THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: 11400-18

(1)	REPORTABLE: Yes☐/ No ☒
(2)	OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3)	REVISED: Yes ☐ / No ☒

[redacted]

Date: 15 October 2024 WJ du Plessis

In the matter between:

ABSA BANK LIMITED Plaintiff

and

SASHWIN PILLAI First Defendant

TAKE SHAPE PROPERTIES 20 CC Second Defendant

Coram: Du Plessis AJ

Heard on: 15 August 2024
Decided on: 15 October 2024

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by e-mail to the attorneys of record of the parties. The deemed date and time of the delivery is 10H00 on 15 October 2024.

JUDGMENT

DU PLESSIS AJ

[1] This is an opposed summary judgment where the plaintiff, ABSA Bank Limited ("ABSA"), seeks payment for approximately R10 million plus interest.

[2] This comes after ABSA and the defendant,[1] Mr Pillai ("Mr Pillai") entered into a written private Bank One Banking Facility Agreement. On the same day, the second defendant, Take Shape Properties 20 CC ("Take Shape Properties"), executed a Deed of Suretyship for Mr Pillai's indebtedness in favour of ABSA.

[3] On 8 January 2018, a manager of ABSA issued a certificate of balance certifying that Mr Pillai and Take Shape Properties were indebted in the amount of R10 178 401.90 plus interest at the rate of 8.90% per annum, capitalised monthly from 9 January 2018 to date of payment. A letter of demand was sent. A combined summons was served on Mr Pillai and Take Shape Properties on 31 March 2018. A notice of intention to defend was entered on 17 April 2018, whereafter ABSA delivered an application for summary judgment on 11 May 2018, enrolled for 28 June 2018.

[4] A notice of set down was delivered on 15 June 2023, whereafter the defendants' attorney of record withdrew. The matter was then set down on the unopposed motion roll, where Mr Pillai appeared on the day. The matter was then removed for the matter to be enrolled on the opposed motion roll. The defendants then delivered an affidavit resisting summary judgment. This is thus an opposed summary judgment in terms of Rule 32, launched before its amendment on 1 July 2019.

[1] For ease of reference the parties will be referred to as they are in the action.

[5] There was also an application to declare certain immovable property specially executable in terms of Rule 46A, which application was granted. The application for summary judgment only pertains to the monetary judgment.

[6] The cause of action for Mr Pillai arose from his default under a facility agreement and against Take Shape Properties based on the Deed of Suretyship it executed.

[7] Initially, Mr Pillai represented himself, but on the hearing date, he was represented by Mr Naidoo, who filed supplementary heads of argument. In the affidavit resisting summary judgment, the defendants raised various defences, but on the hearing date, they persisted in only one.

[8] The one that they did not persist with was the defence that the parties had concluded a settlement agreement that was made an order of court. However, the defendants made unilateral changes to the proposed settlement, and ABSA did not accept it. The defendants conceded that ABSA did not sign the settlement agreement. There was, thus, no settlement agreement. As far as this aspect is concerned, there is no bona fide defence.

[9] The second defence is that ABSA is vexatious as the matter has already been decided. However, ABSA indicates that they are not persisting with the order for the executability of the property as they have already obtained that order. They are only applying for monetary judgment. This is thus not a bona fide defence.

[10] The defence persisted with the following at the hearing: ABSA owes an entity known as African Vision Holdings (Pty) Ltd ("African Vision") R160 million, and the defendants had attempted to settle the indebtedness. Both defendants rely on this income. ABSA's indebtedness to African Vision is in dispute, and African Vision has taken no steps to enforce ABSA's alleged indebtedness. In their supplementary heads of argument, the defendants state that it is now common cause that summons have been

issued against ABSA for these monies. The defendants want the opportunity to fully ventilate their action against ABSA.

[11] Furthermore, ABSA states that even if they are so indebted, this has no impact on these proceedings as African Vision is not a party to these proceedings. Furthermore, there is no agreement to set off a portion of the claim to settle the above matter. In any case, this would not be possible, as the debt owed is not between the same parties in the same capacities, amongst other things. This, ABSA states, is thus not a bona fide defence.

[12] I agree with ABSA that, on the facts, the first two defences are not valid defences. The set-off "defence" should also fail, as the defendants do not meet the first requirement for set-off in that the debts must be owing between the same parties in the same capacity.[2] In this case, the debts in this application are between ABSA and Mr Pillay and Take Shape Properties. In the action, the debt is between ABSA and African Vision. Therefore, this is also not a bona fide defence.

[13] This means that ABSA's application for summary judgment should succeed. ABSA asked for a cost order on an attorney and client scale, as per the agreement, and I see no reason to depart from that.

Order

[14] The following order is made:

1. Payment in the sum of R10 178 401.90.
2. Interest on the sum of R10 178 401.90 at the rate of 8.90% per annum, capitalised monthly from 9 January 2018 to the date of payment, both days inclusive.
3. The costs include the wasted costs occasioned by removing the matter from the unopposed motion roll on 13 July 2023.

[2] *AAA Brick Co (Pty) Ltd v Coetzee* [1996] 1 All SA 23 (B); 1996 3 SA 578 (B);

[redacted]

WJ du Plessis
Acting Judge of the High Court

For the Plaintiff:	K Mitchell instructed by Tim du Toit incorporated
For the Defendants:	R Naidoo, attorney