

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 52341/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE:

SIGNATURE

In the matter between:

NEDBANK LIMITED

Plaintiff

and

UYS, MARTHINUS CORNELIUS

(ID: 5[...])

First Defendant

UYS, SUSANNA ALETTA

(ID: 7[...])

Second Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 8 June 2023

JUDGMENT

LG KILMARTIN, AJ:

[1] This is an opposed summary judgment application brought in terms of Rule 32 of the Uniform Rules of Court.

[2] The Plaintiff seeks the following relief against the First and Second Defendants (hereinafter collectively referred to as ‘the Defendants’):

[2.1] payment of the amount of R567 639.20, together with interest thereon, at a rate of 5.75% per annum, calculated and capitalised monthly in advance from 1 August 2020 to date of payment;

[2.2] an order declaring the following immovable property specially executable:

Erf 7[...], S[...] P[...] Township, Registration Division I.Q., Province of Gauteng, measuring 1 301 (one thousand three hundred and one) square metres (local authority: Emfuleni Local Municipality), situated at 8[...] D[...] B[...] I[...], held by the Defendants under Deed of Transfer T[...] hypothecated in favour of the Plaintiff in terms of the Mortgage Bond B[...]⁶ (“the immovable property”);

[2.3] that the Registrar of the court be authorised to issue a Warrant of Attachment in respect of the immovable property in respect of the immovable property as envisaged in terms of Rule 46(1)(a) of the Uniform Rules of Court;

[2.4] that no reserve price be set, *alternatively*, that a reserve price is set at R425 000.00;

[2.5] that, in the event that a reserve price is not attained, and subject to Rule 46A(9)(d) and (e), the Plaintiff may approach the court

on the papers, duly supplemented, to reconsider the reserve price in terms of Rule 46A(9)(c);

[2.6] that, in the event that personal service is not attained, condonation in terms of Rule 46A(3)(d) is granted; and

[2.7] that the Defendants be ordered to pay the taxed costs on the scale as between attorney and own client.

RELEVANT BACKGROUND FACTS

[3] On 2 April 2006, 14 August 2007, 26 September 2007 and 26 September 2008, the Plaintiff (represented by a duly authorised official) and the Defendants (acting personally) concluded written agreements of Loan (hereinafter collectively referred to as “the loan agreements”).

[4] In accordance with the provisions of the loan agreements, on or about 14 July 2006, 6 September 2007, 13 December 2007 and 15 October 2008, the Registrar of Deeds, Pretoria, registered covering mortgage bonds with registration numbers: B[...]6, B1[...], B2[...] and B9[...] (hereinafter collectively referred to as “the mortgage bonds”).

[5] The loan agreements as read with the mortgage bonds contained the following material terms and conditions:

[5.1] the Defendants acknowledged themselves to be truly and lawfully indebted and held and firmly bound to and in favour of the Plaintiff in the sum of R587 896.00 (“the capital”) together with interest thereon, and further sums of R33 500.00, R18 000.00, R26 000.00 and R21 000.00;

[5.2] the loan amount of R587 896.00, together with finance charges would be repaid by the Defendants in regular monthly instalments of R7 788.28;

- [5.3] the loan amount or the balance thereof owing from time to time, together with other amounts owing to or claimable by Plaintiff in terms of the loan agreement would bear interest at a rate of 14.25% per annum;
- [5.4] interest would be reckoned from the date on which the loan amount/s or any part thereof were advanced to the Defendants and would be calculated daily on the basis of a year of 365 days, whether or not the year is a leap year, and debited monthly on the date on which the instalment would be payable;
- [5.5] the Plaintiff would have right to vary the interest rate from time to time and to increase the monthly instalment accordingly in order to ensure that the indebtedness is repaid within the same period as would have been the case if the interest rate had not been increased;
- [5.6] all amounts owing to or claimable by the Plaintiff would, at the Plaintiff's option, become immediately due and payable without notice, in the event that the Defendants fail to pay on demand any sum or sums of money owing to or claimable by the Plaintiff;
- [5.7] in the event of the Defendants breaching any condition contained in the loan agreement/s, or any other agreement with the Plaintiff, the Plaintiff would have the right to claim repayment of all amounts owing to or claimable by the Defendants in terms of the agreements, together with finance charges thereon and to have the immovable property declared executable;
- [5.8] the nature and amount of the Defendants' indebtedness to the Plaintiff as well as the annual finance charge rate payable, would at any time be determined and proved by a written certificate purporting to have been signed by a Manager or Accountant for the time being of any branch or the Head Office of the Plaintiff whose capacity or authority it would not be necessary to prove

and which certificate would upon mere production thereof be binding on the Defendants and be *prima facie* proof of the contents thereof and of the fact that such amount is due and payable in any legal proceeding against the Defendants;

[5.9] the Defendants chose the address of their immovable property as their chosen *domicilium citandi et executandi* for all purposes arising out of the loan agreements as read with the mortgage bonds; and

[5.10] the Defendants agreed to be liable to the Plaintiff for the payment of all legal costs on the scale as between attorney and client.

[6] As security for the payment of the capital, all interest claimable from the Defendants and all such other costs, charges and future debts generally which may be claimable from the Defendants under the mortgage bonds, the Plaintiff hypothecated Erf 7[...], S[...], Vereeniging.

[7] The Plaintiff complied with its obligations under the mortgage bonds as read with the loan agreements and more particularly advanced the loan amounts of the Defendants during or about 14 July 2006, 6 September 2007, 13 December 2007 and 15 October 2008.

[8] According to the Plaintiff, in breach of the provisions of the mortgage bonds, read with the loan agreements, the Defendants failed to pay all monthly instalments on the due date and, as at 1 August 2020, the Defendants were in arrears in the amount of R41 897.77.

[9] The Plaintiff alleges that, as at 11 August 2020, the Defendants were indebted to the Plaintiff in the sum of R567 639.20, which amount bears interest at a rate of 5.75% per annum from 1 August 2020 to date of payment, calculated daily and compounded monthly, which amount, notwithstanding due and proper demand, the Defendants failed, refused and/or neglected to pay.

[10] On or about 17 February 2014, the Defendants applied for debt review in terms of section 86 of the National Credit Act, 34 of 2005 (“the NCA”), whereafter a debt restructuring order was granted on 12 June 2014 (“the debt restructuring order”).

[11] The debt restructuring order was amended by way of a court order dated 20 November 2014 which was issued by the Magistrates Court for the district of Bloemfontein, held at Bloemfontein (“the court order”). The court order reads as follows:

*“HAVING HEARD THE ATTORNEY FOR THE APPLICANT IT IS
HEREBY ORDERED THAT:*

- 1. That 3RD Respondent / Credit Provider wants to increase the instalment from R2 807.34 with 7.75% to R3 641.00 with 7.75% monthly. See acceptance letter attached here to **Annexure ‘A’**.*
- 2. That the Consumer’s obligation in terms of his and her credit agreements be rearranged as per **Annexure ‘B’**.”*

[12] It is common cause that the annexures to the court order were not physically marked as “A” and “B” but that they were, in fact, the annexures referred to in the court order. They also bear the same date stamp of the Magistrate which appears on the court order. What should have been marked “A” constitutes the proposal made by the Defendants on 14 April 2014 and what should have been marked “B” is a letter from the Plaintiff issued to the Defendants which is titled “*Final Letter of Acceptance of Rearrangement Proposal*” and is dated 28 October 2014.

RELEVANT LEGAL PROVISIONS AND AUTHORITIES

[13] Rule 32 of the Uniform Rules of Court is titled “**Summary judgment**” and provides *inter alia* as follows:

“(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only —

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment;

together with any claim for interest and costs.

(2) (a) Within 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 subrule (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 plaintiff’s claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) ...

(3) The defendant may —

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five 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 of 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 material facts relied upon therefor."

...

(5) If the defendant does not find security or satisfy the court as provided in paragraph (b) of subrule (3), the court may enter summary judgment for the plaintiff.

...

(9) The court may at the hearing of such application make such order as to costs as to it may seem just: Provided that if —

(a) the plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle such defendant to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client; and

(b) in any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable,

the court may order the plaintiff's costs of the action to be taxed as between attorney and client."

[14] Summary judgment is only to be granted where the Plaintiff can establish its claim clearly and the Defendant fails to set up a *bona fide* defence.¹

[15] As was stated by the full court of this division in *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another*²

"The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under s 34 of the Constitution." (Emphasis added).

DISCUSSION OF THE MERITS

[16] The Plaintiff alleges that it complied with section 129 of the NCA and is entitled to the order which is sought by it.

[17] The Plaintiff further alleges that the defence pleaded in the Defendants' plea does not raise any triable issue and contends that:

[17.1] there is no defence raised in respect of the merits of the matter;

[17.2] the Defendants do not deny the conclusion of the loan agreements pleaded;

¹ Erasmus Superior Court Practice, RS 17, 2021, D1- 383.

² 2020 (1) SA 623 (GJ), para [16].

[17.3] the Defendants do not deny the terms of the loan agreements pleaded;

[17.4] the Defendants do not deny any obligations as pleaded in the particulars of claim;

[17.5] the Defendants do not contest the action on the basis of any positive factual averments made; and

[17.6] the plea is, in essence, a bare denial of the Plaintiff's claim as fully pleaded in the particulars of claim.

[18] Upon consideration of the plea, it appears that the Defendants have raised two defences, namely:

[18.1] a special plea of jurisdiction. In this regard, the Defendants plead that although this court has jurisdiction to adjudicate the matter, this court has concurrent jurisdiction with the Magistrates Court and therefore the Magistrates Court must be the court of first instance; and

[18.2] that the Defendants are paying in accordance with the court order and that the Plaintiff failed to inform the Defendants about its non-compliance with the court order.

(a) Special plea of jurisdiction

[19] The special plea is devoid of any merit. The Plaintiff is *dominus litis* and can decide on whether to institute the proceedings in this Court or the Magistrate's Court. The Defendants have expressly admitted this Court has jurisdiction to hear the matter in paragraph 1 of their special plea.

(a) Interpretation of the court order

[20] It is not in dispute that the court order was granted but there is a dispute as to how the court order must be interpreted.

[21] According to the Plaintiff, it is of importance to note that the court order included both the proposal by the Defendants (annexure “B” to the court order) as well as the Plaintiff’s “*acceptance*” on particular terms (annexure “A” to the court order).

[22] The Plaintiff contends that

[22.1] the significance of the court order lies therein that the acceptance was as per the terms which were made part of the court order in prayer 1 and annexure “A” stipulates clearly that the period for same entailed 60 instalments or months;

[22.2] the 60-month period of the payment of R3 641.00, with an interest rate of 7.75%, constituted a significant reduction from the ordinary monthly payment;

[22.3] the 60-month period pertaining to the reduced instalment amount in terms of the court order commenced in September 2014 and came to an end by effluxion time after 60 months, thus at the end of August 2019;

[22.4] accordingly, the court order and debt review process of the Defendants came to an end by effluxion of time at the end of August 2019;

[22.5] after the operation of the court order had come to an end after August 2019, the normal obligations in terms of the underlying loan agreements between the parties once again became operational by operation of law;

[22.6] the required monthly instalment outside the ambit of operation of the court order and in terms of the underlying loan agreements constituted an amount of R6 911.41 from August 2019;

[22.7] the Defendants failed to pay in terms of their obligations under the loan agreements subsequent to August 2019.

[23] In paragraph 7 of the affidavit resisting summary judgment, the Defendants admit that the court order was granted but deny that the annexures are marked “A” and “B”. The Defendants do, however, accept that the annexures to the court order, which were stamped by the Magistrate on the same day that the court order was granted, are those referred to in the order.

[24] It was pointed out by counsel for the Plaintiff that the issue regarding the annexures not being marked was not raised in the plea and was, therefore, inconsistent with what had been pleaded, which is impermissible. In this regard, the Court was referred to the unreported judgment (marked reportable) or His Lordship Mr Acting Justice Moorcroft in *Vukile Property Fund Limited v True Ruby Trading1002 (CC) trading as PostNet and Another*³ where it was stated that the Defendant may not raise defences in the affidavit resisting summary judgment that are not pleaded. I am of the view that the Defendants’ denial that the annexures are not marked “A” and “B” is not a “*defence*” raised which is inconsistent with what is pleaded, particularly as it is accepted by the Defendants that the documents that form part of the Court order are those that were referred to as annexure “A” and “B” in the court order.

[25] The correct interpretation of the court order forms the crux of the dispute.

[26] According to the Defendants, paragraph 1 of the order should be interpreted as a mere recordal that the Plaintiff **wanted to** increase the instalment from the amount of the previously ordered amount to the amount referred to in prayer 1 of the court order, and that paragraph 2 of the court order is the paragraph which actually ordered the rearrangement of the Defendants’ obligations as per the terms proposed in annexure “B”.

³ Case No. 2020/9705, dated 21 May 2021, paras [6] to [13].

[27] It was argued by the Defendants that the only valid “*order*” in the court order is paragraph 2 as, in terms of section 87(1)(b) of the NCA, the powers of a Magistrate are that a Magistrate may order a restructuring of a customer’s obligations in accordance with the debt restructuring proposal.

[28] The difference in interpretation impacts upon what the “*concession period*” was in terms of the court order. According to the Plaintiff it was limited to a 60-month period and, according to the Defendants there was no limit on the period.

[29] The Defendants’ interpretation appears to accord with the express wording of the order. It does seem as though paragraph 1 is merely a recordal of what the Plaintiff wished the terms to be but the rearrangement ordered is in terms of annexure “B” which has no 60-month limit on the concession period. On that note, *prima facie*, it does not appear that the parties reached an agreement on what the Defendants’ obligations would be after the rearrangement. The document that should have been marked “A” is not an “*acceptance*” of the terms in the proposal that should have been marked “B”. Annexure “A” appears to be in the nature of a counter-proposal despite the description given to it.

[30] The court order does not state that the arrangement would endure “*for a period of 60 months*”.

[31] In the circumstances, I am of the view that the Defendants have put up a *bona fide* defence in denying that they were obliged to make payments in terms of the normal obligations in terms of the underlying loan agreements after 60 months, i.e. an instalment amount of R6 911.41 from August 2019.

[32] The court order stands and is still in full force and effect and, as the Defendants have been paying in terms thereof, they have, raised a triable issue.

[33] It was pointed out by the Defendants that, if the Plaintiff believed there was an error in the court order or that the wording thereof did not accord with

what was intended, the Plaintiff could have sought an amendment thereof, *alternatively* a declaratory order as to its terms. There was also no review or appeal proceedings brought by the Plaintiff in respect of the court order.

[34] If the Defendant's interpretation of the court order is accepted by the trial Court, as: (i) the court order has not been rescinded in terms of the Rules of Court, (ii) no certificate of clearance (Form 19) has been issued by the Debt Counsellor in terms of section 71(2)(b)(i) of the NCA certifying that the Defendants satisfied all their obligations under the loan agreements which form the subject matter of the court order; or (iii) the Defendants have not been declared to be overindebted, the Defendants are arguably still under debt review

[35] The Defendants argued that, based on section 130(4)(e), read with section 88(3)(b)(ii) of the NCA, the court must dismiss the matter in terms of the provisions of the NCA.

[36] Section 88 is titled "***Effective debt review or re-arrangement order or agreement***" and section 88(3) provides as follows:

"88 Effect of debt review or re-arrangement order or agreement

(3) *Subject to section 86 (9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86 (4) (b) (i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-*

(a) *the consumer is in default under the credit agreement;*
and

(b) *one of the following has occurred:*

(i) *an event contemplated in subsection (1) (a) through (c); or*

- (ii) *the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.*"

[37] Section 130(4)(e) provides that:

"130 Debt procedures in a Court

- (4) *In any proceedings contemplated in this section, if the court determines that-*
- (b) *the credit provider has not complied with the relevant provisions of this Act, as:*
- (e) *the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter."*

[38] In ascertaining whether the court order and debt review process could come to an end by the effluxion of time, the Defendants submitted that:

[38.1] there are no provisions in the NCA to that effect; and

[38.2] the only available avenues to exit the debt review process are contained in sections 71 and 88 of the NCA. In this regard, the Court was referred to *Van Vuuren v Roets and Others (Banking Association of South Africa and Others as amici curiae)*⁴ where it was stated that the consumer is bound to the provisions of section 88(1)(c) and 88(2) until all of the consumer's obligations under a rearrangement are discharged.

⁴ 2019 [4] All SA 583 (GJ) at paras [33] to [36] and [43].

[39] Insofar as the question of whether a creditor may institute legal action while the debt review process and a debt restructuring order is in effect and the consumer is complying with the order, the Defendants submitted that:

[39.1] it is clear from the wording of section 88(1) of the NCA that the consumer's rights to contract on credit as well as the creditor's rights to institute legal action against the consumer are effectively frozen; and

[39.2] in accordance with section 88(2) that this state of affairs prevails until such time as the customer fulfils its obligation in terms of the debt restructuring order or consolidated agreement.

[40] Provided the interpretation of the court order contended for by the Defendants is correct, it would follow that they are still under debt review and the aforesaid provisions of the NCA would apply.

[41] In the light of the above, I am of the view that summary judgment should not be granted.

[42] Insofar as costs are concerned, I have been requested by the Defendants to order that the costs be payable on an attorney and client scale. In this regard, the Defendants submitted *inter alia* that:

[42.1] the Defendants pleaded that they were declared overindebted and were subject to the court order;

[42.2] notwithstanding the Plaintiff: (i) being afforded the opportunity to consider the plea; (ii) being aware of the court order and debt review process as well as their effect; and (iii) having received and considered the answering affidavit, it persisted with the application for summary judgment and elected to institute legal

action at great expense to the overindebted Defendants in the High Court;

[42.3] instead of attacking the uncertainty regarding the repayment terms contained in the amended court order through the Rules of Court, the Plaintiff attempted to circumvent the implications and effect of the NCA to expedite the repayment of the loan agreement at great expense to and at the peril of the Defendants; and

[42.4] considering the Plaintiff's frivolous and vexatious attempt to circumvent the remedies available to it in terms of the NCA and the Rules of Court to cure its uncertainty regarding the repayment terms in terms of the court order, the Plaintiff should be held liable for the costs of this application on an attorney and client scale.

[44] In my view, the Plaintiff was entitled to bring the application for summary judgment and there is no evidence that it is an abuse of process or vexatious. The Plaintiff believes that the interpretation of the court order contended for by it is the correct one and, on this basis and based on legal advice, proceeded with the matter. In the circumstances, I do not believe that a punitive cost order is warranted.

ORDER

In the circumstances, I make the following order:

1. The application for summary judgment is dismissed;
2. The Plaintiff is directed to pay the Defendants' costs incurred in relation to the summary judgment application.

LG KILMARTIN

ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:	15 March 2023
Date of judgment:	8 June 2023
For the Plaintiff:	Adv WJ Roos
Instructed by:	Van Heerdens Inc.
For the Defendants:	Adv R van der Westhuizen
Instructed by:	Bernice de Beer Attorneys