<u>IN THE HIGH COURT OF SOUTH AFRICA</u>

<u>(NORTH GAUTENG HIGH COURT, PRETORIA)</u>

Case No: 48549/2008

Date: 21 May 2010

In the matter between:

CHANGING TIDES **Applicant**

And

DOUWE FOPPE MAHONEY **First Respondent**

SANET MAHONEY **Second Respondent**

JUDGMENT

MAVUNDLA, J.

[1] This is an opposed application for summary judgment against the defendants, jointly and severally, the one paying the other to be absolved, for payment in the amount of R444, 952.20 together with interest on the aforesaid amount calculated at the rate of 16.10% per annum from 1 September 2008 to date of oayment. The applicant further prays for an order declaring executable certain immovable property Erf 2186 Stilfontein Extension 4 Township, Registration Division Province of North as well as costs of suit on attorney and own client.

[2] The plaintiff issued summons against the defendants for the payment of the amount mentioned herein above. The plaintiff in paragraph 1.1 of the particulars of claim has alleged that it is a trustee of South African Home Loans Guarantee Trust, a irust dully registered under Masters Reference No. IT/10713/00 (‘the Trust”), with its principal office place of business at The Grades, 78 Amstrong Avenue, La Lucia, Durban.

[3] The plaintiff has attached as annexure “A1” a copy of the letter of authority issued by the Master of the High Court (Transvaal Provincial Division) to the plaintiff and authorising the plaintiff to act as trustee of The South African Home Loans Guarantee Trust.

[4] According to the particulars of claim, the first defendant and the second defendant are married to each

other out of community of property, and their respective addresses of *domicilium citandi et excutand'* is at the above mentioned property sought to be declared executaoie.

[5] The indebtedness of the defendants is premised on two loan agreements in respect of amounts loaned and advanced to the defendants, and tne relevant righis. interest and title in respect of such indebtedness was allegedly ceded to the Plaintiff.

[6] The first loan agreement was concluded between Pretoria, Main Street 65 (Pty) Ltd and the defendants on 1S January 2006 for an amount of R279 783.18, plus an additional sum of R75 000. 00[1]. The amount of R279 783.18 was advanced to the defendants by **Main Street 65 (Pty) Ltd** on 13 February 2006 subject to the terms and conditions contained in the loan agreement, a copy of which is attached as annexure “B1" and “B2” to the particulars of claim. It is alleged that the defendants failed to comply with the material repayment terms of the aforesaid agreement.

[7] It is futher alleged that on 5 April 2006 Main Street 65 (Pty) Ltd in writing ceded all its rights, title anc interest and arising out of the Loan Agreement, to Thekwini Warehousing Conduit (Pty) Ltd (“Thekwini”) who accepted the cession. Annexure “C” being the copy of the cession has been attached to the particulars of claim.[2] It is further averred in paragraph 11 of its particulars of claim that the plaintiff as lender, at the instance of the defendants re-advanced on 13 July 2005 to the defendants as borrowers, at the latters instance and request an amount of R18, 000. 00, for which plaintiff holds no security. Annexure “D’ is attached, being a copy of the Re-advance Schedule.

[8] It is further averred in paragraph 12 of the particulars of claim, that on 22 November 2006 **Thekwini** ceded all its right, title and interest, to and were accepted by **Main Street 65 (Pty) Ltd Registration Number 2001/00404/07),** which in turn ceded on 29 May 2007 all its rights arising from the aforesaid cession. It is further averred that Main **Street,** then on 22 November 2006 **ceded** to **The Thekwini Fund** 5 (Pty) Ltd which accepted, all its right, title and interest arising from the aforesaid cession. A copy of the said cession is attached as annexure “F”.

[9] In paragraph 14 of the particulars of claim, it is averred that on 29 May 2007 and at Pretoria, the Thekwini Fund 5 agreed to advance to the defendants an amount of R115 000.00 subject to the terms and conditions contained in the loan agreement and its schedule, a copies of which are attached as annexure “G1” and “G2” respectively. Pursuant to the aforesaid agreement, Thekwini 5 on 19 June 2007 duly advanced to the defendants the amount of R115, 000. 00.

[10] It is further averred in paragraph 15 that, *inter aiia*, on 5 August 2008 Thekwini ceded, as it was entitled to, all its right, title and interest to Main Street 65 (Pty) Ltd, in terms of or arising from the loan agreement to

“Main Street, which accepted such cession. A copy of the aforesaid cession is attached as annexure “H”. It is further averred that the defendants failed to comply in terms and conditions as stipulated in the two written agreements, the schedules thereto and Re-Advancement Schedule. anneyj'e "B1”, “B2V r2” ano “D’ oy ïaliirc into arrears witr. tne montniy instalment which arrears, in soite demand, defenaants failed

[11] The defendants in opposing the application for summary judgment have raised in their opposing affidavit two points *in limine.* The first point *in iimine* is that the affidavit in support of the application for summary judgment was not deposed to in accordance with the requirements contained in Regulation 1(1) of the Regulations published in Government Gazette R1258 of 21 July 1S72 (“the Regulations”). However this point *in iimine* has been abandoned.

[12] The second point *in limine* is tnat the plaintiffs particular's of claim are vague and embarrassing and accordingly excipiabie in that: the plaintiff cites itself personally as a trustee of South African Home Loans Guarantee Trust with the Master’s reference number: IT 10713/ 00, but not as nominee ex *officio.* It is further contended that in paragraph 23 of particulars of claim it is alleged that the trust on 1 September paid an amount of R444, 952. 20 yet the judgment is sought in favour of the plaintiff in its personal capacity, and there is no legal basis alleged upon which the plaintiff is entitled to one judgment.

The second point *in limine* raised is that the piainiiff in this action is Changing Tides 17 (Pty) Ltd. The plaintiff has cited itself as trustee of 'South AFRICAN Home Loans Guarantee Trust, with the Masters reference number as IT 10713/00. The plaintiff however has not cited itself as nomino officio, but in its personal capacity as Changing Tides 17 (Pty) Ltd. It is contended that there is no allegation made in the particulars of claim to support the contention that the trust is before the Court. It is submitted that the plaintiff before Court has no *locus standi.*

[13] It is further contended that the particulars of ciaim contain essentially two claims. The first ciaim which arises from moneys lent and advanced by “Main Street 65 (Pty) Ltd", which were allegedly later ceded back to “Thekwini Warehouse Conduit (Pty) Ltd’ and later again ceded back to “ Main Street” and which were allegedly later ceoed back to “Thekwini 5 (Pty) Ltd.

[14] The second claim is in respect of money allegedly lent and advanced by one Thekwini 5 (Pty) and again it is alleged in respect of a cession thereof to “Main Street" and later again ceded back to “Thekwini 5. The cause of action set out in the particulars of claim is in favou' of the South African Home Loans Guarantee Trust (“the trust”) and not Changing Tides (Pty) Ltd. There is no allegation made explaining the basis upon which “Changing Tides 17” is entitled to judgment.

[15] It is further contended that the affidavit in support of summary judgment has reference to the trust as

being the Plaintiff with the Master's reference number as IT 10713/00. It is contended that there is no allegation made in the particulars of claim to support the contention that the trust is before the Court, it is submitted that the plaintiff before Court has no *locus standi.*

[16] It is contended on behalf of the applicant that the defences raised by the defendants are highly technical and by nature indicative of the fact that the defendants do not have a bona fide defence against the plaintiffs claim and that they should not be allowed to hide behind such defences but ordered to pay the plaintiff's claimin this regard reference is made of *Trans-African Insurance CO. Ltd v Maluke*[3] *and JNO. G Teale & Sons Ltd v Vrystaatse Plantediens Ltd.*[4] It is further contended that where the defendants are aware of the plaintiff's claim, there is no prejudice on their part and the Court should in the exercise of its discretion order the defendants to pay the plaintiff's claim, in this regard the plaintiff relies on the matter of *Standard Bank of South Africa Ltd v Roestof*[5]

[17] With regard to the defendants' contention on *locus standi,* it is submitted on behalf of the plaintiff that the issue is not so much whether the piaintiff has *locus standi,* but whether it has been properly cited, it is submitted that it is evident from paragraphs 1.1 to 1.3 of the plaintiff's particulars of claim that it is cited in its representative capacity as trustees of the South African Loan Guaranteed Trust ("trust").

[18] It is further submitted that the plaintiff is properly before the Court in its representative capacity in this regard reliance is made of the matters of *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 WLD at 127B-C; *Mariola and Others v Kaye- Eddie NO and Others* 1995 (2) SA 728 WLD at 731CV-D.

[19] It is further contended on behalf of the plaintiff that even if it were to be found that the citation is incorrect, which is not admitted, the citation is capable of being cured by way of an amendment at the hearing of the application and the defendants would suffer no prejudice, in this regard reliance is made on *Rosner v Lydia Swanepoei Trust*[6]; *Standard Bank Finance Nominees (Pty) Ltd v Lurie and Others*[7].

[20] The defendants in order to successfully resist the summary judgment application must satisfy the court that they have a bona fide defence to the applicant's claim. They must do so by stating the nature the grounds their defence and the material facts upon which they rely which appears to be good in law ; vide. *Maharaj v Barc;ays National Bank Ltd*[8] "(I) The defence must go to the merits of the application and not consist merely of an attack on the language of the summons and the plaintiff's affidavit, nor is it sufficient for a defendant merely to state that he or she has no knowledge of the allegations in the plaintiff's summons or that he or she cannot comment on the plaintiff's claim;

> (ii) the defence raised must be valid in law not merely an unenforceable moral right or inability to pay.

However, the procedure for summary judgment is not intended to replace the exception as a test of one or other of the parties' legal contentions. It has been held that when a real difficulty as to the matter of law arises, the court should grant summary judgment only if it is satisfied that the point is really unarguable, and also that it is not depriving the defendant of the right he or she would have had, in an appropriate case, had the point in ; law been decided against him or her on exception, of an amending his or her pleading...

(iii). The defendant is not required to disclose the whole of his or defence; it is sufficient if he or she discloses the nature and the grounds of a *bona fide* defence and the material facts relied upon therefor;

(iv). Purely technical defences are not permitted.” Vide Superior Court Practice at B1-225.

[21] A trustee cannot act in its personal capacity. It must act *nomino officio, vide Mariola and Others v Kaye-Eddie NO and Others*.[9]

[22] It has been submitted on behalf of the respondents that *in casu* the plaintiff is acting in its persona! capacity. It has further been submitted that this *status quo* cannot be cured by an amendment since there is no allegation that the plaintiff is acting *nominee officio.* It is further submitted that the summary judgmsn; snouid oe dismissal' witr, costs for the aforesaid reasons, *inter alia.*

[23] In is not in dispute that the plaintiff is a trustee. In paragraph 1.3 the plaintiff refers to the letter of authority issued by the Master of the High Court (Transvaal Provincial Division) and in support thereof has attached annexure A, which is a copy of the aforesaid letter. This letter provides, *inter alia*. that the plaintiff is represented by Donald Andrew Guthrie and is thereby authorised to act as trustee of The South African Loans Guarantee.

[24] With regard to the submission made on behalf of the respondents that the *status qou* cannot be cured. ! find it apposite to cite in full what was said by Goldstein J in *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 128:

> “8 In *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 353 (C) at 359—Rose innes J said the following:
>
> > The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in action, will always be allowed unless the application to amend is *mala fide or* unless the amendment would cause an injustice or prejudice to the other side which cannot be compensates by an oroer for costs or, in other woros. uniess tne parries cannot oe put back for the purposes of justice in the same position as they were in tne notice of motion which it is sought to amend was filed... A material amendment such as alteration or correction of the name of tne applicant, or the substitution a new a new applicant, should in my view usually be granted subject to the considerations mentioned of prejudice to the respondent... The risk of prejudice will usually be less in the case where the correct applicant has been incorrectly named and the amendment is sought to correct the misnomer than in the case where it is sought to substitute a new applicant. The criterion in both cases, however, is prejudice which cannot be remedied by an order of costs and there is no difference in principle between the two cases...’
> >
> > I respectfully agree with the dicta. Not only is there a considerable body of authority which accords with the learned Judge’s views (see, for example, Goldberg v Tomaselli & Sons Ltd

1940 TPD 408; *Curtis-Setchwell & McKie v Koeppen* 1948 (3) SA 1017 (W); *Trustees African Explosives Pension Fund v Nestel* 1961 (3) SA 245(W)), but his approach appears to me. with respect, to be eminently practical and sensible, eschewing technicality and correcting procedural mistakes as cheaply as is possible. Of course, the passage ! have quoted justifies the amendment.''

[25] In casu, there is no application for an amendment. However, were this matter to go on trial, I have no doubt that an amendment would be successfully appiied for. The amendment would purely be to state that the plaintiff is acting *nominee officio.* As matters stand, the respondents are aware that the plaintiff has authority to act on behalf of the Trust, as is clear from annexure A referred to herein above.

[26] It has further been submitted that there are no allegations in the pleading to justify an entitlement of the amounts claimed by the plaintiff who is acting in its personal capacity. In my view, the answer to this submission is to be found in what was said by Labuschagne J in the matter of *Mariola and Others v Kayie-Eddie NO and Others* (supra) at 232:

> "In our law a trust is not a legal persona but a legal institution. *sui generis.* The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purposes of administration of trust, but *qua* trustee he has no beneficial interest therein. See *3raun v 3iann and 3oth at NNO and Another* 1984 (2) SA 850 (A) at 859E-60A *Commissioner of iniand Revenue v Friedman and Others NNO* 1993 (1) SA 353 (A) at 370E-G."

[27] Whatever amount are to be paid in this matter as it stands, such money would be for the benefit of the trust and not for the plaintiff in its personal capacity. In as much it has been specifically pleaded that the moneys are claimed on behalf the trust, I am of the view that in the circumstances of the case it is clear that the money claimed would accrue to the benefit of the trust. In the premises I am of the view that the contention of the respondents should not be upheld. This must be seen in the context that the defendants do not dispute their indebtedness to the plaintiff.

[28] On the merits, the defendants do not dispute their indebtedness to the plaintiff. They, however, contend that after they had financial constrains, they approached a debt commissioner for the restructuring of their financial liabilities informed the plaintiff accordingly. They further contend that the plaintiff unlawfully cancelled the debt review

[29] I do not agree that there was an unlawful cancellation of the debt review by the plaintiff. In my view there is no merit in this contention. Annexure DM2 is dated 2 May 2008. The defendants were ni September 2008 per annexure DM7 informed by Hoem Loan that their account is in arrears, unless they remedy the

situation within In my view the plaintiff was within its rights to issue summons against the defendants. There is no merit in this submission.

[30] In respect of merits, the defendants contend that after they had financial constrains during April/May they approached a credit advisor to place them under debt review in terms of s36 of the National Credit Act. On the 15 May 2008 their credit advisor DDT Financial Services remitted a letter to their creditors, including Home Loans Guarantee Trust in terms of section 8S(4)(b)(i)(ii) of the Credit Act[10]. On 27 August 2008 their debt counsellor notified Home Loans in terms of subsection 24 (10) of the regulations of the National Credit Act 34 of 2005 that the application of the first respondent for debt review was successful and that are in the process of being restructured[11] . The available monthly repayment to the plaintiff was determined at R2200.70 @ 3.00% per annum.[12]

[31] Home Loan on 3rd September 2008 informed DDT that it has not received any payment proposal nor any payment has been allocated to itself. It also advised in terms of s 86(10) of the National Credit Act of the termination the debt review with immediate effect as 60 days after the application for debt review.[13]

[32] The defendants further aver that the plaintiff unlawfully cancelled the debt review. From what I have pointed out herein above, it is clear that the first respondent applied for debt review in May. Only on 27 August 2008 was his application successful, much longer than 60 days from the date of application of debt review.

In my view, the plaintiff cannot be faulted for having terminated the debt review because in any event, there was no payment by the first defendant of any amount determined by the deo: counseilor. Besides, there was no action by the defendants or the debt counsellor to the Magistrate's Court as envisaged in section 87 of the National Credit Act.[14]

There is no explanation provided by the first defendant as to why there was this delay before his application was approved. There is also no indication that the second defendant has also applied for debt review. In the circumstances. I am of the view that there is nothing obliging the plaintiff from not issuing summons against the defendants and claim payment of what is due to it. I am also of the view that the review debt cancellation by the plaintiff was not unlawful.

[34] The defendants, in my view, have not snow' that they have not satisfied me that they have *bona fide* defence against the plaintiff's claim, in the premise, I am of the view that the application for summary judgment should be granted against the Defendants.

[35] In the premises, I make the following order:

1. That summary judgment in favour of the plaintiffs is granted against both defendants, the one paying the other to be absolved, for:

> 1.1 payment of the sum of R444 952.20.;
>
> 1.2 interest on the amount of R444 952.20 at a rate interest on the 16.10% per annum from 1 September 2008 to date of payment.
>
> 1.3 ERF 21285 STILFONTEIN EXTENSION 4 TOWNSHIP, REGISTRATION DIVISION I.P.. PROVINCE OF NORTH - WEST, MEASURING 1487 (ONE THOUSAND FOUR HUNDRED AND EIGHT'.' SEVEN!) SQUARE METRES, HE_D ? DEED OF TRANSFER NO. T83354/20C3. SUBJECT TO THE CONDITIONS "HEREIN CONTAINED AND EXPECIALLY TO THE RESERVATION OF RIGHTS TO MENERALS. also known as 149 JAN VAN RIEBEECK AVENUE, STILFONTEIN EXTENSION 4. NORTH, is hereby declared executable.
>
> 1.4 Costs of suit.

DATE OF JUDGEMENT: 21 MAY 2010

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

PLAINTIFF'S ATT : EDELSTEIN-BOSMAN INC.

PLAINTIFF'S ADV : MR DANIEL PRINSLOO.

DEFENDANTS' ATT : MICHIEL ZWARTS ATTORNEYS

DEFENDANTS'ADV : MRZ.F. KRIEL

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1 **Paragraph 3 of the particulars of claim, at paginated page 5.**

2 **Paginated page 10 of the particulars of claim at paragraph 10**

3 *1956(2) SA 273 (A.D.) at 278F-G: "No doubt parties and their legal advisers should not be encouraged o become slack in the observance of the Rules, which are an important element in the machinery for administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absense of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."*

4 1968(4) SA 381 A at 374G-H:

5 **. 2004 (2) SA 492 WLD at 496 G-H: "If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff s claim against him."**

6 Supra at 127B-C; etc

7 1978 (3) SA 338 (W) at 346A-B

8 *1976(1) SA418 at 426 A-C*

9 **1995 (2) SA 728 (W) at 732 where Labuschagne .T said:
"In legal proceedings trustees must act nominee *officii* and cannot act in their private capacities. *Shahmahomed v Hendriks and Others* 1920 .AD 151 at 170-If."'; *Rosne v Lydia Swanepoei Trust* 1998 (2) SA 123 (W) at 127 para 7.**

10 **The defendants have attached a copy of the relevant letter as annexure DFM2. In the said letter all credit bureaus were advised to list consumer Douwe Foppe Mahoney, within 5 days of receipt of this notice, as having applied for debt review. All credit providers are advised to supply credit details with regard to the above mentioned consumer as per section 86(5)(a)(b) of the National Credit Act 34 of 2005, Current balance R390 000 Installment R5833.23**

11 **Annexure DFM 3.1 at paginated page 152.**

12 Paginated page 153 and 154

13 Paginated page 160-161

14 Magistrate may re-arrange consumer's obligations -(1) If a debt cou nselor makes a proposal to the Magistrate's terms of section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9), the Court must conduct a hearing and, having regard to the proposal and information before it And the financial means, prospects and obligations may – reject the recommendation or application as the case may be : or make:

(I) an order declaring any credit agreement to be reckless, and an order contemplated in section 83 (2) or (3), if the Magistrate's Court concludes that the agreement is reckless:
(ii) an order re-arranging the consumers obligations in any manner contemplated in section 86(7)(c)(ii); or
(iii) both orders contemplated in subparagraph (I) and (ii)
The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in