IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

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

Case number: 5579/2017

In the matter between:

SMALL ENTERPRISE FINANCE AGENCY SOC LTD — Plaintiff

and

RE-YAKGONA TRANSPORT CC — 1st Defendant

JOSEPH DIHEKE MPHUTHI — 2nd Defendant

CORAM: MHLAMBI J,

HEARD ON: 28 JUNE 2018

DELIVERED ON: 04 JULY 2018

MHLAMBI, J

[1] This an opposed summary judgment application against:

"***A: THE DEFENDANTS, IN SOLIDUM, THE ONE TO PAY, THE OTHER TO BE ABSOLVED, FOR:***

1. *Payment of the sum of R 366 182.12, together with the interest thereon at the rate of 13.50% per annum, calculated daily and compounded monthly in arrears as aforesaid, calculated from 1 April to date of payment, both days inclusive;*

B: THE FIRST DEFENDNAT FOR:

2. *Confirmation of cancellation of the Agreement marked* ***Annexure "C1" and "C3"*** *to Plaintiff's particulars of claim and forfeiture of all payment made in terms thereof;*
3. *Return of the asset – a Mercedes Benz Actros Heavy load Vehicle bearing Chassis number WDB9342416L941664 and Engine number 541944C0965468;*
4. *Return of the assets – Mercedes Benz Actros Heavy Load Vehicle bearing Chassis number WDB9342416L941666 and Engine number 541944C0965453;*

C: THE DEFENDANT, IN SOLIDUM, THE ONE TO PAY, THE OTHER TO BE ABSOLVED, FOR:

5. *That judgment for the amount Plaintiff may be entitled to per prayer (5) of the particulars of claim herein, together with interest thereon, be postponed sine dies, pending return of the assets per (3)-(4), its subsequent disposal and calculation of the amount to which Plaintiff is entitled;*
6. *Cost of suite (sic) to be taxed on an attorney & client scale; and*
7. *Further and/or alternative relief."*

[2] The first claim is based on a written agreement of loan in terms of which an amount of R 413 430.24 was lent to the first defendant at the latter's special instance and request. The total loan amount, inclusive of interest, was payable in full by 31 May 2017.

[3] It was a term of the agreement that a statement purporting to be signed by any authorised signatory of the plaintiff (whose appointment or authority need not be proved) shall for all purposes, including provisional and summary judgment, be deemed to be *prima facie* proof of all amounts owing to the plaintiff, and of the interest rate applicable to the outstanding balance from time to time.

[4] The plaintiff complied with its obligations and advanced the monies as per the loan agreement to the first defendant. The first defendant breached the loan agreement by not making payment of the required instalments as and when due and payable and by not settling the total loan amount and interest by 31 May 2017.

[5] The plaintiff and the first defendant entered into a written instalment sale agreement in terms of which the plaintiff sold to the defendant a certain Mercedes Benz Actros Heavy Load Vehicle bearing VIN number WDB9342416L941664 and Engine number 541944C0965468 for R 1 580 181.02 and a total collectable of R 2 217 931.78. The first defendant would pay the total collectable by way of fifty- seven monthly instalments in the amount of R 38 240.30 each beginning on 29 February 2016 and a final payment of R 38 234.68 on 30 November 2020. Interest on the principal debt due or the balance thereof would be chargeable

at a fixed rate of interest of 13.50% per annum from 30 November 2015, calculated daily and debited monthly.

[6] A certificate issued by an authorised signatory of the plaintiff whose appointment need not be proved, stating the amount of first defendant's indebtedness to the plaintiff, the interest rate charged and the date from which interest is to be calculated in terms of the agreement would be sufficient proof of such indebtedness.

[7] A second written instalment sale agreement was entered into between the plaintiff and the first defendant in terms of which the plaintiff sold to the first defendant a certain Mercedes Ben Actros Heavy Load Vehicles bearing Chassis number WDB9342416L941666 and Engine number 541944C0965453, for the amount of R 1 580 182.02 and a total collectable of R 2 217 931.78. The first defendant would pay the total collectable in fifty- seven monthly instalments in the amount of R 38 240.30 each with effect from 29 February 2016 and a final payment of R 38 234.68 on 30 November 2020. Interest would be chargeable on the principal debt due or the balance thereof at a fixed rate of interest of 13.50% per annum from 30 November 2015, calculated daily and debited monthly.

[8] A certificate issued by an authorised signatory of the plaintiff, whose appointment need not be proved, stating the amount of the first defendant's indebtedness to the plaintiff, the interest rate charged and the date from which interest was to be calculated in terms of the agreement, would be sufficient proof of such indebtedness.

[9] The plaintiff met all the relevant terms of the agreement and the first defendant took position of the vehicle. The first defendant committed a breach of the agreement in that it failed to make regular payment of instalments and other amounts due and payable as per the agreement.

[10] On the same date, the second defendant bound himself in writing, to an unlimited amount as surety and co-principal debtor *in solidum* for the first defendant's indebtedness to the plaintiff, whether for past, present or future debts.

[11] The surety would, on demand, pay to the plaintiff all liabilities, due by the first defendant to the plaintiff, including all interest, cost, commissions, charges and expenses which the plaintiff might incur in obtaining payment of the sums of money due to the plaintiff from the first defendant arising out of the secured obligations as defined in the deed of suretyship.

[12] A certificate signed by a director or manager of the plaintiff, whose appointment or authority need not be proved, as to the amount owing at any time, the date such amount is due and payable, interest and the rate of interest payable thereon would be *prima facie* proof of the facts stated therein and of the surety's indebtedness.

[13] The defendants opposed the application for summary judgment and raised the following defences:

*"**<u>CLAIM1- THE DEVELOPMENTAL TERM LOAN ARGEEMENT</u>***

9. *We dispute the amount alleged to be indebted to the Applicant.*

10. *The applicant does not attach a statement from which the amount and interest can be ascertained.*

11. *The Applicant, pertaining to evidencing the 1st Respondent's alleged indebtedness, places reliance on the construction of clause 22 to Annexure "A1", the Development Term Loan Agreement, which provides as follows:*

    22.1 A certificate issued by an authorized signatory of the Lender, whose status and designation need not be proven, shall be prima facie proof of the status of the facts stated therein with regard to, including but not limited to, any amount owing to the Lender by the Borrower, the interest rate applicable to such loan, the date from which interest is to be calculated, the cause of action ad the fact that the Amount Outstanding is due and payable.

    22.2 In the event that the Borrower disputes the correctness or accuracy of any aspect of the content of the certificate, the Borrower shall be obliged to adduce evidence in rebuttal ad the onus to lead and prove such rebuttal evidence shall similarly rest on the Borrower.

12. *To this end the Applicant relies further on the content of Annexure "B" to its Particulars of Claim as support of our alleged indebtedness to the Applicant.*

13. Upon perusal of the papers herein it became apparent that the signatory of Annexure "B", one Fredie Botha, made no allegation that he is an authorized signatory of the Applicant.

14. In the premise I submit that the Certificate of Balance, Annexure "B" is of no consequence and does not prima facie establish any indebtedness.

15. In the premise I submit that the 1st claim stands to be dismissed with costs on this basis alone."

[14] The defences raised in respect of claims two and three, *i.e*. the two instalment sale agreements, were the same as in claim one. The defences to the suretyship agreement was the same as in the previous claims save that it was alleged, in defence of this claim, that the said Ferdie Botha made no allegation that he was a manager or director of the applicant.

[15] The defendants arrived at the following conclusion:

*"**CONCLUSION:***

37. In the premise I submit that there is no evidence before Court pertaining to our indebtedness as alleged or at all.

38. We are prejudiced I having to respond to the Applicant's claim as it stands due to lack statements.

39. Payments were made to the Applicant and can we not as it stands establish our indebtedness and extent thereof, to the Applicant.

***WHEREFORE** we pray that the Applicant's Application for Summary Judgment be dismissed with costs."*

[16] It was contended both in the heads of argument and oral address by the plaintiff's counsel that the opposing affidavit to the application for summary judgment did not dispute the following:

"4.2.1 The first defendant and the Plaintiff entered into and concluded a loan agreement and this is not disputed.

4.2.2 The First Defendant and the Plaintiff entered into and concluded two (2) Instalment Sale Agreements and this is not disputed.

4.2.3 The terms and conditions of the abovementioned agreements are not disputed.

4.2.4 The First Defendant's contractual obligations and in particular that the First Defendant was obliged to make certain monthly payments to the Plaintiff are not disputed.

4.2.5 It is not disputed that the Plaintiff complied with its contractual obligations.

4.2.6 The Second Defendant's liability towards the Plaintiff is not disputed.

4.2.7 The Plaintiff's remedies, should the Defendants breach any of the terms and conditions of the abovementioned agreements are not disputed;

4.2.8 It is not disputed that the Plaintiff delivered letters of demand to the Defendants and that despite delivering the same no further payments were received."

[17] Neither in writing nor in oral argument did the defendant's counsel contest or dispute this submission made on behalf of the plaintiff. The issues were narrowed to the only issue raised by the defendants, namely, the validity of the various certificates of balance annexed to the particulars of claim. The said Ferdie Botha signed the three certificates of balance in his capacity as management accountant[1]. The issue raised by the defendants was that no allegations whatsoever where made that Mr Botha was duly authorised to issue the certificates.[2] The certificates were therefore not sufficient for purposes of the provisions of the various written agreements and were fatal to the plaintiff's case.

[18] In support of his argument, the defendant's counsel referred to the case of **Nedperm Bank Ltd v Verbri Projects CC[3].** This decision does not assist the defendants as it was stated in that case that it was not necessary for the plaintiff to rely upon the certificate to have established the indebtedness relied upon. A defendant in summary judgment proceedings *"cannot sit back supinely and justifiably say: 'Well you took my documents. I don't know whether I owe you any money. I might, I might not, but don't give summary judgment against me because when it comes to a trial I might be able to find in the documents that you provide some basis for saying that I don't owe you any money anyway'. That is not good enough if one has to demonstrate bona fides as the Rule requires, nor is it good enough if one has to set out one's defence fully by way of facts as opposed to speculative oppositions"*[4]

[1] Annexures "E1", "E2", "E3" pages 81 to 83 of the indexed bundle
[2] Paragraph 12 page 7 of the respondents heads of argument
[3] 1993 (3) All SA 215 W
[4] Nedperm page 223 paragraphs B-D

[19] Uniform Rule 32 (3) (b) provides that:

Upon the hearing of an application for summary judgment the defendant may-

(a) …….

(b) *Satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."*

[20] In paragraph 39 of the opposing affidavit the defendants state that *"Payments were made to the applicant and can we not as it stands establish our indebtedness and extent thereof, to the applicant."* This represents a bare denial which does not disclose fully the nature and grounds of and the material facts relied upon by the defendant for his defence. Summary judgment is granted on supposition that the plaintiff's claim is unimpeachable because the defendant has no proper defence.[5] It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.[6]

[21] Despite the provisions of clauses 22.2 of the developmental term loan agreement and 18.2 of the two instalment sale agreements the borrower, as he was obliged to do, failed to adduce evidence in rebuttal of the correctness or accuracy of any aspect of the content of the certificates of balance. The defendants were

[5] Maharaj v Barkley's National Bank Ltd 1976 (1) SA 418 (A)
[6] Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) para 31

content with the allegations that Ferdie Botha did not allege that he was an authorised signatory of the applicant. These defences are devoid of substance and failed to comply with the requirements of Rule 32 (3) (b). I am of the view that no plausible and bona fide defence was established to stave off the application for summary judgment. In the circumstances, the plaintiff is entitled to summary judgment as claimed in the notice of set down. The costs should follow the event.

[22] I therefore make the following order:

Order

An order is granted in terms of prayers 1, 2, 3, 4, 5 and 6 of the notice of application.

MHLAMBI, J

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