IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 28031/09

In the application between:

NEDBANK LIMITED PLAINTIFF

and

SQUARE METRE DEVELOPMENT (PTY) LTD 1st DEFENDANT

(REGISTRATION NO: 2004/028997/07)

MARGARETHE VAN RENSBURG 2nd DEFENDANT

BRENT VAN RENSBURG 3RD DEFENDANT

MANDIE JANSEN 4th DEFENDANT

JUDGMENT

[1] The plaintiff, Nedbank Limited, sued the first defendant as principal debtor and the second, third and fourth defendants as sureties for payment of R718 309.39, pursuant to the first defendant's alleged failure to comply with the terms of a loan agreement, secured by a mortgage bond, interest and costs.

[2] The defendants all entered appearance to defend and the plaintiff applied for summary judgment, and the defendants filed affidavits opposing the application.

[3] The first point raised by the defendants is that the plaintiff is non-suited in these proceedings because section 129 of the National Credit Act, Act 34 of 2005 (hereinafter referred to as *"the NCA'),* has not been complied with.

[4] Mr Van den Berg, who appeared on behalf of the plaintiff, argued that the NCA is not applicable in this case <u>alternatively</u> that section 129 was in fact complied with.

[5] The applicability of the NCA to juristic persons is provided for in section 41(a) and (b) of the NCA, which reads as follows:

> *"Subject to sections (5) and (6) this Act applies to every credit agreement between parties dealing at arms length and made within or having an effect within, the Republic, except-*
>
> *(a) 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);*
> >
> > *(ii) ...*
> >
> > *(iii)...*
> >
> > *(b) A large agreement, as described in section 9(4) 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 determined by the Minister in terms of section 7(1)."*

[5] The threshold value determined by the Minister in terms of section 7(1) is a million rands as determined by the Minister in Government Notice 713 in Government Gazette 28893 of 1 June 2006.

[6] Section 9(4) defines a large agreement as including a mortgage agreement (irrespective of its size).

[8] The alleged outstanding amount is due in terms of a mortgage loan which renders it a iarge agreement owed by a juristic person. I therefore conclude that the National Credit Act is not applicable to the loan advanced by the plaintiff to the first defendant. It is therefore unnecessary for me to decide whether section 129 has been complied with.

[9] The second point raised by the defendants is that the amount claimed is *"not liquid".* This is explained by the defendants on the basis that the principal debtor has three accounts with the plaintiff under the following account numbers:

9.1. [………………….];
9.2. [………………….]; and
9.3. [………………….].

[10] The amount claimed, so the defendants contend, is the aggregate owing on all three accounts and the amount outstanding is not owing on account […….]; on which the plaintiff's claim is ostensibly based. Since payments were made on the other accounts in excess of the principal debtor's monthly obligations, such excess ought to have been allocated to this account, which, I assume they contend, would render the account not in arrears.

[11] A *liquidated amount in money"* as required by Rule 32(1)(b) is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment. (See **Lester investments (Ptv) Ltd v Narshi** **1951 (2) SA** 464 **(C); Fatti's Engineering Co** (Ptv) **Ltd** v **Vendick Spares** (Ptv) Ltd 1962 (1) SA 736 (T); Botha v W Swansen & Company (Ptv) Ltd 19S8 **(2) PH F 85 (CPD); Commercial Bank of Namibia Ltd v Trans Continental Trading Namibia 1992 (2) SA 66 (NmHC).)**

[12] The plaintiff's claim in this case is based on the amount outstanding in terms of a mortgage bond and is claimable by way of a certificate of balance. A dispute as to the amount outstanding does not render the claim illiquid for purposes of summary judgment.

[13] The *gravamen* of the defendants' case on the merits is that payments made were allocated to

other accounts and ought to have been allocated to the accounts sued upon by the defendants herein.

[14] The defendants do not attempt to identify such payments or quantify which amounts ought to have been so allocated.

[15] While it is not incumbent upon the defendant to formulate his / her opposition to the summary judgment application with the precision that would be required in a plea nonetheless when he / she advances his / her contentions in resistance to the plaintiff's claim he / she must do so with a sufficient degree of clarity to enable the court to ascertain whether he / she has deposed to a defence which, if proved at the trial, would constitute a good defence to the action. See *Farlam Fichard and Van Loggerenberg* *Erasmus : Superior Court Practice* *B1-222-223*

[16] In **Breytenbach v Fiat 1976 (2) SA 226 (T) at 230** G - H the Full Bench of this division per Colman J held:

> *"It is difficult to imagine a balder statement of the defence of payment than that which the defendant had put forward. Payment, it may be remembered, is a defence in respect whereof the onus of proof at the trial could have been on the defendant. He would have had to deaf with the manner in which he discharged his obligation to pay over a period an amount of excess of R36 000.00; or if it was his case that a lesser sum had become payable by him, he would have had to say why. In his affidavit he does not say that he paid the rentals monthly as they fell due; he does not say when or how he made the payments relied upon or what their amounts were. What he has really done is to state the nature of his defence but not the facts relied upon in support of it, which were, presumably a series of payments by him. The defendant does not even allege that he had paid all the rent which according to the plaintiff's particulars of claim became payable to it. He contents himself with the allegation that he had paid the plaintiff all that it due to it without indicating what he concedes to have been due. " due. "*

[17] The closest which the defendants came to identify those payments is a reference to annexure "C", a loan account statement of account number […………]; which shows that even that account is in arrears to the amount of R82 223.73 and that payments made into that account were not made monthly but sporadically in round figures as and when it suited the first defendant to make such payments. Those payments did not bring that account up to date. If anything, the reference to that statement disproves the defendant's oniy possible defence.

[18] Lastly it was argued on behalf of the sureties that the deeds of suretyship do not comply with section 6 of the General Law Amendment Act, Act 50 of 1956, in that they do not expressly refer to the account on which the plaintiff bases its action. All three of the deeds of suretyship provide as follows in the first paragraph thereof:

> *"In consideration of Nedbank Limited ... allowing Square Metre Development (Pty) Ltd ... banking facilities, subject to the terms and conditions hereinafter set out I /we the undersigned... (name of surety) ... bind and oblige myself / ourselves jointly as well as severally as surety(ies) and co-principal debtor(s) in solidum for the repayment on demand of all or any sum or sums of money which the debtor may now or from time to time hereafter owe or be*
>
> *indebted to the bank, its successors or assigns whether such indebtedness be incurred by the debtor in the debtor's own name or in the name of any firm under which the debtor may be trading and whether solely or jointly with another or others or in partnership or othewvise and whether such indebtedness arises from money allegedly advanced or hereafter to be advanced or from promissory notes or bills of exchange already or hereafter to be made, accepted or endorsed or by virtue of any individual joint suretyship or guarantee or bond or pursuant to any cession or assignment from third parties or otherwise howsoever, including interest, discount, commission, legal costs incurred or to be . incurred on an attorney-client scale including collection commission, stamps and all other necessary usual or incidental charges and expenses..."*

[19] The account upon which the plaintiff's claim is based herein, is clearly covered by the

aforesaid description. It has been held in **<u>industrial</u>** **<u>Development Corporation of SA</u>** (Ptv) **<u>Ltd v Silver</u> 2003 (1) SA 365 (SCA)** that even the absence of the name of the principal debtor and the incorporation by reference to another agreement does not render the deed of suretyship invalid in terms of section 6 of the General Law Amendment Act, 1956.

[20] I find that there is no substance in this defence either.

[21] In the premises I am of the view that summary judgment ought to be granted in favour of the plaintiff and I make the following order:

> *"Summary judgment is granted against the defendants, jointly and severally, the one paying the other to be absolved for:*
>
> > *1. Payment of the amount of R718 309.39;*
> > *2. Interest on the aforesaid amount at the rate of 14.15% per annum calculated daily from 2 January 2009 to date of payment;*
> > *3. An order declaring the following mortgaged property specially executable for the said sums and costs : Erf […………], Gauteng Province measuring 1040m^2 held by deed of transfer no. […………] subject to the conditions therein contained;*
> > *4. Costs of suit on the scale as between attorney and client to be taxed plus Sheriff's charges and collection commission as provided for in the mortgage bond.''*

P. ELLIS

ACTING JUDGE OF THE HIGH COURT