IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No: 202/2019
Date Heard: 25 June 2019
Date Delivered: 16 July 2019

In the matter between:

CHANGING TIDES 17 PROPRIETARY LIMITED NO Plaintiff

and

SONGEZO BHOKOYI First Defendant
ANDISA BHOKOYI Second Defendant

JUDGMENT

EKSTEEN J:

[1] This is an application for summary judgment. The claim arises from a Loan Agreement concluded during 2016 between Blue Banner Securitisation Vehicle RCI (Pty) Ltd and the defendants. The sum of R1 187 500 was duly advanced to the defendants in terms of the Loan Agreement. A complex arrangement was thereafter concluded (which is not material for present purposes) which has the effect that the outstanding balance now alleged to be due is claimable by the plaintiff. The plaintiff's

locus standi is, however, not in dispute in the present proceedings and I shall accordingly not address that issue herein.

[2] The material terms of the Loan Agreement for purposes of the present application are:

(i) The agreement would endure for 240 months and would be payable in monthly instalments commencing on the first of the month following registration of the indemnity bond and thereafter on the same day of each consecutive month;

(ii) The monthly instalments payable, subject to change in terms of the Loan Agreement, was the amount of R13 025,25;

(iii) The full amount outstanding from time to time would bear interest at the market rate for deposits in South African rand for a period of three months, which appears on the Reuters screen, SAFEY page under the caption "Yield" as of approximately "11:00am" Johannesburg time on the date of registration of the indemnity bond referred to in the agreement and would reset thereafter on the same basis on 21 February, 21 May, 21 August and 21 November (JIBAFR rate) converted to and expressed as a nominal annual rate, compounded monthly, rounded up to the first decimal point (the base rate), plus 3.9% as reflected in the agreement;

(iv) The capital and interest would, subject to the provisions of the Loan Agreement, be repaid in 240 consecutive monthly instalments commencing on the dates specified and thereafter on the same date on each consecutive month until repaid in full;

(v) The defendants were entitled to select any other date in the month as his payment date;

(vi) The defendants were entitled "to pre-pay any amount owed under the agreement before the due date for repayment";

(vii) The plaintiff would credit each payment made under the Loan Agreement to the defendants' account as to the date of receipt of the payments as follows:

(i) First, to satisfy any due or unpaid interest charges;

(ii) secondly, to satisfy any due or unpaid fees or charges; and

(iii) thirdly, to reduce the amount of capital.

(viii) A certificate purporting to be signed by a director of SA Home Loans or an official of the lender showing the indebtedness to the plaintiff in terms of the agreement or any other fact in terms of or arising out of the agreement shall be *prima facie* proof of the matter stated therein.

[3] The plaintiffs allege that the defendants are in breach of the agreement in that they have failed to pay the amounts due under the agreement promptly when they fell due. The plaintiffs accordingly purport to have foreclosed on the loan. It alleges that the amount of R818 080,06 is now due and payable as certified by a certificate contemplated in the Loan Agreement.

[4] Rule 32(3)(b) of the Uniform Rules of Court requires of a party seeking to avoid summary judgment to satisfy the court by affidavit that he/she has a *bona fide* defence to the action. To do so he/she should set out fully the nature and the grounds of his/her defence and the material facts upon which he/she relies. The defendants oppose the application for summary judgment and they have filed an affidavit pursuant to the provisions of Rule 32(3)(b) of the Rules of Court.

[5] The defendants are married in community of property and the thrust of the defence raised is that they did not fail to pay the amounts due under the agreement as and when they fell due, are not in arrears and accordingly that the plaintiff is not now permitted to foreclose.

[6] The agreement was concluded on 2 June 2016. The defendants duly signed a debit order for the monthly installments which accords with clause 7.5 of the agreement. As recorded earlier the monthly instalments at the outset amounted to R13 025,24 per month. On 25 August 2016 the first instalment was deducted from the defendants'

account in favour of the plaintiff. On 31 August 2016, however, the second defendant was retrenched from her employment. A retrenchment package then fell due to her.

[7] The defendants state that they realized that they would be unable to maintain the payments due under the bond unless they utilised the money received in the retrenchment package to satisfy the bond payments. In these circumstances the defendants paid the amount of R450 000 from the retrenchment package into the bond account on 22 September 2016, before the second instalment fell due. This, the defendants contend, would cover their instalment for at least 34 months, until July 2019.

[8] To their surprise, however, a further debit order in the amount of R13 025,25 was deducted from their account of 25 September 2016. Upon an enquiry they were informed that the lump sum payment would not cover their bond instalments until July 2019, but that monthly instalments would be reduced accordingly. This they accepted under protest, however, they still maintain it to be incorrect and contend that upon a proper interpretation of the Loan Agreement their monthly instalment have been covered by the lump sum payment until July 2019.

[9] By virtue of the response of the plaintiff the amount of the monthly instalments was reduced to approximately R8 500 per month which was deducted from their account and which came from the first defendant's salary. This they managed to maintain until November 2017, albeit that it appears from the statement of account that they did not always pay the full sum when it was alleged to be due. In any event, as at

1 November 2017 the defendants allege that their account reflected no arrears. In December 2017 they entered into an agreement with the plaintiff, so it is alleged, that the monthly instalments be reduced to R4 800 per month for a period of 10 months until September 2018. The plaintiff's statement of account reflects a monthly deduction of R4 800 per month commencing in December 2018 and persisting until September 2019, which accords with the alleged agreement. In November 2018, however, the defendants received a notice in terms of section 129 of the National Credit Act, 34 of 2005, advising that they were in arrears with their bond instalments in the amount of R72 543,37. This they deny for the reasons set out earlier.

[10] In **Joob Joob Investments Pty Ltd v Stocks Mavundla Zek Joint Venture** 2009 (5) SA 1 (SCA) at 11G-12D the Supreme Court of Appeal placed the process of summary judgment in its context thus:

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

[11] The remedy should accordingly be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a *bona fide* defence. (See *Erasmus: Superior Court Practice* (2nd ed) vol 2 page D1-383 and the authorities referred to therein.) Reverting then to the defendants' defence. Clause 7.2 of the Loan Agreement provides expressly for the defendants' right to pre-pay any amount owed under the agreement before the date upon which it falls due. That is what they did. The provision that the capital and the interest are to be repaid in 240 consecutive monthly instalments does not seem to me to detract from this right. Neither do I think that the provisions relating to the allocation of payments necessarily has the effect that the defendants are to be deprived of the benefit which they sought to achieve by paying 34 instalments in advance. It seems to me, at best for the plaintiff, that the issue turns on the interpretation of the contract, which ought not be decided in summary judgment proceedings. The interpretation of the contract is, after all, dependent upon all admissible evidence (see **Natal Joint Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at 503F-504B) which should be tendered and tested in trial proceedings. Suffice it to say and I think that the defence which the defendants have made out presents at least a triable issue.

[12] In the result:

1. The application for summary judgment is dismissed.
2. The defendants are granted leave to defend.
3. The costs occasioned by the summary judgment application are to be costs in the action.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv T Rossi instructed by Strombeck Pieterse Attorneys, Port Elizabeth

For Defendants: Adv A Barnett instructed by Goldberg & De Villiers, Port Elizabeth