

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

Case No.: 3048/2015

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

And

JOROY 0004 CC t/a UBUNTU PROCUREM

1st Defendant

(Reg No 2003/078533/23)

EDNA HELEN HILDA CAMPANIE

2nd Defendant

HEARD ON: 3 SEPTEMBER 2015

DELIVERED: 17 SEPTEMBER 2015

MOKOENA, AJ

- [1] This is an application for summary judgment for: (a) payment in the sum of R140 518,02; (b) interest at a rate of 15.65% per annum from 25 November 2014 to date of payment; (c) costs of suit on an attorney and client scale and (d) further and/or alternative relief. The claim is against the first defendant as principal debtor (being a contracting party to a loan agreement) and the second defendant (as surety and co-principal debtor). The application is opposed.
- [2] On or about the 27 July 2012, and at the plaintiff's Brandwag branch, the plaintiff entered into a written application and credit agreement ("the agreement") with the first defendant in

terms whereof plaintiff granted a business current account facility to the first defendant. Being a transactional account, the plaintiff would, from time to time, lend and advance monies to the defendants under account number 422 204 773. Again, on the 27 July 2012 the plaintiff entered into a written deed of suretyship for the maximum amount of up to R500 000,00 (five hundred thousand rand) with the second defendant as surety and co-principal debtor.

- [3] The issue to be determined is whether the plaintiff is entitled to summary judgment on the papers as they stand.
- [4] Counsel for the defendants took four points in *limine*. The first is that in its particulars of claim, plaintiff fails to aver and/or allege, as it is obliged to do, in terms of Uniform Rule of Court Rule 18(6), whom concluded the alleged agreement with the first defendant and contended that the agreement was not signed by the plaintiff or any person on its behalf.

It is clear *ex facie* the agreement annexed to the particulars of claim that it was signed on behalf of the plaintiff by the plaintiff's representative (SBSA representative) stating her full names and designation. Accordingly, this submission is not sustainable.

- [5] The second was that plaintiff's attempt to or indeed attach to its present application for summary judgment an annexure other than a liquid document, which plaintiff is not entitled or

permitted to do in summary judgment proceedings and which alone, entitles the court to dismiss the present application for summary judgment with an appropriate order as to costs is an abuse of process and is not permitted.

The plaintiff did not attach any documents to its application other than an affidavit. Paragraph 4 of the affidavit attached in support of the summary judgment application confirms the cause of the plaintiff's action together with the amount claimed in the summons and reads as follows:-

"I verify the cause of action and the amount claimed by the applicant to be a certificated amount of R140 518,02 (one hundred and forty thousand five hundred and eighteen rand and two cents) as per annexure "H" on the plaintiff's particulars of claim."

The said annexure "H" on the plaintiff's particulars of claim is a certificate of balance which plaintiff relies on to prove its claim against the defendants. It was not attached to this application but was merely referred to in the affidavit attached in support of this application. Accordingly, this submission is also not sustainable.

- [6] The third was, in its action instituted by way of combined summons, plaintiff only sought payment of "costs of suit in the sum of R200 plus sheriff fees" while now moving in the application for summary judgment plaintiff seeks a different order of costs being "costs of suit on an attorney and client scale". Counsel for the defendants submitted that the

present application can for this reason alone, be dismissed with costs.

While I agree with defendant's counsel that an application for summary judgment or the hearing of such application is not the appropriate forum for allowing the plaintiff to amend its papers, cause of action or relief sought, *in casu*, the plaintiff did not formally seek an amendment of the relief sought and in my view, this is no reason *per se* for refusing summary judgment. In summary judgment applications, the plaintiff can only seek relief as is prayed for in the summons. Accordingly, this submission is not sustainable.

- [7] The fourth was that in its affidavit in support of the present application the deponent for plaintiff states that "... in my opinion, the respondents do not raise a *bona fide* defence to the applicant's claim ..." while the heading of the affidavit neither provides for an applicant or respondent, deponent for plaintiff should have rather stated, as is required by the Rule 32, that "... that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for purpose of delay..."

It is clear that the use of the word "applicant" and "respondent" is purely an error and in my view, anyone reading these papers will in no doubt realise that the use of the words "plaintiff" and "defendants" were intended. These are the type of errors which were dealt with in **Standard**

Bank of South Africa Ltd v Roestof 2004 (2) SA 492 at 496B-C.

The points *in limine* are therefore dismissed.

- [8] Turning to the merits of the present application, first and second defendant have not only filed an answering affidavit in opposition to the present application for summary judgment, but have also served and filed a notice in terms of Uniform Rule of Court 23(1) to the plaintiff's particulars of claim notifying the plaintiff that defendants hold the view that plaintiff's particulars of claim is vague and embarrassing due to a number of technical deficiencies and giving the plaintiff an opportunity to rectify same. Counsel for defendants submitted that it is open for defendants in summary judgment proceedings not only to oppose such application by way of the filing of an answering affidavit addressing the merits of plaintiff's claim, but also base their opposition to such application on the excipiability or irregularity of the plaintiff's claim as formulated.

- [9] Uniform Rule of Court 23(1) states that:

"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (b); Provided where a party intends to take an exception that

a pleading is vague and embarrassing he shall **within the period allowed** (my emphasis) as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided ...”

In this case the summons provide that first and second defendants had 20 (twenty) days after filing and serving their notice of intention to defend to file with the Registrar and serve upon the plaintiff a plea, exception, notice to strike out, within or without a counterclaim.

- [10] The first and second defendants filed and served their notice of intention to defend on 14 July 2015 and as such had until 12 August 2015 to file and serve their exception. The defendants only filed and served their notice of exception on 14 August 2015. Accordingly, there was no proper exception and the submission by defendant’s counsel that the defendants can still persist with their exception in these proceedings cannot be correct.

- [11] Counsel for plaintiff submitted that the first and second defendants (a) have not brought the payments under the credit agreement up to date and (b) have received a loan from the plaintiff and have failed and/or neglected to pay it back.

- [12] It is important to mention that plaintiff’s cause of action in its particulars of claim is mainly premised on the following averments: that the plaintiff “... duly represented, entered

into a written application and credit agreement (“the Agreement”), with the first defendant, duly represented by the second defendant ...”; that “... A true electronic copy of the written portion of the credit agreement are attached hereto and marked annexure “C”...”; that “... Plaintiff would from time to time cause to be delivered, to the first defendant, statements reflecting the current outstanding balance/amount due and payable by the first defendant and further reflecting when such periodical payments are due, copies of such statement results, are attached hereto marked annexure “G”, ... it can be seen that no positive payments were made toward the said account as from this said date;” [as stated in paragraph 6 of the particulars of claim].

- [13] The relevant annexure “G”, titled “Account Analysis Enquiry Result, reflected certain information such as (a) latest balance, (b) overdraft rate, (c) interest amount, (d) commitment active, (g) date last deposit and (h) expiry date.

Contrary to what has been alleged in the plaintiff’s cause of action as stated above, the content of annexure “G” does not appear to record or reflect for example the (a) amount due and payable by the first defendant, (b) periodical payment, (c) when such periodical payment are due, but rather pertains to the resolution of an account analysis enquiry wherein the total full outstanding amount as claimed in the summons is reflected.

- [14] Annexure “G” does not reflect the full transaction history and as such it is even difficult for this court to decipher from its contents how the amount of R140 518,02 was computed.

It is appropriate to mention that annexure “G” has (a) the date of last statement as 21.11.2014, (b) date of next statement as 21.12.2014 and (c) date of last deposit as 22.11.2014 being the day after the last date of statement issued. It is therefore clear *ex facie* annexure “G” that monies were deposited on the 22.11.2014 however, the amount deposited has not been reflected. The statement of the 21.12.2014 was not attached and as such it is not clear whether the defendants did pay on the 19 December 2014 or not.

- [15] Counsel for first and second defendant made the following submissions:

(a) that the defendants deny having failed and/or neglected to make any periodical payment to plaintiff as a result of which, the full outstanding balance as alleged, is due and payable.

I have already dealt with this this submission above.

(b) The first defendant has made at least five (5) separate payments to plaintiff on the account totalling R10 000,00 and R2 000,00 on 19 December 2014 being the date

after issue of the certificate of balance (annexure “H” to the plaintiff’s particulars of claim) and therefore disputes the correctness of the amount claimed by the plaintiff in these proceedings.

This allegation has not been substantiated and accordingly is not sufficient proof that payment has been made by the defendants to the plaintiff.

(c) The first defendant is in breach of the agreement in terms of which the facility was extended to it by the plaintiff or that first defendant or second defendant have breached any agreement entitling the plaintiff to claim the full balance.

(d) The defendants have not received any notice from plaintiff (prior to receipt of the section 129 notice) claiming that they are in breach or default of any agreement.

[16] In conclusion, counsel for defendants submitted that in the light of the above submissions, the defendants have a *bona fide* defence to the alleged claim of the plaintiff and requested that the plaintiff’s application be dismissed with costs.

[17] I pause to mention that clause 6.1 of the credit agreement states as follows:

“This loan has no fixed term but is reviewable annually and is payable in full on demand in the circumstances outlined in clause 9 of Part B.”

Clause 9 of Part “B” of the agreement to the extent relevant, reads as follows:

“9. Default

9.1 Default in terms of this Agreement will occur if:

9.1.1 you fail to make payment, in full, on or before the payment date, of any amount owing by you; or

9.1.2 you breach this Agreement, or any other Agreement between us, and you fail to remedy the breach within the time period specified in our written notice to you; or

9.1.3 ...

9.1.4 ...

9.1.5 ...

9.1.6 ...

9.1.7 ...

9.1.8 ...

9.1.9 ...

9.1.10 ...

9.1.11 ...

9.1.12 any surety in respect of this Agreement:

9.1.12.1 fails to satisfy their suretyship commitment when requested to do so; or

9.1.12.2 commits any breach of their obligations to us, whether as surety or otherwise, or

9.1.12.3 ...

9.1.13 ...

- 9.2 If you default in your obligations under this Agreement we will:
 - 9.2.1 provide you with written notice of such default requesting that you rectify the default, and/or
 - 9.2.2 suspend the credit limit, or reduced the credit limit, or your account and/or
 - 9.2.3 withdraw the credit limit, by giving you 10 (ten) business days written notice; and/or
 - 9.2.4. ...
 - 9.2.5 ...
 - 9.2.6 ...
- 9.3 ...
- 9.4 In the event of default, we may, at our election and without affecting any other rights that we may in terms of this agreement or otherwise, recover from you payment of all amounts owing under this agreement (whether then owing or not) by adhering to the default procedure described above.
- 9.5 The above default clauses and default procedure will not apply if:
 - 9.5.1 you generally do or omit to do anything which may cause us to suffer any loss or damage; or ..."

[18] Plaintiff did not provide this court with periodical statements showing that the defendants were in breach of their payment obligations thereby entitling it of immediate payment of the full outstanding balance. It also failed to allege having complied with its own default procedures.

[19] In essence, the first and second defendant's contention is that plaintiff's pleadings are technically incorrect and rely on the decision of **Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty)**

Ltd & Another 1998 (1) SA 679 (O) where it was stated at 684A that:

“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.”

In **Mowschenson and Mowschenson v Mercatile Acceptance Corporation of SA Ltd** 1959 (3) SA 362 (W) at 366E-F it was said:

“The remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the court to the defendant. That can only be done if there is no doubt but that the plaintiff has an unanswerable case. If it is reasonably possibly that the plaintiff's application is defective or that the defendant has a good defence, the issue must, in my view, be decided in favour of the defendant.”

[20] I am of the view that the plaintiff has a challenge with annexure “G” which is a critical component of its pleadings. The document does not reflect the information it purports to contain and as such renders the plaintiff's application reasonably possibly defective. This court cannot grant summary judgment considering that the plaintiff's pleadings are not entirely technically correct and this is prejudicial to the defendant.

[21] It follows therefore that having arrived at this conclusion, it does not become necessary for this court to determine whether the defendant has disclosed a *bona fide* defence in the opposing affidavit because, once a court arrives at a conclusion that there is a reasonable possibility that the plaintiff's case is defective, the application for summary judgment ought to be dismissed. See **Mowschenson** *supra*.

[22] In the circumstances the following order is made:

(a) The application for summary judgment is dismissed with costs.

(b) Defendant is granted leave to defend the action.

R. MOKOENA, AJ

On behalf of the plaintiff: Adv. P. C. Ploos van Amstel
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On behalf of the Defendants: Adv. C. Snyman
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