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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NUMBER: 112/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

DATE

SIGNATURE

In the matter between:

ABSA BANK LTD

APPLICANT

And

RALTON LAI

FIRST RESPONDENT

NATSHA MINNAAR

SECOND RESPONDENT

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This is a summary judgment application to which the provisions of the old Rule 32 of the Uniform Rules of Court apply. The Applicant instituted action against the Respondents for:

1.1 Payment of **R511 582.34**;

1.2 Payment of interest on the amount claimed at the rate of **8.60%** per annum, from **22 November 2018** to date of final payment, such interest calculated and capitalised monthly in arrears;

1.3 That the property described in paragraph 2 below be declared specially executable;

1.4 That the Registrar be authorized to issue a Writ of Execution against the immovable property referred to in paragraph 2 below to give effect to the order granted in terms of sub-paragraph 1.3 above;

1.5 That the honourable court set a reserve price for the sale of the immovable property; and

1.6 Costs as between attorney and client to be taxed.

[2] The debt arose in terms of a home loan agreement concluded by the parties, which was subsequently secured by registration of a first covering mortgage bond **No B8000/2008**) over immovable property described as PORTION 5 OF ERF [...] REGISTRATION DIVISION J.T. PROVINCE OF MPUMALANGA MEASURING 395 (Three Hundred and Ninety Five) Square Metres HELD by Deed of Transfer T8080/2008 Known as: 6 Kinaboom, West Acres, Extension 24 SUBJECT TO THE CONDITIONS WHERE AFTER REFERED TO IN THE SAID CERTIFICATE OF TRANSFER.

BACKGROUND

[3] The Respondent failed to live up to their commitments recorded in the first covering mortgage bond as a result of which the Applicant instituted the action as set out above. The Respondents defended the action and believing that the Respondents do not have a bona fide defence and that they were defending the matter solely for the purpose of delaying the proceedings, the Applicant launched this summary judgment application.

ISSUES

[4] The issues for consideration are:

4.1 Is this an appropriate matter in which the court can grant summary judgment?

4.2 Is the claim of the Applicant clear and technically correct on the papers?

4.3 Is the amount claimed liquid or if not, is the claim of an AMOUNT that is easily determinable? If all these questions are answered in the affirmative –

4.3.1 Has the Respondent set out a bona fide defence, which will be good in law if proved at the trial proceedings of the main case?

LEGAL PRINCIPLES

[5] Previously, courts have held the view that summary judgment is an extraordinary and drastic remedy in that it effectively closes the doors of the court to the defendant, without affording him opportunity to present his case and call witnesses in support and also, and most importantly, that he is not afforded opportunity to test the plaintiff's case in cross examination. See, Erasmus, Superior Court Practice, Van Loggerenberg, Juta, Volume 2, page D1-383.

[6] The notion that summary judgment application is an extraordinary and drastic remedy was somewhat qualified in the matter of Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 SCA at 11G - D, when the SCA explained that it is in fact not a drastic measure provided that it is correctly considered by the trial Court. The court stated that:

6.1 The procedure is not intended to deprive a defendant with a sustainable defence or a triable issue of his day in court;

6.2 If a defence is *bona fide*, in the sense that it will be good in law if proven at the trial, summary judgment will not be granted; and

6.3 Courts should not, in an application for summary judgment, require the same precision from the defendant as is required in pleadings.

- [7] In Maisel v Strul 1937 CPD 128, a decision that has been persistently mentioned and followed with support in subsequent cases, including Joob Joob Investments supra, the Court held that:

“A court must be careful to guard against injustice to the defendant who is called upon on short notice and with only the information contained in or annexed to the particulars of claim, and without the opportunity to enforce discovery and to cross examine the plaintiff’s witnesses to satisfy the Court that he has a bona fide defence.”

- [8] It is a formal requirement that the applicant must set out his claim with clarity and exactitude. See, Visser v De La Rey 1980 (3) SA 147 T at 150. (This includes annexing copies of all contracts upon which an applicant’s claim is based. In Gulf Steel (Pty) Ltd, Rack-Rite BOP (Pty) Ltd and Another 1998 (1) SA 679 (O), it was held, at 683H – 684B, that:

“In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a bona fide defence as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiff’s claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if the plaintiff’s claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court.”

- [9] Conversely, it is not required of the Respondent to set out his defence in detail and in lengthy and prolix affidavits as it is not the intention of the rule to provide the plaintiff with the unilateral advantage of a preview of the defendant’s evidence. See, Edwards v Menezes 1973 (1) SA 299 (NC) at 304 and Breytenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 T at 229. As such, summary judgment is not easily granted where the defendant has filed opposing papers in accordance with the rules of Court.

EVALUATION

- [10] Perhaps the first issue to consider should be whether or not the claim is liquid. In view of lack of challenge to the liquidity of the claim, the court will accept that the claim is liquid and that it is therefore proper to launch summary judgment proceedings in circumstances where the Applicant believes that the Respondents have entered appearance to defend purely for purposes of delay.
- [11] Following stating his names, the deponent to the founding affidavit, Mr Matsepe, declares that:

“1.

1.1 I am the Vice President at Home Loans Recoveries Division of Absa Bank Limited.

1.2 I am duly authorized to depose to this affidavit and to launch an application for summary judgment on behalf of the Plaintiff.

1.3 All the documents and records in respect of the relationship between the Plaintiff and the Defendants are in my possession and under my control and I have access and insight into that documentation on a continuing basis. The indebtedness of the Defendants is also apparent from the documentation in my possession and under my control. In the circumstances, I have direct and personal knowledge of the facts underlying the causes of action against the Defendants and can therefore swear positively to the facts verifying those causes of action and the amounts due as set out in the summons issued on behalf of the Plaintiff against the Defendants in the abovementioned matter.

2. I herewith confirm that the Defendants are indebted to the Plaintiff on the causes and the facts and in the amounts as set out and claimed in the Plaintiffs summons and herewith verify the said causes and facts and the amounts claimed as set out in the summons.

3. In the circumstances, I confirm that the Plaintiffs claim against the First and Second Defendants, jointly and severally, the one to pay the other to be absolved is as follows:

3.1 Payment in the amount of **R511 582.34**

3.2 Payment of interest on the amount of **R511 582.34** at a rate of **8.60%** per annum, from **22 November 2018** to date of final payment, such interest calculated and capitalized monthly in arrears.

3.3 An order declaring the following property specially executable:

PORTION 5 OF ERF 2071 WEST ACRES

EXTENSION 24 TOWNSHIP REGISTRATION DIVISION J.T.

PROVINCE OF MPUMALANGA

MEASURING 395 (Three Hundred and Ninety-Five) Square metres

HELD by Deed of Transfer T8080/2008

Also known as: 6 Kinnaboom, West Acres, Extension 24

SUBJECT TO THE CONDITIONS WHERE AFTER REFFERED TO IN THE
SAID CERTIFICATE OF TRANSFER

- 3.4 That the Plaintiff / Registrar be authorized to issue a Writ of Execution against the immovable property referred to in paragraph 3.3 above.
- 3.5 That the honourable court set a reserve price for the sale of the immovable property.
- 3.6 Costs to be taxed on a scale as between attorney and client;
4. In my opinion the Defendants do not have a *bona fide* defence to the action and the claim of the Plaintiff and the notice of intention to defend was delivered solely for the purpose of delay."

[12] Firstly, the Respondents have raised non-compliance with Uniform Rule of Court 32(2) as a defence arguing that the facts verified in the affidavit in support of summary judgment, deposed to by Matsepe, do not fall within his personal knowledge and he can, accordingly, not swear positively to the facts. It is now settled that a deponent to an affidavit of an applicant, which is a corporation in summary judgment proceedings need not have first-hand knowledge of every fact comprising the plaintiffs cause of action. In that instance, knowledge derived from appropriate documents in the possession of the corporation will suffice for reliance. See, **Rees and Another v Investec Bank Ltd 2014 (4) SA 220 (SCA)** and **ABSA BANK LTD v FUTURE INDEFINITE INVESTMENTS 201 (PTY) LTD AND OTHERS (WESTERN CAPE DIVISION CASE NO. 20266/2015) where Binns-ward J distinguished the facts before him from those in Rees before dismissing the summary judgment application.**

[13] The Respondent has relied heavily on what the court said in the Future Indefinite Investment 201 case *supra* as such, it is crucial as well to make a distinction between this matter and the facts that presented before Binns-Ward J in that case. In the case of Future Indefinite Investments 201, the deponent refers to relevant documents without mentioning which ones they are whereas in the current matter, over and above stating that he is employed in the home loan recoveries division of the plaintiff, the division within which this transaction would ordinarily be handled, the following are notable:

- 13.1 That all the documents relating to this cause of action are in his possession;
- 13.2 He confirms that he has insight and continued access to the documentation;
- 13.3 Having had regard to all the documentation and records relating to the transaction between the parties, he confirms that the Respondents are indebted to the Applicant;
- 13.4 Other than as aforesaid, he has set out the claim of the Applicant in full suggesting that he has read the summons and particulars upon which the claim is based.

[14] I agree that the destruction of the loan agreement in fire is neither here nor there because it has been confirmed that its terms and conditions were captured on the computer system of the Applicant. Besides, the existence of the mortgage bond and subsequent registration of transfer of the property into the names of the Respondents is evidence of the existence of a prior contractual relationship (loan agreement) between the parties without which there would not have been the advancement of the amount. Most importantly, the mortgage bond is not contested anyway.

[15] Signature of the certificate of balance is not restricted to any particular individual manager. On the contrary, it will suffice if it is signed by any manager of the Applicant and provided of course that there are no manifest errors in calculation. Accordingly, it is of no moment that the certificate of balance has been signed by some other person other than Matsepe. In any event Matsepe has already verified the amount reflected on the certificate in his affidavit in support of the summary judgment application. There being no challenge of errors of calculation of the amount stated in the certificate of balance, the Respondents' contention must be rejected for lack of merit.

[16] It is correct that previously there were suggestions that a branch manager of a financial institution would be the most appropriate person to depose to an affidavit in support of a summary judgment application. That has since been rejected and it is now trite that as long as a person holds a position that gives him sufficient

responsibility and authority, he will be recognised or accepted as a person with personal knowledge. In the circumstances, the contention is devoid of any merit and cannot be entertained

- [17] The Respondents have also raised non-compliance with the relevant provisions of the National Credit Act No. 25 of 2005 (“the NCA”) in that they allege that the Applicant has failed to comply with Sections 129 and 86(10) of the NCA because they did not receive the section 129 notices. According to them, they chose 8 Kinaboom, West Acres, Mbombela as their *domicilium* address, and that this address is also where their account statements were sent.
- [18] It is common cause that the Applicant sent registered mail and that it served the Section 129 notices via the sheriff at the admitted *domicilium* address being Portion 5 of Erf 2071, Ext 24, West Acres, Mbombela known as 8 Kinaboom Street, West Acres, Mbombela. The Applicant has attached proof of dispatch of the notices by registered mail, the track and trace reports proving delivery to the relevant Post Office and that notifications were sent to the Respondents to the summons. Furthermore, there is also proof of service of the Section 129 notices at the same address on 29 November 2018 by the sheriff.
- [19] The question whether the Respondents have chosen to receive correspondence by post or physical delivery does not really apply because the Applicant has effected service of the Section 129 notice by both methods. That said, it should be noted that ***Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC)*** in the end settled the issue pertaining to notice of default to a consumer. Tersely, the Constitutional Court held that delivery would be satisfied, in those instances where the respondent has chosen service by post, if a notice sent by an applicant has reached the local post office of a respondent and that the post office concerned in turn notified the respondent that a registered item was awaiting collection. The respondent can rebut receipt by demonstrating that the notification did not reach him even though sent to an address designated by him.
- [20] In line with what was held in Kubyana, there being proof that the local post office, West Acres, had subsequent to receiving the notice drawn the attention of the Respondents to its presence, by issuing a notice to the designated address, it was

for the Respondents to show that they did not receive it or state why they failed to collect the notices after they had been notified by the Post Office. In the circumstances, the Respondents' claim that the Applicant has not observed the provisions of Section 129 of the NCA cannot succeed. The contention that there has also been no compliance with Section 86(10) of the NCA is ignored because it does not find application under the facts of this matter.

CONCLUSION

[21] This Court is in the circumstances contented that the claim is liquid, clear and technically correct. The Respondents have, on the other hand, failed to demonstrate that they have a bona fide defence, which if proved at the trial would constitute a valid defence. For those reasons the application ought to succeed.

ORDER

[22] I make the following order:

1.1 The Respondents are directed to make Payment of **R511 582.34 to the Applicant together with** interest on the amount claimed at the rate of **8.60%** per annum, from **22 November 2018** to date of final payment, such interest calculated and capitalised monthly in arrears;

1.2 The property described as Portion [...] Nelspruit is declared specially executable;

1.3 The Registrar is authorized to issue a Writ of Execution against the immovable property referred to in paragraph 1.2 above to give effect to the order granted in terms of sub-paragraph 1.2 above;

1.4 The reserve price for the sale of the immovable property is set at R850 000.00; and

1.5 The Respondents are to pay the costs of the Applicant as at the scale between attorney and client.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

Appearances:

Counsel for the Applicant:

Adv J Van der Merwe

Instructed by:

TIM DU TOIT & CO INCORPORATED

Counsel for the Defendants:

Adv Matlata TP

Instructed by:

MT SILINDA & ASSOCIATES INCORPORATED

Date heard:

01 November 2019

Date of Judgment:

19 November 2019