

18/9/2009

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

REPORTABLE

CASE NO: 31008/09

In the matter between:

FIRSTRAND BANK LIMITED
Trading *inter alia* as FNB HOME LOANS
(formerly FIRST NATIONAL BANK
OF SOUTHERN AFRICA LIMITED)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO	☐ YES ☒ NO
(3) REVISED.	☐ YES ☒ NO
2009/09/18 DATE	 SIGNATURE

PLAINTIFF

and

MOSTERT: HURBERTUS BRUYN

FIRST DEFENDANT

MOSTERT; LETITIA

SECOND DEFENDANT

JUDGMENT

MAVUNDLA J,

- [1] The plaintiff applies for summary judgment against the defendants for payment of the amount of R1, 269.021, 84 together with interest on this amount calculated at the rate of 11.65% per annum from 04 May 2009 of summons to date of payment, both days inclusive, together with further ancillary

relief. Nothing turns on the supporting affidavit for such application and I will therefore not mention same.

[2] In opposing the summary judgment application, the respondents filed their opposing affidavit wherein they raise a point *in limine* that the application is premature in that there is a *lis alibi pendens* between same parties under case number 4634/ 2008 wherein the same relief as in casu is claimed against the defendants.

[3] It is common cause that the plaintiff had issued summons against the defendants under case number 4634/ 2008 4634/ 2008 for the same relief as sought in casu. In the earlier case applicant brought an application for summary judgment. The defendants in that case filed their opposing affidavit.

[4] The defence raised in the opposing affidavit under case number 4634/ 2008 is that on 21 November 2007 the plaintiff duly represented by one Paul Walker, the professional manager of the applicant agreed telephonically with the second defendant that the amount owing by the defendants under bonds numbers B19984/2006 and B215912/2006, which two bonds are registered as security in favour of the plaintiff for the property ERF 649 be suspended or be held over until May 2008. It was further agreed that the defendant would resume paying the arrear instalments as from 1 June 2008. This agreement was

reached on the understanding that the defendants would during May 2008 receive payment of an amount of R500, 000. 00 from SARS. It was further contended in their opposing affidavit that the aforesaid summons were premature. Besides what I have stated herein, the defendants did not disclose any defence with regard to the merits.

- [5] In the present application for summary judgment besides the point *in limine of lis alibi pendent*, there is no other defence raised. This opposing affidavit was filed with registrar on 3 September 2009, after it had been served on 2 September 2009 . The summary judgment application was served with the registrar on 15 July 2009.
- [6] On the 7 September 2009 the plaintiff's attorneys of record served a notice of withdrawal of case number 4634/ 2008. The said notice of withdrawal was silent on the question of costs.
- [7] It is contended on behalf of the respondent that at the time when the application for summary judgment was initiated, the earlier action had not been withdrawn and therefore there was a *lis* pending. It is further contended that because the notice of withdrawal is silent with regard to the costs, therefore the point of *lis* still stands.
- [8] On behalf of the applicant, it is contended that the Court has a discretion to grant summary judgment, notwithstanding the fact

that the notice of withdrawal did not tender the costs. It is further submitted that having regard to the fact that essentially, but for the point of *lis pendent*, the respondent has in the previous summary judgment admitted its indebtedness to the applicant. It was further pointed out that once the previous action has been withdrawn, the respondent has no defence on the merits. It is further submitted that the contract provides, *inter alia*, per clause 16.3 that "The Bank may relax some of the conditions of the agreement or grant the Mortgagor an indulgence without affecting the validity of all the provisions of the agreement or prejudicing the rights of the Bank in any way." It is further submitted that with regard to the costs the respondent is entitled to as the result of the withdrawal, such costs, after taxation would be miniscule and would have to be set off against the amount owed by the defendants. It is submitted that under such circumstances, the Court, in the exercise of its discretion, should grant the summary judgment against the defendants.

- [9] It is trite that in order to successfully oppose a summary judgment application, the defendants need to satisfy the Court that they have a *bona fide* defence to the plaintiff's action by fully disclosing (a) the nature and grounds of their defence and the material facts upon which the defence is premised; (b) whether the facts relied upon are a defence against the whole

or part of the claim, vide *Maharaj v Barclays National Bank Ltd.*¹

[10] The defence raised must not be merely technical ²and merely having the effect of delaying the claim of the applicant. Where the defence raised, if the matter were to go on trial, has a good prospects of successfully defeating the claim, then the Court in the exercise of its discretion will refuse to grant the summary judgment. Each and every case must be determined on its own facts.

[11] The parties were agreed that I should have regard to the affidavit that had been filed in the action that has since been withdrawn. As I have already indicated herein above, the only defence raised in that affidavit is that there was an agreement reached with one Paul Walker in terms of which the payments towards the bond repayment were deferred until the end of May 2008, and that the arrears would be brought up to date on 1 June 2008. According to the summons in casu, that were

¹ 1976 (1) SA 418 where at 426 A-C.

² vide *Lohrman v Vall Onwikkelingsmaatskappy (EDM)* 1979 (3) SA 391 (T) at 393H-396A; *Trans-African Insurance C O. Ltd v Maluleka* **1956 (2) SA 273 (A.D.) at 278 F-G:**

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other had technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits." Vide also *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 WLD at 496 G – H.

issued on 25 May 2009, the defendants failed to pay the monthly instalments under the mortgage bonds thereby making the whole amount outstanding due and payable. Certainly the breach of payment can only be long after the 1 June 2008, on which latter date the defendants, according to their version in the previous case under case number 4634/08, would have been the date on which the arrears would have been brought up to date. It stands to reason that such arrears were never brought to date, thus causing a new breach. But besides, one of the terms of the agreement specifically provides that any indulgence granted would not prejudice the rights of the plaintiff.

- [12] Although the defence of *lis* at the time when it was raised, was good in law, but such defence has since fallen away as the result of the withdrawal of action under case number 4634/08. Were the matter to go to trial, there would be no valid defence that can be raised by the defendants, save for the counterclaim in respect of the costs which have not been tendered when the aforesaid case was withdrawn. I am aware of the decision that says that a counterclaim which is less than the amount claimed may be raised. However, when the court exercise its discretion, it must also have regard to the fact that a summary judgment is designed to avert causing a plaintiff who has a genuine claim against a defendant who has no defence at all to be subjected to an inordinate delay as a result of an unnecessary and protracted trial, with the concomitant expenses of trial.

[13] I am of the view that the defendants do not have a defence to the plaintiffs case. On their own admission, in the previous opposing affidavit, they are indebted to the plaintiff. I have already expressed my view, that the alleged agreement of deference of the payments until end of May 2008 subject to the bringing up to date of the arrears on 1 June 2008, is no valid defence to the plaintiff's claim. The defence of *lis*, were I to refer the matter to trial would not be sustained since the relevant *lis* has been withdrawn. In conclusion, I am of the view, in the exercise of my discretion, in the circumstances of this case, I should not prolong the inevitable and I should grant the summary judgment.

[14] In the result I make the following order:

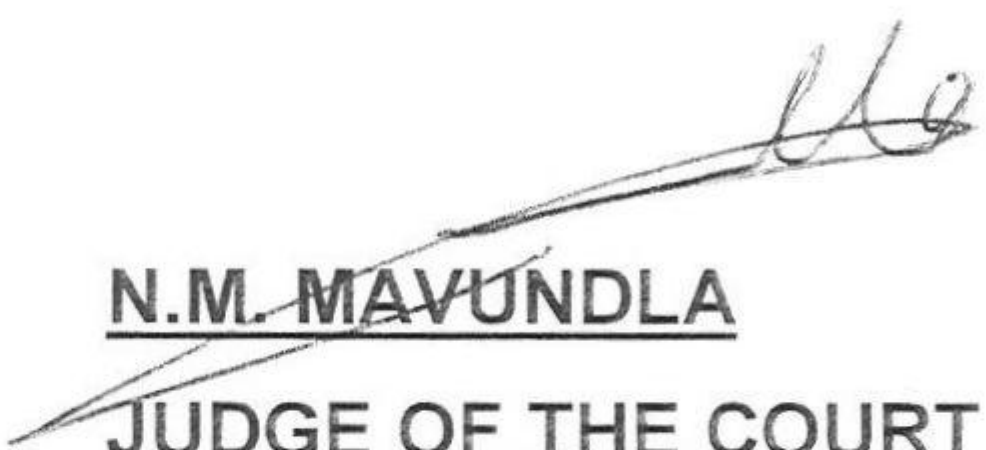
1 That summary judgement in favour of the plaintiff is granted against the defendants, jointly and severally, the one paying the other to be absolved for:

1.1 Payment of the sum of R1, 269, 021. 84

1.2 Interest on the aforesaid amount at the rate of 12.65% per annum compounded daily and capitalised monthly in terms of the Mortgage Bond, from the 15th April 2009 to 3 May 2009 and at the rate of 11.65% from 4 May 2009 to date of payment, both dates inclusive;

1.3 ERF 649, Potchesftroom Township, Registration Division IQ, North West Province, Measuring 2855 (Two Thousand Eight Hundred and Fifty Five) square meters and held under Deed of Transfer T80503/ 2005, is declared executable for the said sum.

1.4 Costs of suit on the scale as between attorney and client.



N.M. MAVUNDLA

JUDGE OF THE COURT

DATE OF HEARING	: 10/09/2009
DATE OF JUDGEMENT	: 18 /09/2009
PLAINTIFF'S ATT	:VAN HULSTEYNS ATTORNEYS
PLAINTIFF'S ADV	: L MEINTJES
DEFENDANT'S ATT	: E A L MULLER ATTORNEYS
DEFENDANT'S ADV	: P A VENTER