IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO.: EL 1/12

ECD 301/2012

DATE: 26 JUNE 2012

In the matter between:

STANDARD BANK OF S A LIMITED **Plaintiff**

vs

L B NOMPOZOLO **Defendant**

EX TEMPORE JUDGMENT

EBRAHIM ADJP:

1] This is an application for summary judgment in which the plaintiff seeks judgment against the defendant in the sum of R204 384.94 plus interest at the rate of 8% per annum calculated and compounded monthly together with costs on the scale as between attorney and client. The application is opposed by the defendant. I need to mention at the outset that the defendant has appeared personally to oppose and argue his opposition to the application.

2] The opposing affidavit filed by the defendant indicates that he is opposing summary judgment on various grounds. Some of these are procedural in nature while the others raise certain issues of law. First, the defendant contends that he was previously married in community of property on the 16th of August 1996 to Nikiwe Nomapehlu Hongo. In the opposing affidavit the Defendant also refers to the fact that she is his ex-wife but does not disclose on what date they were divorced. From the bar the defendant assured me that he and his ex-wife were indeed divorced. The defendant also indicates that he purchased the property at a time that he had not yet married his ex-wife and that the bond was registered on the 28th August 1996. In his submissions from the bar he alluded to the fact that the registration of the bond had taken place after he and his ex-wife were married. That does not appear from the opposing affidavit. The gist of his argument insofar as this opposition is concerned is that there has been a non-joinder of Nikiwe Nomphelo Hongo. The defendant has contended that since the property formed part of their joint estate during the period that they were married she should have been cited as a co-defendant in the action brought by the plaintiff. In his view the non-joinder, in this instance, was fatal to the application for summary judgment.

3] I have some difficulty in comprehending why the non-joinder in this instance should be fatal to the application for summary judgment. What is evident is, if the plaintiff has elected to proceed against one of a number of debtors without joining them all in the action, the plaintiff runs the risk that should it be unsuccessful against the particular defendant, whom it has brought to Court, it may then be precluded from obtaining appropriate relief against the remaining debtors. I am not sure on what basis, in this particular instance, the defendant contends that such non-joinder is fatal. He says that in his view it is fatal since if the property were to be sold in execution the non-joinder of his ex-wife would prejudice her in that she would then quite clearly be placed in a position where part of her assets were being liquidated without her having been joined in this particular action. I express no final view in this regard, but it seems to me that were such a situation to arise his ex-wife would clearly have an action against the plaintiff for any prejudice that she may have suffered in this regard. As I have said previously, I cannot see in this instance why such non-joinder would be fatal and I do not find in favour of the defendant insofar as this issue is concerned.

4] A further point raised by the defendant is that the application for summary judgment served on him did not have annexed an affidavit as required in terms of Rule 32 of the Rules of Court. I note in this regard that the return of service, and I should mention that service was effected by the Sheriff of the Court, reflects that it was served on a certain 'Ms Z Sikweza, partner, ostensibly a responsible person and not less than 16 years of age and in control of and at the place of residence of Lindelwa Brian Nompozolo, Defendant/Respondent'. The return of service further states that a copy of the original was exhibited and a copy handed to the person after explaining the nature and exigency of the said process. It is clear from the return of service that what was served on the particular individual were the summary judgment and annexures and the affidavit in support of the application for summary judgment by James Anthony McKenna. The defendant's claim that the affidavit was not annexed rests purely on his disputing this. In my view there is no reason why the defendant could not have filed an affidavit by Ms Z Sikweza to indicate which documents had been served on her and that these documents did not include an affidavit in support of the application for summary judgment by James Anthony McKenna. I do not think that it is sufficient for the defendant merely to assert or to deny that something has taken place without providing the Court with something more when such facts or evidence is available to satisfy the Court that, *prima facie*, the issue being raised is one which casts doubt on the evidence or the facts placed before the Court in support of the plaintiff's case. I have no reason to doubt that the return of service submitted by the Sheriff of the Court is untruthful or that the Sheriff has failed to serve documents which he says he has served. There is no indication why an affidavit has not been filed by Ms Sikweza in elucidation of the contention that such an affidavit did not form part of the documents. The originals filed with the Court indicate that such an affidavit indeed exists and in the circumstances I accept that the affidavit was served on the defendant and this objection is not upheld.

5] The defendant has also raised the fact that the summons was served at another address. I am not sure what the relevance of this is, except that he indicates that it is not his *domicilium citandi et executandi*. But, he does not dispute, of course, that the summary judgment was served at the correct address. If the suggestion is that service of the summons at an incorrect address nullifies these proceedings, that is not an issue that has been pertinently raised by the defendant and I see no reason why I should determine that aspect as in my view it is not relevant to the question of determining whether summary judgment should be granted or not.

6] Finally, the defendant has asserted that he is not indebted to the Plaintiff in the sum of R204 384.94, but admits his indebtedness for R178 714.24. The defendant has made great play of the fact that the certificate of balance furnished by the plaintiff and dated 15th November 2011 differs from a letter written by the attorneys acting for the plaintiff in which they indicate that the outstanding balance is R201 680.57. This letter is dated the 16th November 2011, a day later than the certificate of balance. The defendant contends that the difference in these amounts means that the plaintiff is not entitled to obtain summary judgment. At the same time the defendant has indicated that the letter sent by the attorneys was not evidence. This was in response to a question from the Court that the letter disclosed that he was in arrears to the extent of R24 609.70. I regret the defendant cannot have his cake and eat it. If he disputes the letter is evidence and contends that the Court should not accept what is stated in it, I see no reason why the certificate of balance is then brought into doubt. It surely is acceptable to the Court as it is provided for in the bond agreement.

7] The defendant has also asserted that the summons does not disclose that he is in arrear, or more specifically that it does not indicate on what day or date he fell into arrear with the payments. What is interesting about this point is that the defendant has not stated specifically or even by implication that he is not in arrear with the payments on his bond. Indeed when pressed on this the defendant could merely say that the plaintiff was required to state on what date he had fallen in arrears with the payment of his bond and that in the absence thereof its claim for summary judgment should not be upheld.

8] I am not persuaded by this argument. In my view, the defendant has stated in unequivocal terms that he is indebted to the plaintiff in the sum of R178 714.24. That said, it means that the plaintiff on the basis of this admission would be entitled to summary judgment for that amount.

9] Before pronouncing finally on that, I need to say something in general terms insofar as summary judgment and opposing affidavits are concerned. Where a defendant seeks to oppose summary judgment the defendant may do so either by furnishing security to the plaintiff to the satisfaction of the Registrar for any judgment including costs or satisfy the Court by way of an affidavit, or in certain instances, with the leave of the Court, by oral evidence, that he has a *bona fide* defence to the action. The defendant is required in asserting that he has a *bona fide* defence to fully disclose the nature and grounds of the defence and the material facts relied upon therefor. This is certainly lacking in the affidavit filed by the defendant. When it is stripped of the procedural objections that were raised in respect of the issues that I have mentioned, and when one addresses the question as to what the defence of the defendant is to the claim, the affidavit reveals that no such defence has in fact been disclosed. It is not enough for a defendant to come along and merely say I do not owe the amount. That is clearly insufficient and does not comply with the Rules.

10] In *Standard Bank of SA Ltd v Friedman 1999 (2) SA* 456 at 461E-J the Court said the following*:*

> 'A defendant confronted with an application for summary judgment can elect to give security to the plaintiff to the satisfaction of the Registrar of any judgment including costs that may be given or satisfy the Court by affidavit that he has a *bona fide* defence to the action. The affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon for it (Rule 32(3)*(a)* and *(b)* of the Uniform Rules of Court).
>
> In this matter the defendant has elected to resist the summary judgment application by filing an opposing affidavit as envisaged in Rule 32(3)*(b)*.
>
> The very least that is required of the defendant is to set out in

her affidavit her defence and the material facts upon which she relies with sufficient particularity and completeness to enable the Court to decide whether a *bona fide* defence to the claim has been established.

In *Maharaj vs Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426B-C Corbett JA, as he then was, says:

> "All that a Court enquires into is: *(a)* whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(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 both *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."

It therefore follows from the above that where the defendant has not fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, to an extent where the Court is not able to determine on the facts disclosed that the defendant has a *bona fide* defence which is good in law, then the Court should grant summary judgment.'

11] Of further relevance is what was said in *Breitenbach vs Fiat S A (Edms) Bpk* 1976 (2) (TPD) 226 at 229E-H. In that case the Court was quoting from a judgment of Miller J in *Shepstone vs Shepstone* 1974 (2) SA 462 (N), which reads as follows:

> 'I quote the following passages from the judgment of Miller J, in that case, at p467E-H:
>
> > "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."
>
> That is the first quotation and the second is:

> "...... a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial."

The discretion under sub-rule (5) should not be exercised against the plaintiff on the basis of mere conjecture or speculation. It should be exercised on the basis of material before the Court. We were referred by counsel to a *dictum* by Erasmus, J, in *Jacobsen van den Berg SA (Pty) Ltd vs Triton Yachting Supplies* 1974 (2) SA 584 (O) at p. 589. The learned judge said this:

> "Summary judgment proceedings, however stringent, in a sense constitute a call for honesty, and a discretion given to a Court in terms of the Rule to give leave to a defendant to defend, although such defendant has not complied with Rule 32(3)*(b)* should only be exercised when the Court feels an injustice would be done if it does not exercise its discretion."

I would respectfully question the appropriateness of the phrase "*would* be done" in that passage. It seems to me that if, on the material before it, the Court sees a reasonable possibility that an injustice *may* be done if summary judgment is granted, that is a sufficient basis on which the exercise its discretion in favour of the Defendant.'

12] On what has been placed before me I am not persuaded that an injustice would be done should summary judgment be granted. I am also not persuaded that the defendant has been open and frank with the Court and disclosed in any manner whatsoever what his defence is to the claim of the plaintiff.

13] In the circumstances I am disposed to exercising my discretion to grant summary judgment in favour of the plaintiff and summary judgment is granted in the following terms:

There is summary judgment against the defendant for:

1. Payment of the sum of R178 714.24;
2. Payment of interest on the capital sum of R178 714.24 at the rate of 8% per annum calculated and compounded monthly in arrears from the 15th November 2011 to date of payment, both days inclusive;

3. Costs of the summary judgment application;
4. An order declaring the hypothecated property referred to below to be executable for the said sums as contemplated by the provisions of Section 26(3) of the Constitution of the Republic of South Africa, Act 108 of 1996, the facts relied upon by the Plaintiff appears above, entitling the Defendant to the order sought namely:

   Portion 25 of the farm Cove Ridge Estate No. 965, Division of East London, Province of the Eastern Cape; In extent 8,5653 hectares, and which property is held by Defendant in terms of Deed of Transfer No. T4541/1996; Subject to the conditions therein contained and especially to the reservation of rights to minerals, together with any buildings or other improvements thereon.

5. Defendant is granted leave to defend the balance of plaintiff's claim in the sum of R25 670.70 together with interest thereon.

JUDGE Y EBRAHIM
ACTING DEPUTY JUDGE PRESIDENT, BHISHO HIGH COURT