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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NUMBER: **2395/2022**
HEARD ON: **17 NOVEMBER 2023**
DELIVERED ON: **19 JANUARY 2024**

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Regional Magistrates: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ABSA BANK LIMITED

Plaintiff / Applicant

and

JAN HENDRIK GERHARDUS SAUNDERSON
(Identity Number: 7[...])

Defendant / Respondent

Coram: **Olivier AJ**

JUDGEMENT

OLIVIER AJ

INTRODUCTION:

1. This is an application for summary judgment in terms whereof the plaintiff / applicant (herein after referred to only as “***the plaintiff***”) approaches this Court

for judgment against the defendant / respondent (***“the defendant”***) in essentially the following terms:

- 1.1 Payment in the amount of R1 589 187.81 plus interest thereon at a rate of 9,75% linked, per annum, capitalized monthly from 21 September 2022 to date of payment;
 - 1.2 Payment in the amount of R3 339 659.28 plus interest thereon at a rate of 9,75% linked, per annum, capitalized monthly from 21 September 2022 to date of payment;
 - 1.3 Payment in the amount of R831 974.24 plus interest thereon at a rate of 9,75% linked, per annum, capitalized monthly from 21 September 2022 to date of payment; and
 - 1.4 Payment by the defendant of the costs of suit on a scale as between attorney and client.
2. The plaintiff's notice of application for summary judgment, dated 29 March 2023, contains further prayers for orders in terms whereof various properties would be declared specially executable as well as matters ancillary thereto, but these prayers did not form the subject of the argument before me at this time and I consequently did not have to determine same.
- It appears to be accepted that the relief sought by way of these prayers will be referred to open Court for determination in due course.
3. This application for summary judgment (herein after only referred to as ***“the Application”***) is opposed.

BACKGROUND:

4. The plaintiff issued Combined Summons against the defendant on or about 12 December 2022 and the defendant, subsequent to being served with a Notice of Bar, filed his plea on or about 3 March 2023.
5. The Application was filed on 29 March 2023 and served before Nxumalo J on 5 May 2023 who postponed the Application to 9 June 2023 and who ordered *inter alia* further that the defendant's answering affidavit should be delivered on/before 12 May 2023.
6. It appears to be common cause that the answering affidavit was served 2 (two) Court days out of time which prompted the defendant to lodge an application for condonation for the late filing of said answering affidavit on or about 18 May 2023 (herein after referred to as "***the Condonation Application***").
7. Subsequent to the filing of the answering affidavit on 16 May 2023, the application served before Nxumalo J again, who postponed the Application to the opposed roll of 17 November 2023 for argument and determination.

CONDONATION FOR LATE FILING OF ANSWERING AFFIDAVIT:

8. At the commencement of argument of the Application on 17 November 2023, I enquired from Mr van Tonder who appeared for the plaintiff, whether he intended pursuing any sort of argument in opposition to the condonation application since he indicated in his Heads of Argument on behalf of the plaintiff that the condonation application will not be opposed.
9. Mr van Tonder indicated that the plaintiff's position in the above regard had not changed and conceded that the plaintiff had not suffered any prejudice as a result of the late filing of the defendant's answering affidavit in the Application.
10. In view of the above and also in view of the fact that the answering affidavit was filed a mere 2 (two) Court days out of time, I can see no reason why the

required condonation should not be granted and I furthermore do not deem it necessary to spend any more time on the issue.

LEGAL POSITION IN RESPECT OF THE FOUNDING PAPERS:

11. It is common cause that **Rule 32** of the Uniform Rules of Court (herein after referred to only as “**the Rules**”) was amended during the course of 2019 and that the amended **Rule 32** came into operation on 1 July 2019.
12. It is furthermore common cause that probably the most significant amendment to **Rule 32** is that an application for summary judgment may now only be brought after a defendant's plea in an action had been filed as opposed to after notice of intention to defend was given according to what was required by the rule pre-amendment.
13. **Rule 32(1)** of the Rules sets out the restricted claims on which summary judgment may be applied for.
14. The parties appeared to be *ad idem* that, given the claims of the plaintiff on which the Application is based in this matter, the Application is competent.

It was certainly not argued to the contrary by any of the parties.

15. **Rule 32** furthermore stipulates that an application for summary judgment should be delivered within 15 (fifteen) days from date of delivery of a plea.¹
16. In this instance again, the parties seemed to be *ad idem* about the fact that the Application was served within the required period of 15 (fifteen days) as no argument to the contrary was offered.

¹ **Rule 32(2)(a)** of the Rules

17. **Rule 32** then proceeds in stipulating that an application for summary judgment should be accompanied by an affidavit deposed to by someone who can swear positively to the facts² and that said affidavit should:
 - 17.1 Verify the cause of action and the amount, if any, claimed;
 - 17.2 Identify any point of law relied upon as well as the facts upon which the plaintiff's claim is based; and
 - 17.3 Explain briefly why the defence as pleaded does not raise any issue for trial.
18. The above is a further significant departure from the provisions of **Rule 32** pre-amendment, as the "old" rule required that an affidavit in support of an application for summary judgment should be made by someone who can swear positively to the facts and such a deponent was then only required to:
 - 18.1 Verify the cause of action and amount, if any, that was claimed; and
 - 18.2 State that in his/her opinion a *bona fide* defence to the claims did not exist and that notice of intention to defend was given solely for the purpose of delaying the proceedings in the action.
19. From a cursory glance at the contents of the defendant's answering affidavit in the present matter, it appears that the defendant takes issue with the fact that the plaintiff's supporting affidavit does not meet the formal requirements of **Rule 32 (2)** of the Rules as the said supporting affidavit allegedly goes "*above and beyond*" what is expected of an affidavit in support of an application for summary judgment.

² See **Rule 32(2)(a)** of the Rules

20. It does however also appear that the deponent to the defendant's answering affidavit, despite correctly quoting **Rule 32(2)(a)** and **Rule 32(2)(b)** of the Rules in paragraph 3.4.2 of the answering affidavit, confuses the current provisions of **Rule 32** in respect of the contents of the supporting affidavit, with the provisions of **Rule 32** pre-amendment, where the said deponent states in paragraph 3.5 of the answering affidavit "... that an application for summary judgment must be supported by an affidavit which must comply with Rule 32(2)", which is essentially correct, but then in paragraph 3.7 states as follows:

"In order to comply with Rule 32(2) the verifying affidavit must be made by the applicant or by another person who can swear positively to the facts, contain a verification of the cause of action and the amount, if any, claimed, as well as contain a statement by the deponent that in his opinion there is no bona fide defence to the claim and that appearance to defend has been entered solely for the purposes of delay." (My underlining)

21. The last-mentioned underlined statement made by the defendant is of course not correct as this is not required by **Rule 32** post-amendment any longer.
22. Mr Jankowitz who appeared for the defendant in the Application did however pursue the fact that the supporting affidavit goes "*above and beyond*" what is expected of an affidavit in support of an application for summary judgment during his argument before me and I consequently deem it prudent to deal with this issue at this stage of my judgment already.
23. Mr Jankowitz, if I understood him correctly, primarily took umbrage with the fact that in the supporting affidavit in the Application, the plaintiff delves into the merits of the matter by discussing the validity of the defendant's plea and by attaching documents to the supporting affidavit which were not attached to the plaintiff's particulars of claim and that the plaintiff, in doing so, creates a "*mini-trial*" which in essence defeats the purpose of summary judgment proceedings.

24. **Rule 32(2)(b)** of the Rules specifically states as follows:

“The plaintiff shall, in the affidavit referred to in sub-rule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff’s claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.” (My underlining)

25. I hold the view that the above underlined of **Rule 32(2)** of the Rules, already indicate that a supporting affidavit in an application for summary judgment (post-amendment) should contain something more and deal with something more than what was required, or rather prescribed, in terms of **Rule 32(2)** pre-amendment.

26. I am fortified in my above view to a very large extent by a recent judgment penned by the learned Binns-Ward J in the matter of ***Tumileng Trading CC v National Security and Fire (Pty) Ltd***³ where, with reference to the contents of a memorandum published by the relevant task team of the Rules Board during June 2016, the learned Judge *inter alia* pointed out that the Rules Board reasoned as follows:⁴

26.1 That the requirement that a plaintiff should briefly explain in his/her founding affidavit why the defences proffered by the defendant do not raise triable issue(s), is necessary in order to allow the Court to consider the question whether a *bona fide* defence was raised, in a meaningful way;

26.2 That the above requirement will also remove the criticism that the defendant is expected to commit him-/herself to a specific version whilst the plaintiff is not similarly burdened; and

³ [2020] JOL 47144 (WCC). Also see the matter of ***Raumix Aggregates (Pty) Ltd v Richter Sand CC & Another*** [2019] JOL 45983 (GJ) at paragraph [22]

⁴ ***Tumileng Trading***, *supra* at pages 4 and 5

- 26.3 That the above requirement will also serve to minimize the possible temptation for a plaintiff to use the summary judgment procedure as a tactical move in order to have the defendant commit to a specific version under oath which could then serve as basis for cross-examination during trial.
27. The learned Judge then opined that the summary judgment procedure under the new regime, would mean that a plaintiff would be justified to lodge an application for summary judgment only if such plaintiff is able to show that the defence as pleaded in the defendant's plea, is not a *bona fide* defence and that it constitutes a sham defence.⁵
28. Further and with specific reference to the requirement in terms of the "new" rule that the plaintiff should state in his/her supporting affidavit why the defence raised in the defendant's plea does not raise a triable issue, the learned Judge sets out his considered view as to what this requirement entails and then remarks as follows:⁶

"It is required to explain why it is contended that the pleaded defence is a sham ... What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff's supporting affidavit now falls to be made in the context of the deponent's knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a 'formulaic' supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for purposes of delay." (My omissions and underlining)

⁵ *Tumileng Trading*, *supra* at page 8

⁶ *Tumileng Trading*, *supra* at page 10

29. It should be mentioned for the sake of completeness that the learned Binns-Ward J does then proceed in criticizing the purpose and impact of the amended rule and *inter alia* states as follows:⁷

“... a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principle case ... the exercise is likely therefore to conduce to argumentative affidavits, setting forth as averments assertions that could more appropriately be addressed as submissions by counsel from the bar. In other words it is likely to lead to unnecessary lengthy supporting affidavits, dealing more with matters for argument than matters of fact.” (My omissions)

30. The above criticism by the learned Binns-Ward of the summary judgment procedure post-amendment, seems to summarize the umbrage taken by Mr Jankowitz with the plaintiff's supporting affidavit in the present matter (the Application).
31. The above obviously leaves a Court, tasked with determining an application for summary judgment under the new regime, with a conundrum in that:
- 31.1 On the one hand it is clear that the amended **Rule 32** requires of a plaintiff to prepare and file a more comprehensive supporting affidavit⁸ in which the plaintiff is furthermore specifically required to state why the defences pleaded do not raise issues for trial and to substantiate said plaintiff's contentions in this regard in such a manner as to afford the Court a proper opportunity to determine whether the defences raised in the plea, are *bona fide* defences and not sham defences raised with the purpose of delaying proceedings; and

⁷ *Tumileng Trading*, *supra* at page 11

⁸ Than what would have been the position before the amendment to the Rule

- 31.2 On the other hand the Court in question might be put in a position where it is confronted with disputes of fact on the merits of the principle case between the parties which the Court is not expected to determine at the summary judgment stage.⁹
32. The above conundrum should furthermore be considered against the primary purpose of summary judgment proceedings namely “... *to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice.*”¹⁰
33. I could not find any authorities (nor was I referred to any), subsequent to the decision in ***Tumileng Trading***, which specifically deals with and answers the question as to what exactly should be contained in a supporting affidavit after the amendment to the rule¹¹ and more importantly what would be considered as being too much or as it was put by Mr Jankowitz “*over and beyond*” what could or should be expected of such a supporting affidavit.¹²

I could also not find any authority on the question as to whether a plaintiff (subsequent to the amendment to the rule), in an attempt to show that the defences pleaded in the defendant’s plea is not *bona fide*, should be allowed to attach documentation to the supporting affidavit as proof of the contentions made by the plaintiff or not.

This was indeed the case in the present matter and was one of the reasons for the concerns raised on behalf of the defendant.

⁹ Also see the matter of ***Standard Bank of South Africa v Rahme & Another*** [2019] ZAGPJHC 287 (SAFLII Reference), at paragraph [8]

¹⁰ See ***Raumix Aggregates***, *supra* at paragraph [16]

¹¹ Except of course the requirements as set out in the rule itself

¹² This question is not dealt with or answered in the matter of ***Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd*** [2020] ZAGPPHC 808 (SAFLII Reference)

34. It is correct that **Rule 32(4)** of the Rules provides as follows:

“No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in sub-rule (2)...” (My omissions)

The existing authorities in respect of the above **Rule 32(4)** that I could find, however all date prior to the amendment to **Rule 32** and are not of much assistance in answering the question as to whether a plaintiff should be allowed to tender evidence and specifically documentary evidence in his/her supporting affidavit in summary judgment proceedings in terms of the new regime.

35. I hold the view that, in view of the amendment to **Rule 32** and specifically in view of the fact that more is expected of a plaintiff in summary judgment proceedings post-amendment, a more liberal approach is necessary in as far as the allowance of additional evidence is concerned as long as the evidence that is provided by the plaintiff serves only to support the contentions by the plaintiff as to why the defences as pleaded by the defendant, do not raise issues for trial and in the event of this evidence being documentary in nature, same is attached to the supporting affidavit so that the defendant in the matter is in a position to answer thereto.¹³
36. I hold the view further that such an approach would better enable the Court to decide as to whether the matter should proceed to trial by virtue of the fact that a *bona fide* defence was raised by the defendant, or whether the doors of the Court should be closed on the defendant by virtue of the fact that the defences that were raised, were sham defences with the sole purpose to delay.
37. I am of the view that such a liberal approach will still ensure a speedy result in the matter which has always been the primary purpose of summary judgment proceedings and if the defendant is of the view that he/she does have a *bona*

¹³ Also see the matter of *Meredith v Moodley* [2023] ZAGPJHC 176 (SAFLII Reference) at paragraph [24]

fide defence to the claim, he/she is still entitled to answer to the facts and even the evidence provided in the (more comprehensive) supporting affidavit.

38. In view of the above, I am of the view that the annexures attached to the supporting affidavit in the Application serves the above purpose(s) and I am therefore inclined to disagree with the contentions on behalf of the defendant in this instance and to allow the plaintiff's supporting affidavit in the present matter as is.

LEGAL POSITION IN RESPECT OF THE ANSWERING PAPERS:

39. The Court has held in the matter of ***Tumileng Trading*** that, despite the amendment to **Rule 32** of the Rules, what is required from a defendant in the answering affidavit in summary judgment proceedings has remained essentially the same and “... *that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed.*”¹⁴
40. The consequence of the above is therefore that the well-known principles as laid down in *inter alia* the matters of ***Maharaj v Barclays National Bank Ltd***¹⁵ and ***Breitenbach v Fiat SA (Edms) Bpk***¹⁶ therefore still finds application.
41. It is trite therefore that a defendant should, in his answering affidavit in summary judgment proceedings, fully disclose the nature and grounds of his defence and the material facts upon which it is founded and this defence should at the very least be *bona fide* and good in law¹⁷ and not inherently and seriously unconvincing.¹⁸

¹⁴ See ***Tumileng Trading***, *supra* at page 7

¹⁵ 1976 (1) SA 418 (A)

¹⁶ 1976 (2) SA 226 (T)

¹⁷ See ***Maharaj***, *supra* at page 426

¹⁸ See ***Breitenbach***, *supra* at page 228

42. A defendant's defence should furthermore be set out in such a way and with such particularity and completeness that the Court would be able to determine whether a *bona fide* defence is disclosed.¹⁹

43. It has also been held:

*"... that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim ... if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides."*²⁰ (My omissions)

44. In ***Tumileng Trading*** the learned Binns-Ward J considered the principle that a defendant's answering affidavit should not be examined by the standards of pleadings and came to the conclusion that although more may be expected of a defendant now than previously, it does not mean that the intention behind the amendment was to make the procedure more "*draconian or drastic*" than it used to be.²¹

Binns-Ward J then concludes that:

*"Had such a signal change been intended, it seems unlikely that subrule 32(3) would have been left substantively in the same form that it used to have. I would have expected any change in what was required of the defendant's opposing affidavit to be accompanied by the introduction of other changes to bring our procedure more in line with that in jurisdictions in which the courts are able to give directions that enable the genuineness of the advanced defences to be further explored before summary judgment is granted or refused..."*²²

¹⁹ See *Maharaj*, *supra*

²⁰ *Breitenbach*, *supra*

²¹ *Tumileng Trading*, *supra* at page 12

²² *Supra*

THE PLAINTIFF'S CLAIM:

45. The plaintiff's claim is essentially based on the following:
- 45.1 A mortgage loan agreement entered into between the parties on or about 6 February 2017 in terms whereof an amount of R1 500 000.00 was advanced by the plaintiff to the defendant;
 - 45.2 A term loan agreement entered into between the parties on or about 26 November 2015 and in terms whereof the plaintiff afforded a loan in the amount of R2 500 000.00 to the defendant; and
 - 45.3 An overdraft facility agreement entered into between the parties in terms whereof (essentially) the defendant was afforded an overdraft facility, as from 23 December 2020, in the amount of R1 000 000.00 on the defendant's existing cheque account.
46. The plaintiff alleges that the defendant is in breach of the above agreements as the defendant had failed to make timeous payments of the installments due in terms of the agreements, which resulted therein that the defendant is indebted towards the plaintiff in the amounts claimed from the defendant in the action.
47. The plaintiff furthermore alleges that it properly complied with the relevant provisions of The National Credit Act²³ (herein after referred to as "***the NCA***").

THE DEFENDANT'S DEFENCES:

48. It should be mentioned that, at the commencement of his argument, I enquired from Mr Jankowitz whether the conclusion of the above agreements and the

²³ Act 34 of 2005

non-payments as alleged were in dispute since it appeared from the defendant's plea that same was not.

Mr Jankowitz confirmed that the above was not in dispute, but also confirmed that the defendant will persist with his defences as set out in the plea and indeed also in the answering affidavit for purposes of the application.

49. These defences, in summary, are as follows:

- 49.1 That the supporting affidavit relied upon by the plaintiff in the application, goes beyond the boundaries as prescribed by **Rule 32(2)** of the Rules, in that the supporting affidavit seeks to introduce evidence (by way of attaching certain documents to the affidavit) which would result in the application becoming a "*mini trial*" ("*the Defective Affidavit Defence*");
- 49.2 That the plaintiff entered into the above agreements with the defendant without conducting either the required risk assessment or the required assessment as to the defendant's financial means and repayment history and that the conclusion of the agreements ultimately boils down to the affording of credit to the defendant under circumstances where it was reckless to do so ("*the Reckless Credit Defence*");
- 49.3 That the plaintiff failed to adhere to the provisions of **Section 129** of the NCA by failing to show that proper service of the said notice was effected on the defendant ("*the Section 129 Defence*"); and
- 49.4 That the failure of the defendant to make regular and/or timeous payments of the installments in terms of the agreements, was due to the fact that the plaintiff had afforded the defendant a payment holiday in terms of an oral agreement that was concluded between them and that

the defendant is therefore not indebted towards the plaintiff in the amounts claimed (*"The Payment Holiday Defence"*).

50. The question that this Court now needs to answer is whether the above defences (or any one of them) raise a triable issue which would prompt this Court to dismiss the application and order the matter to proceed to trial.

The Defective Affidavit Defence:

51. I have already dealt with this issue herein above and based on my points of view set out above, I am of the view that this defence raised by the defendant does not cut mustard and cannot be regarded as a defence that raises a triable issue.

The Reckless Credit Defence:

52. Mr van Tonder argued with conviction on behalf of the plaintiff that this particular defence raised by the defendant, should not be regarded as a *bona fide* defence since the allegations made by the defendant in this regard were done so without reference to any factual basis upon which the allegations are based.
53. The allegation by the defendant is therefore denied by the plaintiff and it appears, from the documentation attached to the plaintiff's supporting affidavit, that the plaintiff did in fact take cognizance of certain documents which placed it in a position to assess the relative financial strength of the defendant as well as the defendant's ability to repay the amounts in terms of the agreements in question.

54. Seeing that a credit provider is to a great extent free to determine the ways in which a risk assessment is to be done²⁴, I cannot find the measures used by the plaintiff in this regard to be insufficient or improper.
55. What is interesting is that the defendant, by way of his answering affidavit, elects not to deal with the averments made by the plaintiff in the supporting affidavit in respect of the assessments that were done and specifically in respect of the documentation used for that purpose.

The defendant, *inter alia*, does not deny:

- 55.1 The existence of the documents attached to the plaintiff's supporting affidavit;
- 55.2 The averment made by the plaintiff that these documents were used in assessing the defendant's financial situation and/or his ability to repay the loans;
- 55.3 The plaintiff's averment that the plaintiff, based on these documents, was satisfied that the loans made to the defendant were not reckless; and
- 55.4 The averment made by the plaintiff that the agreements were concluded long before the defendant allegedly fell on hard times and that, prior to the defendant allegedly falling on hard times, the defendant never objected to the loans on the basis that the credit was extended recklessly.

²⁴ See **Section 82(1)** of the NCA

56. In view of the above I consequently hold the view that the Reckless Credit Defence is not only sketchy²⁵ but that it may very well be characterized as a sham defence in that it has no merit.²⁶

The Section 129 Defence:

57. Mr Jankowitz argued on behalf of the defendant that the plaintiff failed to adhere to the provisions of **Section 129** of the NCA in that the plaintiff did not serve the required notice on the defendant properly.
58. Mr Jankowitz's primary complaint, if I understood him correctly, is that the required notice (herein after referred to as "**the Section 129 Notice**") was served upon the defendant by way of affixing and not, as is required by the NCA, by way of registered mail or service on an adult person at the address appointed by the defendant.
59. Mr van Tonder simply argued that the above defence should not be accepted as *bona fide* based thereon that:
- 59.1 The defendant never alleged that the Section 129 Notice did not in fact come to his attention; and
- 59.2 The defendant never stipulated the exact manner in which the plaintiff did not comply with the provisions of **Section 129** of the NCA.
60. In the particulars of claim, the plaintiff *inter alia* pleads as follows:

"The Default Notice ... was served by the Sheriff of the High Court on the defendant at his chosen domicilium citandi et executandi being Perseel 110, Sultanaoord, Karos Settlements, Upington ..." (My omissions)

²⁵ See *Breitenbach*, *supra* at page 228

²⁶ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] 3 All SA 407 at paragraph [31]

and further

“A reasonable consumer (in the position of the defendant), would have acted on the Default Notice which was duly served on him.”

61. In answer to the above, the defendant does not deny receipt of the Section 129 Notice in his plea but simply notes the above facts as pleaded by the plaintiff and then, in as far as the Section 129 Notice is concerned, pleads:

“Defendant subsequently pleads that plaintiff has not complied with the peremptory provisions of Section 129 of the National Credit Act and is, therefore, not entitled to enforce the credit agreements.”

62. In his answering affidavit in the application, strangely enough, the defendant again fails to take his case any further by failing to deny either service or receipt of the Section 129 Notice or by setting out in which manner the plaintiff had allegedly flaunted the provisions of **Section 129** of the NCA.

63. It is only in the Heads of Argument and during argument on behalf of the defendant that the issue of improper service was raised but this, in my view, is unfortunately a case of *“too little too late”*.

64. The Court, as was already alluded to herein above, has to assess the defences raised by a defendant by looking at the contents of the answering affidavit and nowadays also the plea.

65. In this instance I find the Section 129 Defence as set out in the plea and answering affidavit of the defendant to be bald and vague and also devoid of

bona fides as this defence was apparently raised only with the intention to delay the action and to stand in the way of the plaintiff in claiming his relief.²⁷

The Payment Holiday Defence:

66. In his plea, the defendant pleads that the terms of the agreements as pleaded by the plaintiff in the Particulars of Claim, were not the only terms of the agreements and then pleads, in summary, that the defendant entered into an oral agreement with the plaintiff, represented by an authorized (but unidentified) representative of the plaintiff in terms whereof and as a result of certain hardships suffered by the defendant, the plaintiff would afford the defendant a payment holiday as from April 2020 up and until December 2022 where after the defendant's financial position and the terms of the agreements will be reassessed and/or restructured.
67. In the supporting affidavit, the plaintiff denies the above Payment Holiday Defence based thereon:
 - 67.1 That the plaintiff did not agree to a payment holiday of more than 2½ years or at all during which period the plaintiff would not receive any payments, as this would be against accepted banking practice and would be prejudicial to the plaintiff; and
 - 67.2 That the defendant fails to plead the identity of the alleged representative of the plaintiff and also fails to plead that this representative was duly authorized to enter into an agreement which would amend the initial credit agreements.
68. More importantly to the above, the point was taken by the plaintiff in the supporting affidavit that the defendant should not be allowed to rely on the

²⁷ See *Breitenbach*, *supra*. Also see the matter of *NPGS Protection and Security Services CC & Another v Firststrand Bank Limited* [2019] 3 All SA 391 (SCA) at paragraph [14]

alleged oral agreement by reason of a non-variation clause contained in a facility letter, which was incorporated into the above-mentioned Mortgage Loan Agreement as well as similar non-variation clauses contained in the other agreements.

69. The defendant again fails to deal with the above contentions made by the plaintiff in any sort of detail in his answering affidavit and simply repeats the contents of the plea and then adds:

“The applicant now herein merely denies the validity of such an agreement²⁸ yet does not deny the existence thereof.”

This last-mentioned contention made by the defendant is clearly not correct as the plaintiff, on at least two occasions in the supporting affidavit, specifically and categorically denies the existence of the oral agreement.

70. Mr van Tonder argued for the plaintiff that the Payment Holiday Defence does not raise a triable issue by virtue of the fact that the alleged oral agreement would be *contra* the above-mentioned non-variation clauses.²⁹

During his argument on the issue, Mr van Tonder unsurprisingly referred me to the well-known *Shifren* principle that was adopted by the Supreme Court of Appeal in the matter of **SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren & Andere**³⁰ in terms whereof a purported oral amendment of an agreement, *contra* to a stipulation in the agreement to the effect that all amendments should be in writing, is deemed to be void.³¹

71. Mr Jankowitz in turn and whilst acknowledging the above *Shifren* principle, urged me to consider the minority judgment in the recently decided matter of

²⁸ Reference is made to the alleged oral agreement.

²⁹ It should be mentioned that the existence of the non-variation clause was never denied

³⁰ [1964] 4 All SA 520 (A)

³¹ See *Shifren*, *supra* at pages 523 and 524

Ba-Gat Motors CC t/a Gys Pitzer Motoring & Another v Kempster Sedgwick (Pty) Ltd³² and he also referred me, in his heads of argument, to the matter of **Buffet Investments Services (Pty) Ltd & Another v Band & Another**.³³

72. In this instance I deem it necessary to revisit the defendant's plea with specific reference to what is pertinently pleaded in as far as the Payment Holiday Defence is concerned.

The defendant pleads as follows in as far as the above-mentioned mortgage loan agreement is concerned:

“7.3 It is specifically pleaded by the defendant that the plaintiff, as represented by an authorized representative, and the defendant, as represented by himself, during or about March/April 2020 and at Upington, concluded an oral agreement, premised on the following expressed, alternatively tacit, alternatively implied terms:

7.3.1 The plaintiff acknowledged that the defendant as an agricultural farmer had suffered immense losses to its harvest due to unforeseen events, including frost, rain and the Covid 19 pandemic;

7.3.2 Due to the hardships suffered by the defendant, the plaintiff would granted (sic) the defendant a payment holiday up and until the end of 2022;

7.3.3 This payment holiday would commence in April 2020 and continued (sic) up and to December 2022;

³² [2023] JOL 61479 (SCA)

³³ [2009] JOL 24368 (KZD)

7.3.4 *The defendant would remain responsible for the interest accrued during this payment holiday period;*

7.3.5 *The plaintiff would reassess the financial position of the defendant in January 2023, whereafter the parties would either continue with the terms of the agreement, including payment, alternatively the plaintiff would in agreement with the defendant restructure the terms of payment, alternatively assist the defendant to sell his properties through its HelpUsell portal.*

7.4 *These terms were accepted by both the plaintiff and the defendant.”*

The above alleged additional terms of the agreement is repeated in paragraph 15 (in respect of the above term loan agreement) and paragraph 27 (in respect of the above overdraft facilities agreement) of the plea.

73. The defendant then proceeds in his plea to deny, based on the above alleged additional terms, that he is in breach of the various agreements and that he is liable towards the plaintiff in the amounts claimed.

The defendant specifically pleads as follows in paragraph 29 of the plea:

“29.1 *It is denied that the defendant is in breach of the Mortgage Bond Agreement or the Term Loan Agreement or the Overdraft Facility Agreement.*

29.2 *The defendant denies that the full outstanding balance on the agreements have (sic) become due and payable to the plaintiff.*

29.3 *The defendant repeats the content of paragraph 7, 15 and 27 above.*

29.4 *The defendant specifically pleads that, for the reasons advanced herein above, was the plaintiff, in accordance with the payment relief granted, as well as the*

undertaking to reassess the financial position of the defendant, not entitled to issue summons.”

The above is repeated in two further paragraphs in the plea and also in the defendant’s answering affidavit in the application.

74. At the risk of repeating myself it is therefore clear that the defendant’s pleaded defence is that he is not liable for payment of the amounts claimed by the plaintiff based thereon that he was excused from making the agreed upon installment payments in terms of the credit agreements for a period of almost 2½ years and that he is consequently not indebted towards the plaintiff in the amounts claimed.

The defendant in the present matter does not raise an alternative defence based on estoppel (as was the case in **Ba-Gat Motors**) in his plea and also does not attempt to do so in his answering affidavit.

The possibility of a defence based on estoppel was also not pursued by Mr Jankowitz during his argument on behalf of the defendant.

75. In the dissenting judgment in the matter of **Ba-Gat Motors**, the learned Dambuzza JA, with reference to the judgment in the matter of **HNR Properties CC & Another v Standard Bank of SA Ltd**³⁴, held that there is room, though small, for the defence of estoppel founded on non-variation clauses.³⁵

Dambuzza JA in his minority judgment then proceeds and states:

*“The nature and extent of that narrow window has not been defined by our courts, save to say that Shifren must not be violated.”*³⁶

³⁴ 2004] 1 All SA 486 (SCA)

³⁵ **Ba-Gat Motors**, *supra* at paragraph [33]

³⁶ **Ba-Gat Motors**, *supra*.

76. The purpose of a non-variation clause is trite, namely that it serves to protect the creditor as it enables the creditor to determine its rights with reference to existing documentation or documentation in its possession.

The creditor consequently does not need to rely on the memory of employees or ex-employees and the creditor is furthermore protected from spurious defences and unnecessary litigation.³⁷

77. In the matter of **Brisley v Drotsky**³⁸ the Supreme Court of Appeal confirmed the *Shifren* principle and stated *inter alia* that to negate the said principle may lead to legal uncertainty and also that the principle does not create an unreasonable straight jacket.³⁹

The Court then proceeded in holding that a Court does not have the discretion to refuse to enforce validly concluded terms of a contract.⁴⁰

78. What is of further significance is the following comments made by the learned Cameron JA in a minority judgment in the matter of **Brisley**:

“...the appellant asks this Court to reverse the doctrine that contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by again resorting to writing. This Court nearly four decades ago upheld the validity of such clauses. It did so after years of academic and judicial controversy, and after full argument, which canvassed the opposing contentions...”

³⁷ See **Tsaperas & Others v Boland Bank** [1996] 4 All SA 312 (SCA) at page 315

³⁸ 2002] JOL 9693 (A)

³⁹ **Brisley**, *supra* at paragraphs [8] and [9] of the majority judgment

⁴⁰ **Brisley**, *supra* at paragraph [12] of the majority judgment. Reference is also made to the matter of **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** [1984] 2 All SA 583 (A) where the Supreme Court of Appeal, on page 597 of the judgment, confirmed that general principle that it is in the public interest that parties should be held bound to contracts that were concluded by them.

The appellant's attack invites us to reconsider that decision. We are obliged to do so in the light of the Constitution and of our 'general obligation', which is not purely discretionary to develop the common law in the light of fundamental constitutional values.

For the reasons the joint judgment gives, I do not consider that the attack can or should succeed. The Shifren decision represented a doctrinal and policy choice which, on balance, was sound. Apart from the fact of precedent and weighty considerations of commercial reliance and social certainty, that choice in itself remains sound four decades later. Constitutional considerations of equality do not detract from it. On the contrary, they seem to me to enhance it...

The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy...

It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so...

What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.”⁴¹

79. In light of the above authorities therefore, it appears that the *Shifren* principle is still accepted by our Courts and that said principle will, as a general rule be applied, unless it could lead to an injustice or an outcome that is against the public policy.

⁴¹ *Brisley*, *supra* at paragraphs [2] to [6] of the minority judgment of Cameron JA

This is acknowledged in the majority judgment in **Ba-Gat Motors** which, as was rightfully conceded to by Mr Jankowitz, did not assist the defendant's case much.

It should also be stated that the matter of **Buffet** does not assist the defendant either since the learned Mokgohloa J, in considering whether an oral waiver might be effectual despite the existence of a non-variation clause, came to the conclusion that an oral waiver may be valid, but only to the party in regard to a right that accrues to such a party exclusively in terms of the contract and on the basis that the terms of the agreement was to the sole benefit of the plaintiffs.⁴²

This is of course not the case in the present matter as the alleged oral agreement, on the face of it as pleaded by the defendant, is to the sole benefit of the defendant.

80. The defendant, in the present case, did not plead or raise a defence to the effect that, if the relevant non-variation clause is enforced by the Court, it will lead to an injustice or to an outcome that is against public policy and Mr Jankowitz also did not argue as much.

The defendant, as was already mentioned, also did not seem to raise any sort of defence based on estoppel.

81. Coupled to the above, it should be stated that it is still uncertain as to the identity of the alleged representative of the plaintiff with whom the oral agreement was concluded.
82. Although I am aware thereof that certain banks did afford clients the possibility of payment holidays on credit agreements during the COVID-19 pandemic in

⁴² See **Buffet**, *supra* at paragraph [12]

2020, I have to agree with Mr van Tonder's argument, namely that a defence that the plaintiff would agree, orally no less, to a payment holiday for a period of almost 2½ years in terms whereof there are not obvious advantages to the plaintiff, borders on a sham defence.

83. What is also interesting and telling is that the defendant specifically pleads that, despite the alleged payment holiday afforded to the defendant by the plaintiff, the defendant remained liable for payment of the accrued interest on the credit agreements during this period.

The defendant however never pleads that it did in fact make payments in the amounts of the accrued interest during the period of the alleged payment holiday.

84. In view of all of the above, I consequently hold the view that the Payment Holiday Defence does not constitute a *bona fide* defence and that it similarly does not raise an issue for trial.

COSTS:

85. I can find no reason why the costs should not follow the result in this matter and why the plaintiff should not be awarded its costs as prayed for.

ORDER:

86. In view of all of the above, the following order is made:

(1) THE LATE FILING OF THE DEFENDANT'S ANSWERING AFFIDAVIT IN THIS APPLICATION FOR SUMMARY JUDGEMENT IS HEREBY CONDONED;

(2) SUMMARY JUDGMENT IN GRANTED IN FAVOUR OF THE PLAINTIFF AND AGAINST THE DEFENDANT FOR:

(2.1) PAYMENT IN THE AMOUNT OF R1 589 187.81;

(2.2) PAYMENT OF INTEREST ON THE AMOUNT OF R1 589 187.81 AT A RATE OF 9,75% LINKED, PER ANNUM, CAPITALIZED MONTHLY FROM 21 SEPTEMBER 2022 TO DATE OF PAYMENT;

(2.3) PAYMENT IN THE AMOUNT OF R3 339 659.28;

(2.4) PAYMENT OF INTEREST ON THE AMOUNT OF R3 339 659.28 AT A RATE OF 9,75% LINKED, PER ANNUM, CAPITALIZED MONTHLY FROM 21 SEPTEMBER 2022 TO DATE OF PAYMENT;

(2.5) PAYMENT IN THE AMOUNT OF R831 974.24; AND

(2.6) PAYMENT OF INTEREST ON THE AMOUNT OF R831 974.24 AT A RATE OF 9,75% LINKED, PER ANNUM, CAPITALIZED MONTHLY FROM 21 SEPTEMBER 2022 TO DATE OF PAYMENT; AND

(3) PAYMENT BY THE DEFENDANT OF THE COSTS OF SUIT ON A SCALE AS BETWEEN ATTORNEY AND CLIENT.

**ACTING JUDGE AD OLIVIER
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY**



Counsel for the applicant:

Instructed by:

ADV AG VAN TONDER

Tim du Toit & Co. Inc.

Cape Town

c/o **Majiedt Swart Inc.**

Kimberley

Counsel for the respondent:

Instructed by:

ADV DC JANKOWITZ

Willemse & Babinszky Attorneys

Upington

c/o **Engelsman Magabane Inc.**

Kimberley