

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 4752/2008

In the matter between:

FIRST RAND BANK LIMITED

Applicant

and

JOHANNES HENDRIK SMITH

Defendant

HEARD ON:

21 AUGUST 2008

DELIVERED ON:

4 SEPTEMBER 2008

SUMMARY JUDGMENT

MOCUMIE J

[1] The applicant (plaintiff) instituted an action for summary judgment for the payment of the amount of R839 619,55 plus interest at the rate of 14,20% per annum from 1 June 2008 to date of payment. The applicant also seeks an order declaring the immovable property executable, namely Erf 278, Wesselsbron, district Wesselsbron, Province Free State held under Deed of Transport No T12261/1999 and costs of the suit on an attorney and client scale.

- [2] The claim arises from the defendant's failure to effect payment of the monthly installments on the dates as contemplated in the agreement between the parties.
- [3] The defendant's indebtedness to the plaintiff is not in dispute. This, notwithstanding, the defendant avers that the application is premature and contrary to the provisions of the National Credit Act 34 of 2005 (*"the NCA"*).
- [4] The defendant avers that on 7 December 2007 he issued a notice for an application in terms of section 86 of the NCA in the Magistrate Court, Wesselsbron. The application will be heard on 3 October 2008. Applicant is one of the parties.
- [5] Rule 32 of the Superior Court Rules of Practice provides that the defendant must satisfy the Court by an affidavit that he has a *bona fide* defence to the action against the plaintiff. Such affidavit must disclose fully the nature, grounds and the material facts relied upon for the establishment of such defence. See **Gilinsky and Another v Superb Launderers &**

Dry Cleaners 1978 (3) SA 807 (O) at 810A, Maharaj v Barclays National Bank (Pty) Ltd 1976 (1) SA 418 (A) at 426 B-D.

- [6] What “*fully*” in the context of Rule 32 means is not exactly the same in each and every case. Each case will be determined on its own merits. In Caltex Oil SA (Pty) Ltd v Webb & Another 1965 (2) SA 914 (N) at 916G the Court held that it is clear from all the decisions that in applications of this nature, the Court does not examine the evidence presented by the defendant in order to see whether there is a balance of probabilities that a defence will succeed. All that is required is that the Court should be satisfied that the defendant has presented, where the defence is based upon facts, all the material facts upon which his defence is founded and that they appear to disclose a *bona fide* defence. See too Traunt v Du Toit 1966 (1) 69 (O) at 70H-71.

I am in respectful agreement with the above authorities.

- [7] It is trite that the defendant is not, at this stage, required to demonstrate the correctness of the facts stated by him nor

does the Court at this stage have to weigh up or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. The test as shown in different cases is not whether the defence to be raised is likely to succeed or fail, but merely whether it is *bona fide*. See Muller and Others v Bophuthatswana Development Corporation Ltd 2003 (1) SA 651 (SCA) at 656.

[8] The defendant's case is that

- 8.1 the applicant acted contrary to the provisions of the NCA in that he failed to notify him in terms of section 129 prior to issuing summons against him;
- 8.2 the applicant, being a party in proceedings instituted in terms of section 86 of the NCA for debt review the applicant should not have brought this application.

[9] To my mind, the facts which the defendant relies on appear to disclose a *bona fide* defence. It follows that the defendant has set up a *bona fide* defence as to the plaintiff's claim as

required by R32 (3) so as to avoid summary judgment. Needless to state that summary judgment is a drastic remedy which holds serious consequences for a defendant. At worst, it has the effect of shutting the Court's door on a defendant. It also allows a Court to grant judgment for the plaintiff without hearing a defendant. Evidently such remedy can only be granted after careful consideration and where a Court is satisfied that a defendant does not have a bona fide defence.

[15] In the circumstance I make the following order:

15.1 Application for summary judgment is dismissed.

15.2 Defendant is granted leave to enter an appearance to defend.

15.3 Costs will be costs in the main action.

B. C. MOCUMIE, J