



**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

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|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

Case No: 6355/2018

In the matter between:-

**FIRSTRAND BANK LIMITED**

Plaintiff

and

**HENNIE SCHULTZ N.O**

First Defendant

**ELSIE SCHULTZ N.O**

Second Defendant

**LEONARD JOHANNES OELOF TRUTER N.O**

Third Defendant

**HENNIE SCHULTS**

Fourth Defendant

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**CORAM:**

**MBHELE J**

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**HEARD ON:**

**25 APRIL 2019**

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**DELIVERED ON:**

**25 JULY 2019**

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- [1] This is an opposed application for Summary Judgment for payment of R497 538.90 plus interest in respect of claim 1 and R1 236 824.20 plus interest in respect of claim 2.
- [2] The first, second and third respondent are cited in the plaintiff's simple summons in their capacities as trustees of the Schultz Family Trust (IT 55/2014) (The Trust). The Fourth defendant is cited in his personal capacity and as surety and co-principal debtor in an agreement between the plaintiff and the Trust. For the sake of convenience parties are referred to as in the main action.
- [3] The plaintiff's claim pivots on two written agreements entered into on 29 April 2016;  
A written credit facility agreement in terms of which the plaintiff is said to have granted the trust a short term credit facility in the amount of R500 000 and a loan agreement in terms of which the plaintiff is alleged to have lent and advanced an amount of R1 440 000-00 to the Trust at the latter's special instance.
- [4] The Fourth defendant signed a deed of surety in terms of which he bound himself as a co-principal debtor *in solidum* with the Trust, in favour of the Plaintiff, for payment of all monies which the Trust owed or may owe to the plaintiff, from whatsoever cause and howsoever arising.

- [5] Central to the opposition of the Summary Judgment is whether the causes of action were properly set out in the plaintiff's summons and whether the claims are liquidated amounts in money.
- [6] It is the defendants' case that the plaintiff's cause of action is not clearly set out in the summons, neither was it verified by the deponent to the affidavit accompanying an application for Summary Judgment.
- [7] Mr. Van der Merwe on behalf of the defendant submitted that it is not clear *ex facie* the simple summons whether the plaintiff's claim is based on a credit facility provided at the Trust's special request and instance or whether such claim is based on a written agreement or a partially written, partially verbal agreement.
- [8] The defendants take issue with the facility agreement which provides that any amounts owing to the plaintiff shall bear interest at a rate equivalent to the maximum allowable interest rate under the Usury Act 73 of 1968 for as long as such amount remained unpaid interest, which additional interest is calculated daily and capitalised monthly. The agreement further allows the plaintiff to use its sole discretion to charge the additional interest at a rate less than the maximum allowable interest rate under the Usury Act.

- [9] Mr Van der Merwe further contended that it is not clear from the summons whether the plaintiff exercised its discretion to charge additional interest as stipulated in the agreement,
- [10] It is further contended that the plaintiff failed to set out whether the amounts claimed consist solely of the capital outstanding or whether such amounts include interest and at which rate such interest has been charged. In his view the claim is not for the liquidated amount in money as envisaged in Rule 32.
- [11] The plaintiff asserts that the defendants failed to prove that the plaintiff charged additional interest and whether such interest was in terms of the repealed Usury Act or the National Credit Act.

Mr Groenewald submitted that the defendants could have easily ascertained the rate at which interest was charged from the bank statements provided by the plaintiff prior to the issuing of summons. He submitted further that the defendants agreed that in case of dispute arising from both the facility agreement and the loan agreement the certificate of indebtedness, signed by a manager of the Plaintiff, shall be prima facie proof of the amount owed by the respective defendants to the plaintiff until the contrary is proven. He contended further that since the Usury Act was repealed by the National Credit Act, the plaintiff may claim interest in terms of the National Credit Act.

- [12] Clause 5 of the general terms and conditions applicable to the facility agreement, signed by the parties, provides as follows when dealing with penalty interest.

“Any amount(s) owing to the Bank which are not paid on due date, shall bear additional interest at a rate equivalent to the maximum allowable rate under the Usury Act 73 of 1968 (as amended) to the extent applicable, for as long such amount(s) which are due and payable remains unpaid, which additional interest are calculated on daily balance and capitalised monthly.

In the event of breach, the Bank shall be entitled to claim and charge penalty interest at a rate equal to the maximum allowable rate under the Usury Act 73 of 1968 (as amended) to the extent applicable, calculated from the date of breach to the date of payment and compounded monthly in arrears, on the full outstanding balance of the facilities.

The Bank in its sole discretion and without derogating from any other rights that the Bank may have, reserves the right to charge additional interest as set forth in this clause 5 at a rate less than the maximum allowable rate under the Usury Act (to the extent applicable).”

- [13] Summary Judgment is a procedure intended to prevent sham defences from defeating the rights of parties by delay and further causing great loss to plaintiffs who were endeavouring to enforce their rights. It is a procedure aimed at affording an innocent plaintiff who has an answerable case against an elusive defendant a much speedier remedy than that of waiting for the conclusion of an action. Summary Judgment must be refused where the defendant has a triable case. See ( **Joob Joob Investments Pty ( Ltd) v Stocks Mavundla Zek Joint Venture 2009 ( 5) SA (1) .**

- [14] In **Shepstone v Shepstone 1974 (2) SA 462 E – H** the following was said:

“The court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case” and that... “a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial”

[15] I must consider whether the National credit Act finds application in the first claim. It is common cause that the Trust has 3 Trustees and that the agreement in claim 1 was for credit facility in the amount of R 500 000.

[16] In terms of section 4(1)(a) of the National Credit Act the Act does not apply to a credit agreement in terms of which the consumer is:

- (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1) (currently R1 million) ;
- (ii) a large agreement as described in section 9(4) (b) (the principal debt under the transaction exceeds R250 000) in terms of which the consumer is a juristic person, whose asset value or annual turnover is, at the time the agreement is made, below the threshold value (R1 million) determined by the Minister in terms of section 7(1) of the Act.

[17] It is so that the National Credit Act does not apply where the consumer is a juristic person which enters into a large agreement,

irrespective of its total asset value or annual turnover. In the current matter the trust is considered a juristic person as described by the National Credit Act. The principal debt exceeds the R250 0000 as determined by the Minister. Based on the above the National credit Act does not apply to the credit facility.

[18] A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment or where the ascertainment of the amount in issue is 'a matter of mere calculation. See (**Tredoux v Kellerman 2010 (1) SA 160 CPD**)

[19] In **Botha v W. Swanson and Co. (Pty) Ltd** it was held that a claim would not be regarded as one for a liquidated amount in money unless it was based on an obligation to pay an agreed sum of money or it was so expressed that the ascertainment of the amount so claimed was a matter of a mere calculation

[20] Pleadings in general are governed by Rule 18 of the Uniform Rules of court, (Rules).

"18 (4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading as the case may be, with sufficient particularity to enable the opposite party to reply thereto".

The manner in which the plaintiff formulated its claims does not fully satisfy the requirements set out in Rule 18. The amounts claimed are not easily ascertainable.

[21] With the Usury Act having been repealed and the National Credit Act not finding application to the credit facility and the loan agreement, interest has to be calculated in terms of the Prescribed Rate of Interest Act 55 of 1975. It is not clear from the summons

whether the additional interest, on the outstanding amount due, was added, if added, at what rate was it calculated.

Summary judgment must be granted where it is clear that the plaintiff's claim is unimpeachable and the defendant's case is bogus and bad in law. The plaintiff's summons does not state with particularity how the claims were formulated and how the total amount owing was arrived at.

The plaintiff must prove that its claim is unanswerable before I could exercise my discretion to grant summary judgment. Based on the above, I am unable to say with certainty that the plaintiff's claim is unanswerable. The defendants demonstrated that they have a bona fide defence to the claims. The application for summary judgment must fail.

## **ORDER**

1. The application for summary judgments in respects of both claims is dismissed.
2. The defendants are granted leave to defend.
3. Costs shall be costs in the cause.

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**NM MBHELE, J**

On behalf of the plaintiff:

Adv. WJ GROENEWALD



Instructed by:

**SYMINGTON & DE KOK INC.**  
BLOEMFONTEIN

On behalf of the defendant:

Instructed by:

Adv. R. VAN DER MERWE  
**MAREE & VENNOTE ATTORNEYS**  
BLOEMFONTEIN