan Connellan representing the applicant.

[4] The express terms and conditions of the first agreement read with the bond were *inter alia* the following:

4.1 A covering bond in respect of the properties was granted against the loan amount of R10, 5 million.

4.2 The properties were described as Erven 703, 1781, 1783 and 1786 Warmer, Remainder of Erven 273, 274 and 1787, Warmer, Erven 5645 and 2629, Central, Remainder of Erven 2543 and 2544, Port Elizabeth Central and Erf 2818 Kabega Park.

4.3 The interest payable on the loan was agreed to be 1,5 % below prime overdraft interest rate (as quoted by the Defendant) from time to time.

4.4 It was agreed that should the loan fall into arrears by two months or more, the Defendant reserved the right to increase the rate by up to 2% per annum.

4.5 The Defendant also reserved the right to review the interest rate offered at the discretion after the period of 24 months from date of registration of the bond and to make the necessary adjustments subject to a suitable written notification of such adjustment to the applicant.

4.6 The repayment period was ten years in equal monthly instalments including capital and interest.

[5] A year later the contract was restructured through a substantial once-off payment which resulted in a new loan agreement (the “second loan agreement”) of R3, 966 million for ten years commencing on 26 January 2004. KJ Denton representing the Plaintiff accepted the terms and conditions of the restructured second loan agreement. The material express, tacit or implied terms of the second loan agreement were inter alia:

5.1 a covering mortgage bond in respect of the properties was granted as against a loan amount of R3 966 384.00.

5.2 The properties were described as Erven 703, 1781, 1783 and 1786 Warmer, Remainder of Erven 273, 274 and 1787, Warmer, Erven 5645 and 2629, Central, Remainder of Erven 2543 and 2544, Port Elizabeth Central and Erf 2818 Kabega Park.

5.3 The interest payable on the loan was agreed to be 1,5 % below prime overdraft interest rate (as quoted by the Defendant) from time to time.

5.4 It was agreed that should the loan fall into arrears by two months or more, the Defendant reserved the right to increase the rate by up to 2% per annum.

5.5 The Defendant also reserved the right to review the interest rate offered at the discretion after the period of 24 months from date of registration of the bond and to make the necessary adjustments subject to a suitable written notification of such adjustment to the applicant.

5.6 The repayment period was ten years in equal monthly instalments including capital and interest.

5.7 The Defendant was authorised to deduct monthly instalments from the Plaintiff's bank account by debit order.

5.8 A further variation was included in this agreement in that the Defendant provided that it may vary the rate at any time on 30 days written notice so as to bring the rate in line with what it regarded as the ruling mortgage rate which is generally applicable to first mortgage bonds being granted at such time and with a similar risk profile.

5.9 The Defendant agreed that it would not exercise this right prior to the expiry of 24 months from date of registration of the mortgage bond. Should any breach be committed, the Defendant reserved the right to increase the rate by up to 2% per annum and prior to such additional rate being charged Plaintiff would be advised in writing.

5.10 The Defendant would calculate the monthly payments, as adjusted for interest variations from time to time, so as to amortise the loan agreement over 10 years.

[6] The first repayment on the revised agreement (the "second loan agreement") commenced on 1 April 2004 and terminated on 1 April 2014. The Defendant since April 2014 to date of the summons continued to deduct the monthly instalment through debit order from the applicant's bank account and a total amount of R 1 016 066.29 was collected.

[7] The applicant demanded that the respondent cease deducting the payments and launched an application under case number 54941/2015.

ISSUES FOR DETERMINATION

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

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

Legal Principles

[10] In terms of Rule 32(2) (b) the applicant has to identify a point in law and facts relied upon which his claim is based. The applicant has the onus to prove why the defence pleaded does not raise any issues for trial. It is not enough to merely state that the respondent did not have a *bona fide* defence. To the contrary the respondent has to prove that he at the very least has a defence and state the material facts upon which his defence is based. This then enables the court to decide as to whether he has a *bona fide* defence or not.

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

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

[13] It is contended by the respondent that the matter is *lis pendens* and therefore the summary judgment should be dismissed. Secondly a claim for over-payment of interest is based on *condictio indebiti* which it claims has already prescribed as prescription began to run as soon as the debt was due. Further that the applicant was aware that it was indebted to the respondent as evidenced by bank statements sent to the applicant which the applicant has not disputed. Therefore, the applicant should have been aware that the interest rate had changed and that it was still indebted to the respondent. It is the respondent's contention that it has raised or set out sufficient facts in its affidavit, which if proved will constitute and answer to the applicant's claim and or is a *bona fide* defence therefore the court should not grant the summary judgment.

[14] The respondent contends that it has a *bona fide* defence and has raised triable issues entitling it 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 respondent's argument that a court is to be satisfied that the respondent has a *bona fide* defence and he need not prove his defence.

[15] 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.

[16] The applicant averred that the debt has been paid and that this is admitted in the respondent's answering affidavit. Therefore, there is no defence. Secondly the respondent has taken issue with the interest rate which is not the applicant's cause of action. The applicant's case is simple in that it had a ten-year contractual loan with the respondent which expired on 1 April 2014 and the respondent continued to debit the applicant's

account for more than two years in the sum of R 1 016 066.29. It was the applicant's contention that the term of the loan was fixed it was only the amount that could be adjusted by the respondent on written notification of same to the applicant. Further that the bank controlled the amount it deducted and therefore the onus was on the respondent to ensure it collected the correct repayments over the ten-year period and not unilaterally increase the term of the contract which attracted further interest which the applicant should not be liable for. It further stated that the respondent did not even allege that there had been any non-payment by the applicant justifying the extension of the term. Therefore, there is no explanation from the respondent why it proceeded to deduct a further R1 016 066.29 from the applicant and the applicant's claim remains unanswered.

[17] In respect of the respondents second defence relating to the interest rate, the applicant averred that there is no dispute about the interest rate as the respondent in its answering affidavit states that the interest rate was correct, which the applicant has accepted and on that basis was able to quantify its claim against the respondent based on the respondent's schedule. Lastly that the defence of *lis pendens* was not a *bona fide* defence as the causes of action are entirely separate and so were the orders prayed for. It submitted that the other application related to ceasing the respondent from debit the applicant's account further, related to the interest rate calculated and sureties. Therefore, the applicant submitted that the summons and particulars of claim were undisputed and the applicant was entitled to summary judgment.

[18] In **Maharaj v Barclays Ltd 1976 (1) SA 418 (A)** **Maharaj v Barclays Ltd 1976 (1) SA 418 (A)** **Maharaj v Barclays Ltd 1976 (1) SA 418 (A)** 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.

[19] The applicant's cause of action which constitutes its foundation in this application remains undisputed. In my view the defences raised do not provide an explanation to the claim and the claim therefore remains unanswered by the respondent. In respect of the first defence that the matter is *lis pendens* I am satisfied that this application relates to different causes of action against the respondent. In respect of the second defence raised the respondent has in its own papers averred that the debt was extinguished on 8 June 2016, therefore the defence that the applicant is aware that it is indebted to the respondent is non-sensical and must be factually incorrect. In respect of its third defence a fundamental principle of prescription, which is much clearer under the current Prescription Act, is that it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises. **See Lubbe “Die Aanvang van Verjaring waar die Skuldeiser oor die Opeisbaarheid van die Skuld kan Besik” (1988) 51 THRHR 135.**

[20] I am satisfied that the defences raised by the respondent to the applicant's case are not *bona fide* defences of being sustained by the respondent at the subsequent trial.

[21] **I therefore make the following order:**

21.1 Summary judgment is granted with costs.



C SARDIWALLA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:

CD ROUX

Instructed by:

D Paleologu Attorneys

For the First to Third Respondents: R Raubenheimer

Instructed by:

Tim Du Toit & Co Inc