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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **740/2019**

In the matter between:

NEDBANK LIMITED

APPLICANT/PLAINTIFF

and

PETRUS JOHANNES ELOFF VIGNE

1ST RESPONDENT/DEFENDANT

MAGDALENA VIOLET VIGNE

2ND RESPONDENT/DEFENDANT

HEARD ON:

13 JUNE 2019

JUDGMENT BY:

CHESIWE, J

DELIVERED ON:

15 AUGUST 2019

[1] This is an application for summary judgment. The Applicant's claim against the Respondents is for payment in the amount of R225 658.15 (two hundred and twenty-five thousand six hundred and fifty-eight rand fifteen cents). The Respondents opposed the application.

[2] The relief sought by the Applicant is set out as follow in the summary judgement application.

- "1. Payment of the amount of R225 658.15 plus interests and costs against the Defendant/Respondents.
2. Defendants/Respondents to pay interests on the above mentioned amount at 9.25% as from 01/12/2019 to date of final payment.
3. That property known as Remaining Extent of Erf [...] Bloemfontein (Extension 39 District Bloemfontein Province, Free State) in Extent: 746 (seven hundred and forty-six) square metres, held by Deed of Transfer 71780/2006, subject to the conditions therein contained to be specially executable.
4. Cost on attorney and client scale plus sheriff's fee.
5. Further/alternative relief."

[3] The background of this matter is that on or about January 2006, the Applicant represented by a duly authorised official and the Respondents (acting personally) concluded a written Loan

Agreement,¹ (the loan agreement). Pursuant to the loan agreement on the 1 February 2006 the Respondents were duly represented by a Gerda du Toit to register in the Registrar of Deeds a first mortgage bond in favour of the Applicant to cover as security for any sum of money which may be covered or claimable by the Applicant.² In November 2008 the Applicant and Respondents concluded a further loan agreement,³ and this was caused to be registered at the Registrar of Deeds as a second covering mortgage bond, the Respondents were duly represented by Jacobus Stephanus.

[4] On 24 of January 2012, the Respondents entered in a Distressed Restructure Agreement in respect of the home loan with the Applicant.⁴

[5] The Applicant on the 30 May 2011 addressed a letter,⁵ to the Respondents which read as follows:

“Termination of Credit agreement from Debt Review in terms of section 86 (10) of the National Credit Act, No 34 2005.

We confirm that the debt review process the below mentioned account(s) is hereby terminated in terms of section 86(10) of the National Credit Act.

In terms of our notice of default you were given the opportunity to provide us with proof of payment or reasons why the credit agreements/s should not be terminated. We have allowed you a period in excess of 10 days to respond to

our notice and you failed to do so....”

¹ Loan Agreement Annexure A page 19 – 28 of the Particulars of Claim.

² See Clause 13 of the Loan Agreement page 26 of the Particulars of Claim.

³ Loan Agreement Annexure C page 35 – 52 of the Particulars of Claim.

⁴ Distressed Restructure Agreement attached as Annexure A page 62 – 72.

⁵ Annexure G1 on page 74 of the summary judgement application.

- [6] The Applicant launched the summary judgement application, which was filed on 16 April 2019. The Respondents opposed the mentioned application and filed their opposing affidavit resisting summary judgment.
- [7] The issue to be determined is whether the Respondents' affidavit discloses a *bona fide* defence to the Applicant's claim and whether the Respondents have shown that the defence is not merely aimed to delay the Applicant's claim.
- [8] The Applicant's contention is that the Respondents breached the terms of the loan agreement and that the amount claimed is due and payable. The affidavit in support of the summary judgement by Sindisiwe Fortunate Sizakele Mhlongo,⁶ stated that: "The Respondents have, according to my opinion, no bona fide defence and gave notice to defend to matter exclusively to delay the matter."
- [9] The Respondents' contention in their opposing affidavit resisting summary judgment raised a number of issues; that the amount claimed is incorrect and that there is no arrears that are due and payable as the Respondents had a life insurance at Nedgroup life that covered payments in the event that the Respondents became disabled. On the 27 October 2011 the 1st respondent became disabled due to an accident, whereby Nedgroup Life made payments to the bond account. The Respondents further averred that the Applicant's letter of termination was sent prior to

⁶ Affidavit in support of summary judgment page 6 to 7.

the Distressed Reconstruction Agreement and thus failed to comply with Section 129 and 130 of the national credit act.

[10] Counsel on behalf of the Applicant in oral argument submitted that the transaction between the parties was a simple loan contract that the Respondents were required to pay. Thus the Respondents failed to meet their obligation and have breached the loan contract. Counsel submitted the Distressed Restructure Agreement was also breached by the Respondents, and that the Applicant is therefore entitled to claim the amount that is due and payable. He further submitted that the issue of Nedgroup does not involve the Applicant as it is a contract between the Respondents and Nedgroup. Counsel was of the view that the Respondents may proceed to institute a claim against Nedgroup. He further confirmed that the Certificate of Balance⁷ attached to the papers to be accepted by the court as the correct amount owed by the Respondents.

[11] Counsel on behalf of the Respondents in oral submission and the Heads of Argument submitted that the defences raised by the Respondents that the Plaintiff failed to comply with clause 21 of the Distressed Restructure Agreement; that the Respondents do not owe the Plaintiff any arrears as Nedgroup paid an amount of R86 000 towards the bond; that the particulars of claim of the Applicant did not reflect any default in monthly payments as alleged by the Applicant; including the fact that the Respondents

⁷ See *Wolfaard v Trystman and Another* (2923/2015) [2015] ZAFSHC 168 (4 September 2015), Where Rampai J held that: “it has been held on a number of occasions that a certificate clause in a written agreement is designed to facilitate proof of the amount of liability.”

were placed under debt review⁸ which process was terminated by the Applicant and that this termination was prior to the Distressed Restructure Agreement as signed by the parties. He submitted that the Plaintiff did not comply with section 129 and 130 of the National Credit Act 34 of 2005. He submitted that all these defences are bona fide and that the Respondents did not enter an intention to defend in order to delay the Applicant's claim.

[12] The purpose of summary judgment is to assist a plaintiff where the defendant who cannot set out a bona fide defence or raise an issue to be tried, enters appearance simply to delay judgement.

[13] An application for summary judgment is governed by the provisions of Rule 32 of the Uniform Rules of Court. And the requirements resisting summary judgment have been elucidated by Corbett JA *Maharaj V Barclays National Bank Ltd*,⁹ where he stated the following: "One of the ways in which a defendant may successfully oppose a claim for summary judgement is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.."

⁸ Annexure G1 – G7 attached to the affidavit page 74 to 77.

⁹ 1976 (1) SA 418 (A) at 426A-E

- [14] In **Fichereingesellschaft F. Busse & Co Kommandit-Gesellschaft v African Frozen Products (Pty) Ltd**,¹⁰ Theron J held that: “As was pointed out in **Misid Investments (Pty) Ltd v Leslie**,¹¹ that the applicant in summary judgment proceedings must comply strictly with the requirements of the Rules of Court.”
- [15] In the matter of **Mowschenson and Mowschenson v Mecantile Acceptance Corporation of SA Ltd**,¹² Marais J stated as follows:
- “The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and very stringent one, in that it permits a judgment to be given without trial.”
- [16] In **Maharaj supra**,¹³ Coberdt JA (as he then was) said: “All that a Court enquires into: (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law. If satisfied on these matters the court must refuse summary judgment either wholly or in part as the case may be.”
- [17] The court has an overriding discretion whether on the facts averred by the Applicant, it should grant summary judgement or on the basis raised by the Respondents. Such discretion is unfettered. If the court has doubt as to whether the Applicant’s case is unanswerable at trial such doubt should be exercised in

¹⁰ 1967 (4) SA 105 (C) at 111 AB.

¹¹ 1960 (4) SA 473 (W) at page 474.

¹² 1959 (3) 362 (W) at p 366.

¹³ 1976 (1) SA 418 (A) at 4268 – C.

favour of the Respondents and summary judgement should be denied. The court can exercise the discretion and refuse the summary judgement if the requirements have not been met. Summary judgement by its nature is a very drastic remedy. It has the effect of completely denying a Defendant any opportunity of presenting his or her case. It effectively shuts the mouth of the Defendant finally for the Defendant.¹⁴ It is for this reason that compliance is required from a party who brings such an application.

- [18] There are factual dispute between the parties. The Applicant is of the view that the Respondents are in arrears and that the Respondents breached the loan agreement between the parties. The Respondents further raised an issue that the Certificate of Balance is incorrect as the outstanding arrears was paid by the Nedgroup Insurance. Though the Applicant's contention is that the parties in terms of the signed Distressed Restructured Agreement clause 25, the amount reflected on the Certificate of Balance would be proof of the amount which is due and payable. In the matter of **Wolfaard v Trytsman and Another**,¹⁵ Rampai J held as follow: "It has been held on a number of occasions that a certificate clause in a written agreement is designed to facilitate proof of the amount of liability. Therefore, a certificate of balance is often merely accepted by the courts as evidentiary tool to provide in terms of an agreement by one contracting party to the other for the purpose of facilitating proof of the amount of the borrower's indebtedness to the lender."

¹⁴ First Rand Bank Ltd v Beyer 2011 (1) SA 196 (GNP)

¹⁵ (2923/2015, [2015] ZAFSHC 168 (4 September 2018).

- [19] The Respondents' contention that the Applicant send the letter of termination prior to the Distressed Restructure Agreement (the DRA) and thus failed to comply with sections 129 and 130 of the National Credit Act (the NCA) cannot be ignored by the court. That in itself allowed the Respondents to raise it as a defence. The Respondents avers that they were placed under debt review, which process was terminated by a letters, annexure "G1" and "G4", dated 30 May 2011 and these letters are dated prior to the Distressed Restructure Agreement. Thus the Applicant did not comply with section 120 and 130 of the NCA. The defences as raised by the Respondents cannot be ignored and that the court has to take cognisance of these defences. The Respondents denied that their intention to defend the matter is to delay the Applicant's claim and that they do have bona fide defence.
- [20] Section 129(1)(b) of the NCA prohibits the commencement of legal proceedings. Section 130 (3) of the NCA provides that a credit provider may enforce a credit agreement only where there has been compliance with section 129. Section 130 (4) (b) requires a court, where there has not been compliance with section 129, to adjourn the matter and makes an order setting out the steps to be taken in order to ensure compliance by the credit provider.
- [21] The Constitutional Court in **Sebola & Another v Standard Bank of South Africa**,¹⁶ considered that where an action is instituted without prior compliance with section 129 of the NCA, the summons is void. Cameroon J further said:

¹⁶ 2012 (4) SA 142 (CC)

“In my view the notice requirement in section 129 cannot be understood in isolation from section 130. This emerges from three considerations. Firstly, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while section 129 (1) (b) appears to prohibit commencement of legal proceedings altogether legal (“may not commence”), section 130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it, the proceedings have life, but a court “must” adjourn the matter, and make an appropriate order requiring the credit provider to complete the specified steps before resuming the matter. The bar on the proceedings is not absolute, but only dilatory. The absence of notice leads to a pause, not to a nullity”

- [22] The Respondent correctly stated that the letters of termination were dispatched on the 30 May 2011 and the Distressed Restructure Agreement was signed by the parties on the 24 January 2012. Which was indeed prior to the signing of the Distressed Restructure Agreement. Counsel on behalf of the Applicant conceded that the defence raised by the Respondents that the dates on the letters of termination was send prior to the signing of the Distressed Restructure Agreement. The Respondents further relied on clause 22 of the DRA that stated as follows:

“22.1 If the client is in default under this agreement, Nedbank may –

22.1.1 draw the default to the notice of the Client in writing and propose that the Client refers this Agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve the any dispute under this agreement or develop and agree on a plan to bring the payments under this Agreement up to date, and Nedbank may not commence any legal proceedings to enforce this Agreement before such notice has been given; or

22.1.2 in circumstances where this Agreement is being reviewed in terms of Section 86 of the Act, give notice to terminate the review as contemplated in clause 21.6; provided that the requirements set out in this subclause will not apply in circumstances where this Agreement is subject to a debt restructure order, or to proceedings in a court that could result in such an order.”

- [23] As correctly stated by the Respondents in the affidavit resisting summary judgment that the notice of termination letters were already send to them approximately a year before the Distressed Restructure Agreement was even signed by all the parties. Thus in my view the defences raised by the Respondents are bona fide. Including the fact that they were under the impression that the Nedgroup Live Insurance will cover the bond payments.
- [24] While the Respondents need not deal exhaustively with the facts and the evidence relied upon to substantiate it. They must at least disclose a bona fide defence, upon which if based with sufficient particularity and completeness to enable the court to decide whether the affidavit of the Respondents discloses a bona fide defence. At the same time the Respondents are not expected to formulate their opposition to the claim with the prescription that would be required of a plea.
- [25] In my view, the Respondents have a bona fide defence and court should not shut the door on the Respondents intention to have their claim tested according to the requirements of a summary judgment.

[26] In the premises, I make the following order;

1. The application for summary judgment is dismissed.
2. The Defendants are granted leave to defend the action.
3. Costs of the application shall be in the costs in the cause.

S. CHESIWE, J

On behalf of Applicant/Plaintiff: Adv. PC Ploos Van Amstel

Instructed by: Hill, McHardy & Herbst
BLOEMFONTEIN

On behalf of Respondents/ Defendants: R Coetzee

Instructed by: Steenkamp & Jansen
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