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CECILIA JOHANNA BOOYSEN Third Respondent / Third Defendant

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JUDGMENT

SKOSANA AJ

[1] The plaintiff seeks summary judgment against the first and second defendants as well as judgment against the third defendant. The judgment sought is for the payment of a sum of R863 326,96 plus interest thereon at the rate of 7,69% per annum from 06 February 2020 to date of payment as well as the costs of this application.

[2] The application for summary judgment stems from the following sequence of events:

2.1 The plaintiff issued summons in which it claimed that a written home loan agreement was concluded between it and CJ Legal Costs Consultants CC ('the principal debtor') on 28 September 2007 in terms of which the plaintiff lent to the principal debtor the sum of R950 000,00. The claim against the defendants arises out of a suretyship that they signed in respect of the debt of the principal debtor;

2.2 The written loan agreement provided that in the event of the principal debtor failing to observe or perform the terms of the

agreement or commit an act of insolvency or fall into liquidation then the whole sum of the loan as well as the accrued interest would become due and payable by the principal debtor to the plaintiff;

2.3 The loan was secured by means of a covering mortgage bond hypothecating the property known as Erf No. 3390 Marloth Park Holiday Township, registration division J.U. Mpumalanga Province, in extend 1980 square meters held by deed of transfer no. T334703/2007 in favour of the plaintiff;

2.4 The principal debtor not only failed to make due payments but it was also placed under liquidation on 28 June 2011. The plaintiff therefore alleges that the full amount owing in terms of the loan agreement together with all accrued interest became due and payable by the principal debtor to the plaintiff;

2.5 On 27 September 2007, the first, second and third defendants had in writing bound themselves as sureties and co-principal debtors in respect of the payment by the principal debtor when it became due and payable to the plaintiff;

2.6 The plaintiff issued notices to the defendants in terms of section 72 of the National Credit Act in which it demanded payment of the outstanding amount from the defendants but the defendants still failed to pay this amount;

2.7 In their plea, the defendants allege that the representatives of the plaintiff and the principal debtor were not properly identified in the plaintiff's particulars of claim and they therefore deny that the written loan agreement exists in the alleged manner. They however admitted the liquidation of the principal debtor on the date alleged by the plaintiff.

2.8 The defendants further alleged as their defence that the debt has prescribed as it became due on the date of liquidation of the principal debtor on 28 June 2011 while the summons were only issued in April 2020, more than 3 years after the date on which the cause of action arose. Importantly, they alleged that the written loan agreement in question related to Members CJ Legal Costs Consultants CC and not the principal debtor (CJ Legal Costs Consultants CC) for whose debt they had bound themselves as sureties;

2.9 The plaintiff has brought the application for summary judgment on the basis that the defendants' plea does not raise any issue fit for trial.

[3] I am not convinced that this is a matter which satisfies the requirements for the granting of summary judgment against the defendants for the reasons that follow hereunder.

[4] In response to the issue raised by the defendants that the written loan agreement refers to Members CJ Legal Costs Consultants CC instead of the principal debtor for which the defendants had bound themselves as sureties, the plaintiff contends in its heads of argument that it will seek rectification of such written agreement. The plaintiff has not yet pled rectification. In the present case, it can only do so by way of replication to the plea. The plaintiff could not file a replication as it could not take any further step after the plea.¹

[5] Although the defendants' plea admittedly raises issues which call for the rectification of the written loan agreement,² the plaintiff has failed to deal therewith in its affidavit supporting summary judgment. The attempt to do so in the plaintiff's heads of argument is not only belated but also unpersuasive and self-defeating. The contention that he intends to rectify the written loan agreement is a concession that the cause of action as reflected in the summons together with the unrectified contract, is defective as matters stand.

[6] In terms of the amendment to Rule 32 which took effect on 01 July 2019,³ the plaintiff may only seek summary judgment after the defendant has delivered a plea.⁴ One of the reasons for the amendment of the Rule was to remove speculation on the part of the plaintiff as to the nature of the defendant's defences before bringing the application for summary judgment. The corollary

¹ *Hire Purchase Discount Co Ltd v Ryun Scholtz & Co Ltd* 1979(2) SA 305 (SE).

² Para 6.2.4 of the defendants' plea.

³ Introduced by GN R842 published in GG 42497 of 31 May 2019.

⁴ Rule 32(1).

thereof is that the plaintiff must, in its founding affidavit⁵, deal with the defences raised in the plea with a view to expose them as illusory and incapable of raising a triable issue.

[7] It is well known that rectification is a defence that is normally not easy to prove and for which the onus rests on the plaintiff. It requires the party relying thereon to establish that what stands in the agreement is a common mistake of the parties as they intended to agree to something else⁶. In my view, summary judgment cannot and ought not to be granted in these circumstances.

[8] I agree with the defendants' counsel that the need to plead rectification takes the case outside the categories contained in Rule 32(1)⁷. The Supreme Court of Appeal⁸ agreed with **Vermaak** judgment though it added a rider that summary judgment is not incompetent where both parties are ad idem as to the respects in which their written contract does not correctly reflect the agreement between them⁹.

[9] In **PCL Consulting**¹⁰, the SCA had the following to say:

⁵ Plaintiff is not entitled to file a replying or further affidavit (see Rule 32(4))
⁶ *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC 2020(2)SA 419(SCA)* paras 21-23

⁷ *Malcomes Scania (Pty) Ltd v Vermaak 1984(1)SA 297 (W)* at 299E

⁸ In *PCL Consulting (Pty) Ltd v/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA)* at 701-71A

⁹ *PCL Consulting (supra)* para 5

¹⁰ *PCL Consulting (supra)* para

"[3]... A prayer for rectification does indeed fall outside the provisions of rule 32. It does so not because it is a claim impliedly excluded by that rule, but because it is not, in the true sense, a claim at all. The plaintiff's claim properly so called is for payment of arrears due in terms of a lease. In order to succeed on that claim at a trial, the plaintiff would have to allege and prove, inter alia, that it let premises to the defendant in terms of an agreement. The written agreement signed by the parties and annexed to the plaintiff's particulars of claim refers to what the plaintiff alleges were the wrong premises. The plaintiff was therefore obliged to seek rectification of the written agreement in order to enable it to lead evidence that what it alleges were the correct premises were let to the defendant - for, in the absence of rectification, such evidence would be inadmissible both because of the parol evidence or integration rule and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract. 1 But the plaintiff's claim remains a claim for arrears owing in respect of the lease of the 4th floor office, and rectification, although essential to enable the plaintiff to prove its claim, is not part of that claim."

[4] I therefore with respect agree with the judgment of Coetzee J in Malcomress Scania (Pty) Ltd v Vermaak and Another to the extent that it holds that a plaintiff who alleges that a written contract should be rectified is confined to what the plaintiff alleges is the true agreement between the parties, and cannot (in the absence of an express indication to the contrary) rely in the alternative upon the terms of the written agreement as they stand; but I am constrained to disagree with that judgment to the extent that it suggests that summary judgment is

incompetent, even where both parties are ad idem as to the respects in which their written contract does not correctly reflect the agreement between them."[my emphasis]

[10] Moreover, in the present case the rectification, which has not yet been pleaded but has been admitted to be necessary in order to validate the plaintiff's claim, relates to whether or not the principal debtor cited in these proceedings is the one for whose indebtedness the defendants had signed surety. In other words, should such envisaged rectification not be ultimately pleaded for purposes of the trial or should it not succeed, it will be the end of the road for the plaintiff.

[11] Even if the case were to fall within one of the categories of Rule 32(1), for the reasons already outlined above, the necessity for rectification still disqualifies it for summary judgment.

[12] In view of the above, I find it unnecessary for me to deal with the rest of defences raised in the defendants' plea.

[13] As far as costs are concerned, the bringing of summary judgment and insisting upon it in the present circumstances appears to be unreasonable on the part of the plaintiff. This is exacerbated by the plaintiff's startling failure to deal, in its application, with the defence raised in the defendants' plea that the written loan agreement refers to a different entity from the one cited in the papers.

[14] Rule 32(9)(a) empowers this court to order, among others, costs even on a punitive scale against a plaintiff who brings an application for summary judgment where the case falls under the purview of sub-rule (1) or where, in the opinion of the court the defendant relied on a contention which would entitle such defendant to leave to defend. As indicated earlier, I am of the view that this case technically falls arguably outside the parameters of sub-rule (1). Moreover, my view is that the plaintiff knew or ought reasonably to have known that the defendants' contention as contained in their plea would entitle them to leave to defend.

[15] The plaintiff has advanced no plausible ground why it proceeded to bring the present application in the light of the defendants' contention nor why it persisted with the application up to this point. In my view, this is the proper case for showing displeasure at the conduct of the plaintiff by mulcting it with costs of this application. The defendants who are ordinary citizens as opposed to plaintiff which is one of the largest banking institutions in South Africa, had to endure the pain of resisting this rather ill-founded application.

[16] I am however not inclined to grant costs on a punitive scale for the simple reason that the exclusion of this case from the categories of sub-rule (1) by future of the intended rectification is quite a technical exercise. Having exercised the

court's discretion to refuse summary judgment, I further exercise my discretion with regard to costs.

[17] Lastly, the wasted costs occasioned by the postponement of 04 February 2021 are clearly attributable to the plaintiff. Contrary to this court's Practice Manual¹¹ requiring plaintiffs to set down summary judgment applications which are estimated to last for more than one hour on the opposed roll, the present plaintiff set it down on the unopposed of 04 February 2021. The initial estimation of the duration of arguments by the plaintiff was one hour which was criticized by the defendants as unreasonable. The postponement was caused thereby. The same plaintiff has now in its updated practice estimated the duration at 1 to 2 hours. This makes the plaintiff liable for the costs occasioned by the postponement.

[18] In the result I make the following order:

1. The application for summary judgment is dismissed;
2. The first and second defendants are granted leave to defend;
3. The plaintiff is ordered to pay the costs of the application for summary judgment inclusive of the wasted costs of 04 February 2021.



DT SKOSANA (AJ)
Acting Judge of the High Court//

¹¹ Paragraph 9.12 of the Consolidated Practice Manual

Appearances:

For Applicant / Plaintiff:

Adv K Moloisane

Instructed by Vezi De Beer Inc

319 Alpine Way

Lynwood, Pretoria

For 1st and 2nd Respondents / Defendants:

Adv HAA Krige

Instructed by Lombard Muller &

Vennote Inc.

7 12th Street

Menlo Park, Pretoria

For 3rd Respondent / Defendant:

No appearance

Date of hearing: 10 May 2021

Date of judgment: 11 May 2021