IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 152/2019

In the matter between:

GIDEON JAKOBUS KOEGELENBERG N.O. In his capacity as Trustee for the time-being of the Anmilan Trust	First Applicant
ZANET ANNALISE KOEGELENBERG N.O. In his capacity as Trustee for the time-being of the Anmilan Trust	Second Applicant
PETRUS VAN ZYL N.O. In his capacity as Trustee for the time-being of the Anmilan Trust	Third Applicant

and

PRAIA ROCHA 122 INVESTMENTS (PTY) LTD Registration No: 2007/008499/07	Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down are deemed to be 09h30 on 26 November 2021.

JUDGMENT

O'BRIEN AJ.

1. On 18 September 2014, the respondent bought from the applicants ("the Anmilan trust") under a written agreement specific immovable property for R18 000 000.00 (Eighteen Million Rand) plus VAT. The immovable property comprises five plots ("the properties") in the Vaalharts Settlement Scheme in the District of Barkley West in the Northern Cape.

2. The purchase price was payable in cash of R9 000 000.00 to be paid on the date of transfer. The purchase price balance was the issuing of preferential shares in the respondent to the trust, alternatively to the trustees.

3. On 29 April 2015, the property was registered in the respondent's name.

4. The respondent failed to issue the preferential shares as the purchase price balance price on the date of registration and transfer of the property in its name.

5. Instead, a second mortgage bond in favour of the applicants in the sum of R9 000 000.00 was passed over the property. It was a condition of the mortgage bond that the R9 000 000.00, plus interest, were payable to the applicants on 30 March 2015 at the prime lending rate of Absa Bank. Furthermore, the respondent would pay an annual capital amount of R1 500 000.00 plus interest on or before 28 February 2026.

6. The first and second applicants had a usufruct over one property.

7. There were disputes between the parties regarding the balance of the purchase price, working capital, the usufruct, and the purchasing of farming equipment.

8. The parties then reached a settlement agreement. According to the terms of this agreement, the respondent will pay R9 521 891.33 plus interest on the reduced capital amount from 30 September 2015. The deed of settlement was conditional on a further loan to be approved by Suid-Wes Landbou (the primary bondholder) payable by 31 January 2018 to the trust. Another clause of the settlement agreement was that should the respondent fail to pay the purchase price balance over ten years in equal monthly instalments to the trust, the parties agreed that their respective bookkeepers would issue a certificate of indebtedness. Alternatively, in the event of the respondent's default, the properties would be auctioned by 31 March 2018.

9. If there were a material breach of the settlement agreement, the defaulting party would have fourteen days to remedy the defect, failing which, the applicants may cancel the agreement and claim damages plus interest. Alternatively, the total purchase price plus interest will become due and payable.

10. As it turned out, Suid-Wes Landbou gave notice on 12 April 2018 that the application for the loan was unsuccessful.

11. The trust then filed papers to liquidate the respondent. The respondent contested this application on the premise that the amount owing was not due and payable.

12. The parties later agreed that the respondent's liability to the trust would be restructured to carry on with its business and remain solvent.

13. Regarding restructuring the respondent's liability, the parties had agreed that the respondent was indebted to the applicants for R12 235 220.60. That amount would be payable by the respondent as follows:

13.1 R4 250 000.00 on or before 15 December 2018;

13.2 R750 000.00 on or before 31 December 2019;

13.3 R1 000 000.00 on or before 31 December 2020;

13.4 R1 250 000.00 on or before 31 December 2021;

13.5 R1 500 000.00 on or before 31 December 2022;

13.6 R1 750 000.00 on or before 31 December 2023;

13.7 R2 000 000.00 on or before 31 December 2024;

13.8 The interest balance would be determined jointly by the parties' auditors and endorsed before 31 May 2025 and payable on 30 June 2025.

14. The above payments resulted in the amendment of the mortgage bond held by the applicants over the properties on various conditions, which is presently unnecessary to elaborate on.

15. The respondent neglected to pay the amount of R4 250 000.00 on the due date. That meant that, according to the settlement agreement terms the whole amount became due and payable without warning to the respondent. The applicants would be entitled to issue a summons and auction the properties to be specially executable. On two occasions after that (24 December 2018 and 16 January 2019), the applicants' attorney informed the respondent that payment was due and payable with no reply. The applicants' attorney warned that the default of payment triggered the acceleration clause, forcing the entire sum of R12 235 220.60 due and payable.

16. On 25 January 2019, the applicants issued summons claiming payment of R12 235 220.60, interest on the aforesaid amount calculated at the prime rate of Absa Bank Ltd from 24 December 2018, an order declaring the immovable properties executable.

17. On 12 February 2019, the respondent entered a notice of intention to defend.

18. On 14 February 2019, the applicants applied for summary judgment. This application was enrolled for a hearing on 8 March 2019.

19. On 8 March 2019, the parties concluded a second settlement agreement which was made an order of the court. The court order reads that the application for summary judgment was postponed *sine die*, and the second agreement formed part of the court order.

20. On 28 February 2019, the respondent had made a payment of R4 250 000.00. The parties agreed that the balance then, due to the applicants, was R7 985 220.60 plus interest.

21. Regarding clause 3.2 of the second agreement, the parties agreed that the application for summary judgment against the respondent would be postponed *sine die*. That the second agreement is made an order of the court, and the applicants withdraw their application to liquidate the respondent.

22. Regarding restructuring the respondent's indebtedness, the parties had agreed in the second agreement that the respondent was indebted to the applicants in the amount of R12 235 220.60. That amount would be payable by the respondent as follows:

22.1 R4 250 000.00 on or before 15 December 2018;

22.2 R750 000.00 on or before 31 December 2019;

22.3 R1 000 000.00 on or before 31 December 2020;

22.4 R1 250 000.00 on or before 31 December 2021;

22.5 R1 500 000.00 on or before 31 December 2022;

22.6 R1 750 000.00 on or before 31 December 2023;

22.7 R2 000 000.00 on or before 31 December 2024;

22.8 The balance of the interest would be determined jointly by the parties' auditors and certified before 31 May 2025 on 30 June 2025.

23. As per the second agreement, the respondent failed to comply with the payment arrangements by failing to make a payment of R1 000 000.00 by 28 February 2021. The respondent made payments of R150 000.00 and on 1 March 2021, a sum of R50 000.00.

24. The applicants' attorney advised the respondent on 12 April 2021 that payment of R800 000.00 is due and payable before the close of business on 26 April 2021, failing which the application for summary judgment would be enrolled. The amount owing and payable was R9 026 649.89.

25. The respondent made further payments totalling R340 000.00, leaving a shortfall of R510 000.00 on the R1 000 000.00, which was overdue and payable.

26. It was a specific condition of the second agreement that should the respondent be in default, the entire amount thus due with interest would immediately become due, payable, and claimable, and the applicants will be entitled to re-enrol the application for summary judgment on 21 court days' notice and ask for judgment for the amount due and payable and interest and have the properties declared specifically executable.

27. When the application for summary judgment was re-enrolled, the applicants filed a revised notice demanding payment of R8 736 649.98. These payments were recorded in a supplementary affidavit filed on 7 May 2021. The notice of re-enrolment of the summary judgment application was served on the respondent's attorneys on 14 May 2021. Only then the respondent made a payment of R510 000.00, which was due and owing on 28 February 2021. A capital amount of R7 963 649.98 plus interest became due and payable.

28. Through its sole director ("Murdoch"), the respondent filed an opposing affidavit in the application for summary judgment. He complains that the applicants filed an amended summary judgment application, based on the respondent's supposed non-compliance with the terms of the second settlement agreement. It creates a new summary judgment application. In that case, the new Rule 32, which came into effect on 1 July 2019, should have

been pursued by the applicants. Therefore the application was prematurely brought, which a defendant in an action could only move entering after a plea.

29. He maintains that the applicants' plea for leave to enter a supplementary affidavit is not competent under Rule 32(1).

30. Regarding his defence, Murdoch states:

> *"Due to various factors beyond the control of the Respondent however, the Respondent was simply not in a financial position to make good on the above agreement."*

31. He further states:

> *"34. The Respondent, at the time being a producer primarily of lucerne, experienced severe financial difficulties during 2020/2021 primarily by virtue of the fact:*
>
> *34.1 That the markets, as a result of the COVID-19 pandemic, were either closed at various stages or did not function properly resulting therein that the Respondent's lucerne crop did not yield the profits that it was expected to do; and*

> 34.2 *That by virtue of the abundance of rains experienced during 2020, the Respondent's lucerne crops specifically suffered as a result and also did not yield the profits that it was expected to do.*
>
> 35. *I therefore, respectfully submit that the Respondent's failure to make the required payment in time, was not due to any mala fides on the part of the Respondent, but was due to circumstances beyond its control.*"

32. Rule 32(1) authorizes a plaintiff to apply to a court for a summary judgment on a liquid document after the defendant has delivered a plea. The rule originally applied where the defendant had delivered a notice of intention to defend the plaintiff's claim. On 1 July 2019, the rule was amended, allowing a plaintiff only to apply for summary judgment after the defendant has delivered a plea.

33. In **Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture**[1] the court declared:

> "*The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a tribal 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*

[1] 2009(5) SA 1 (SCA) at 11 G – 12 D

of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a tribal issue is not shut out. In the Maharaj case at 425 G – 426 E, 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.

Having regard to its purpose and his proper application, summary judgment proceedings only hold terrors and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425 G – 426 E."

34. It is undisputed that the applicants base their claim in the summons on a liquid document. Also, the cause of action, the amount claimed, and the facts on which the plaintiff's claim is based.

35. Mr Olivier, acting for the respondent, correctly conceded that the defence regarding the respondent's rights to housing does not apply to the respondent.[2] The respondent is a juristic legal entity and therefore cannot rely on s26 of the Republic of South Africa Constitution, Act 108 of 1996.

36. Mr. Olivier further submitted with force that the summary judgment application is a new application under the guise of an amended summary judgment application. The question is this: Is the application a new application, or is it an extension of the previous application. If the court finds that it is a new application, it is dispositive of the matter because such an application can only be filed after a defendant has entered a plea.

37. I am afraid I have to disagree with Mr. Olivier. The amended application is not a new application for summary judgment in the true sense of the word. I am aware that in summary judgment proceedings, a plaintiff is not allowed to file more than one affidavit. However, as the supplementary affidavit shows, the time has overtaken the application. The summary judgment application was on the roll on 8 March 2019. Two days before that application, the parties agreed to postpone the summary judgment application and reach settlement, which was made an order of the court. After that, the respondent made certain payments. These payments were late or not the total amount. There was also the question of interest. As I see it, they filed the supplementary affidavit to show the subsequent payments the respondent made, which reduced the

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[2] Absa Bank Ltd v Mokebe; Absa Bank Ltd v Kobe; Absa Bank Ltd v Vokwani; Standard Bank of South Africa Ltd v Colombick & Another 2018(6) SA 492 (GJ) at para 59 the court stated the following: *"We cannot stress enough that this matter concerns and applies only to those properties which are primary homes of debtors who are individual consumers and natural persons."*

amount that was due and payable to R8 736 649.98 on 7 May 2021. The supplementary affidavit is ancillary to the first affidavit and does not constitute an affidavit for a new cause of action.

38. But there is another reason the respondent's submission cannot be accepted. The court order of 8 March 2019 states that the summary judgment application is postponed *sine die*. That was done before 1 July 2019, so the further conduct of that application does not fall under the new regime. The second agreement, which was made an order of court stipulates at paragraph 3.2.5 states that if the respondent should make no payment which is due and payable in terms of the deed of settlement or is in default of any condition or stipulation and in terms of which the applicants have given 14 days' notice to remedy the breach, the full amount together with interest shall become due and payable within 20 days after receipt of a notice. It reads further:

> "*To place the application for summary judgment on the roll and to apply for judgment of the specified amount and interest due and to declare the properties executable (my translation from the Afrikaans version).*"

39. If the parties intended to bring a new application, they would have put that in the deed of settlement. It bears mention that attorneys represented the parties, and they had time to read the deed of settlement and consider it advisedly. Therefore, I find that the supplementary affidavit does not constitute a new summary judgment application. The supplementary affidavit shows the further payments the respondent made. To refuse summary

judgment would cause piecemeal litigation, which the courts have frequently countenanced.

40. Given this conclusion, it is unnecessary to decide whether the new Rule 32 (1) applies. In any event, there is a presumption against retrospectivity unless the statute or rule expressly or impliedly determines the contrary. The prospective nature of the new rule was confirmed in *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another and related matters* 2020 (1) SA 623 (GJ), with which I am in respectful agreement.

41. Mr. Olivier submitted that the court has the discretion to grant summary judgment given the serious consequences of the remedy. He argued that the respondent was not in arrears having made payment. However, he is mistaken for the respondent cannot decide when to make a payment and what that amount would be. The breach triggers the application for summary judgment. Whatever label one attaches to a summary judgment application, the purpose of such an application is to allow a plaintiff a speedy remedy in the absence of a good defence by a defendant.

42. Murdoch, in his affidavit, states that the respondent could not make good on the second settlement agreement because it was not in a financial position. Being a producer primarily of lucerne, the respondent experienced severe financial difficulties because of the COVID-19 pandemic, resulting in the lucerne crop not yielding profits. The abundance of rain caused the respondent's lucerne crops to suffer.

43. I accept that a respondent in an application for summary judgment need not be as detailed as required in a plea. However, I would have expected the respondent to state why it was not in a financial position beyond simply stating that it was because of various factors. I am well aware that the COVID-19 pandemic caused severe economic problems for business entities; however, in the true sense of the word, that defence is not a legal defence that would trump an application for summary judgment. Apart from referring to the abundance of rains, Murdoch does not explain sufficiently why that caused the respondent's financial difficulties. To sum up, the respondent is vague and lacks detail which would thwart an application for summary judgment. Regarding the conduct of non-payment or late payment and the other documents at my disposal the continued restructuring of payment, it is self-evident that the respondent has no bona fide defence.

44. An issue not raised by the parties is whether this court has the power to declare the properties specially executable In *First Rand Bank Ltd v Lenea* 2008 (3) SA 491 (E) Leach J (as he then was) found that a declaration that property is specially executable is ancillary to an application for default summary judgment. I respectfully agree with the reasoning.

45. There is, therefore, no merit in the so-called technical defences, as Mr. Olivier puts it. I make the following order:

45.1 Summary judgment in the amount of R7 620 223.00 is granted;

45.2 Interest calculated at the prime rate of Absa Ltd from date of demand;

45.3 The following properties are declared executable:

45.3.1 Plot 55, a portion of Plot 1, Vaalharts Nedersetting B, District Barkley West, Northern Cape Province;

45.3.2 Remaining extent of Plot 494, Vaalharts Nedersetting B, District Barkley West, Northern Cape Province;

45.3.3 Plot 56, a portion of Plot 5, Vaalharts Nedersetting B, District Barkley West, Northern Cape Province; and

45.3.3.1 Plot 495, a portion of Plot 1, Vaalharts Nedersetting B, District Barkley West, Northern Cape Province.

45.4 The respondent pays the costs of the application, inclusive of all the wasted costs incurred during the postponements.

S C O'BRIEN

ACTING JUDGE

Applicants' counsel

PR CRONJE

Applicants' attorney

MR A HORWITZ

Respondent's counsel

ADV A D OLIVIER

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