IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.:2049/2024

In the matter between: -

TOYOTA FINANCIAL SERVICES (SA) LTD **PLAINTIFF**

(Registration Number: 1982/010082/06)

And

SIYAKUDUMISATHIXO TRADING AND ENTERPRISE CC **FIRST DEFENDANT**

(Registration Number: CK 2009/115995/23)

SANDILE ERIC NKOTHANA **SECOND DEFENDANT**

JUDGMENT

NORMAN J:

[1] Plaintiff is Toyota Financial Services South Africa Ltd, a company duly registered and incorporated in accordance with company laws of the Republic of South Africa. Plaintiff is also a registered financial services provider. It instituted an action against Siyakudumisa Thixo Trading and Enterprise CC, a close corporation duly incorporated and registered in accordance with the company laws of the country and the first defendant in these proceedings. The first defendant had chosen its *domicilium citandi*

executandi for the purposes of enforcement of the agreement as Mpheko Location, Mthatha. The second defendant is Mr Sandile Eric Nkothana who also resides at Mpheko Administrative Area, Mthatha and chose the same address as his *domicilium citandi executandi.*

[2] On 28 April 2022 plaintiff who was duly represented by an authorized employee together with the first defendant who was represented by the second defendant entered into a written cost of credit schedule instalment sale agreement. The transaction involved the sale and purchase of a 23-seater bus. Plaintiff contends that this agreement falls outside the ambit of the National Credit Act 34 of 2005. The material terms of the agreement were amongst others the following:

> *"1. That plaintiff sold to the first defendant who purchased from it a motor vehicle described as a 2022 Toyota Coasta 4.0 D 23-seater B/S with engine number N[…] chassis number JT[…] and vehicle registration plate number J[…] EC. The total purchase price of the vehicle was R1 307 520. The cash price for the vehicle was R932 899.55."*

[3] The parties further agreed that the first defendant would pay interest on the total amount payable at the fixed rate of 13% per annum and the agreement was to subsist for a period of 61 months. It was to commence on 28 April 2022 and expire on 01 May 2027. The first instalment was the amount of R21 792.00 payable per month. At the time of the conclusion of the agreement no deposit was paid by the first defendant. It was further agreed that the plaintiff was to remain the legal owner and title holder of the goods until all outstanding amounts were paid under the agreement. It was further agreed that in the event that the first defendant failed to pay any amounts due under the agreement then the plaintiff may claim from the first defendant the full amount due and payable and plaintiff would be entitled to cancel the agreement, take the goods back, sell the goods, keep all the instalments that had been paid and claim any balance from the first defendant as damages.

[4] The first defendant agreed to pay all the legal costs on the scale as between attorney and client as well as any collection costs incurred under the debt collectors, any disbursements, administrative and collection charges as well as collection commission on any of the payments made if the matter is referred to a debt collector or an attorney. That all legal notices were to be sent to the physical address chosen by the first defendant or provided by the first defendant.

[5] It is common cause that the goods were duly delivered by the plaintiff to the second defendant in accordance with the agreement. Plaintiff contends that it complied with all of its obligations in terms of the agreement. It alleges that the first defendant breached the provisions of the agreement in that as at 06 March 2024 the first defendant had fallen into arrears in the sum of R150 744,60. A certificate of balance as agreed between the parties is relied upon by the plaintiff for its claim. It alleged that notwithstanding demand first defendant failed, neglected and/or refused to pay the arrear amount of R150 744,60.

[6] As a result of such breach plaintiff claimed the full outstanding balance in the amount of R978 840,60 plus interest at the fixed rate of 13% per annum as from 06 March 2024 to date of payment. Plaintiff further demands return of the bus in terms of the agreement.

[7] The claim against the second defendant is based on a suretyship agreement where he bound himself jointly and severally as surety and co-principal debtor for the punctual payment of all sums due to the plaintiff by the first defendant in terms of the agreement up to the value of R956 252,05. There are various other terms that were agreed by the parties which relate to suretyships and are standard in matters of this nature.

[8] On 11 September 2023 it is alleged that the second defendant on behalf of the first defendant entered into a suitable payment arrangement with the plaintiff's attorneys but defaulted on payments and the account remained substantially in arrears.

[9] In paragraph 18 of the particulars of claim the following allegation is made:

> *"The provisions of the National Credit Act No.34 of 2005 hereinafter referred to as the Act are not applicable to the cause of action herein, having regard that the agreement does not constitute a credit agreement as defined in terms of the Act. None of the provisions of the Act are accordingly applicable to the agreement."*

[10] Both defendants are defending the action and are resisting the summary judgment application.

Defendants case

[11] Defendants took various special pleas:

(a) That this court lacks jurisdiction because the cause of action did not arise in Makhanda, they reside at Mpheko in Mthatha, their chosen *domicilium citandi* and did not consent to the jurisdiction of this court.

(b) Plaintiff's non – compliance with the provisions of section 129 National Credit Act, 34 of 2005 ('the NCA') in that an instalment agreement that falls outside the National Credit Act falls foul of the law and that failure to give notice led to premature litigation.

(c) Plaintiff's non – compliance with Rule 41A of the Uniform Rules of Court has led to lack of facilitation of possible mediation in the matter.

[12] The defendants also pleaded to the merits of the claim. They pleaded that during May 2024 plaintiff indicated that defendants had paid R92 000.00. They were further advised to continue paying instalments and to ignore the summons which were, at the time, with the sheriff in Mthatha. They denied any liability to the plaintiff. The second defendant stated that the contents of the suretyship agreement were never explained to him because everything was done in haste.

[13] Upon receipt of the plea plaintiff delivered a summary judgment application. In an affidavit deposed to by Mr Aphiwe Mayola, the Operational Manager of the plaintiff, he dealt with the special pleas. In his response to the jurisdiction point he stated that the defendants fail to recognize that this Court has concurrent jurisdiction with all other Divisions of the High Court in the Eastern Cape Province, being the main seat of the Court in the Eastern Cape. On this basis he averred that the jurisdiction point lacks merit.

[14] In relation to the section 129 of the NCA notice plaintiff relied on clause 22.1 of the agreement and stated:

> '*In this respect clause 22.1 of the agreement contains a specific acknowledgment by the defendants, which reads as follows:*
>
> *"You agree that all the information you have provided to the Seller before entering this Agreement, is true and correct and that, based on this information, you are not subject to the National Credit Act 34 of 2005."*

[15] He responded to the special plea relating to Rule 41A and attached the sheriff's returns of service as evidence that the Rule 41 A notice was delivered to both defendants. He contended that all the special pleas cannot be sustained at trial.

[16] Plaintiff denied that the second defendant was advised to ignore the summons. He confirmed that during May 2024 the second defendant was at the plaintiff's offices where payment of R92 000.00 was pointed to the defendant on the statement and was advised that the outstanding balance reflected on the statement was correct. He contended that the defenses advanced by the defendants fail to raise any issues for trial and that plaintiff is entitled to summary judgment.

Jurisdiction point

[17] Mr Nonkelela argued that this court does not have jurisdiction to hear the matter. He submitted that because the *domicilium citandi et executandi* is Mpheko in Mthatha, it is the Mthatha High Court that has jurisdiction. He argued that the institution of the action in this court has caused the defendants to incur huge expenses at great inconvenience to them. Ms Sephton argued that Mthatha falls under the jurisdiction of this court as this is the main seat of the Division.

[18] The Supreme Court of Appeal in ***Joob Joob Investments (Pty) Ltd v Stock Mavundla Zek Joint Venture***[1], held that the time has come to discard the labels such as 'extraordinary' and 'drastic' when reference is made to the summary judgment procedure. The fact that it disposes of spurious defences is useful in cases where a defendant seeks to delay finalization of a matter. I now to proceed to examine whether the defenses raised by the defendant are *bona fide*.

[19] The following clause of the agreement is relevant:

> *"17. South African law to apply*
>
> *You agree that the laws of the Republic of South Africa shall apply to this Agreement and that the Magistrates Court shall have jurisdiction over any proceedings that may arise from this Agreement unless the Seller chooses the High Court."*

[20] In the main they pleaded, *inter alia*:

> ***"AD PARAGRAPHS 17 AND 18***
>
> *Defendants deny the allegations contained herein. Further aver that the Court that has the requisite jurisdiction to hear the matter is Mthatha High Court."*

[21] In an article submitted by Strauss Daly Attorneys, dated 2 August 2023 the firm explains the meaning of the term *domicilium citandi et executandi* and its implications in contracts. They refer to ***Amcoal Colleries Ltd v Truter***[2], where the Supreme Court

[1] ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*** 2009 (5) SA 1 (SCA) at 11G -12D.
[2] ***Amcoal Colleries Ltd v Truter*** 1990 (1) SA 1 (A).

of Appeal held that a person's *domicilium citandi et executandi* can be chosen in a contract and that service of process at that address is good service, even if the person is not present at the time of service. They define *domicilium citandi et executandi, as a Latin phrase that means 'house for being summoned and executed upon".*

[22] It is important to note the following facts: The agreement was not concluded in the main seat (but in Scottburg in Kwa Zulu-Natal), plaintiff resides in Sandton, Gauteng province) and the defendants reside in Mthatha. There is a High Court in Mthatha where the defendant is resident. His contention that the plaintiff ought to have sued out of the Mthatha is not preposterous because the plaintiff must follow the defendant. To confine jurisdiction to territorial jurisdiction leads to the neglect of the consumer protection purpose that *Herbstein & Van Winsen,* referred to below, mentions. There must be other jurisdictional factors that ground jurisdiction. Most importantly, to disregard the distance and the inconvenience that the defendants complain of would undermine a constitutional imperative, that courts, must be easily accessible. It may be argued that to follow this reasoning flood gates would be opened where defendants would raise this defense to the prejudice of the plaintiff who is *dominus litis.* I would disagree for this reason: A clear and unambiguous consent to the jurisdiction of a specified High Court could be sought and obtained from the defendant at the time agreements are concluded. That would give parties an opportunity to discuss costs that would be involved if a particular High Court were to be approached. This is what plaintiff pleaded when justifying jurisdiction:

> *"19. The above Honourable Court has jurisdiction to hear this matter, having regard that the whole cause of action arose within the area of jurisdiction of the above Honourable Court and that the First and Second Defendants' chosen domicilium citandi et executandi for the purpose hereof are situated within the area of jurisdiction of the above Honourable Court."* (my underlining)

[23] The underlined allegation loses sight of the fact that both the instalment sale agreement and the suretyship agreements were entered into in Kwa Zulu - Natal. The delivery receipt of the goods took place in Scottburgh. The second ground of the *domicilium citandi et executandi* relates to territorial jurisdiction that the main seat of the Division has.

[24] It is apparent from the annexures to the agreement between the parties that both defendants reside in Mthatha. The Certificate issued by the Registrar of Companies & Close Corporations attached to the record as B8, the registered address of the First

Defendant is Mpheko Location, Mthatha, 5100. There is also another document issued by the Umtata Taxi Owners Association confirming that the First Defendant is permitted to 'route' from Mthatha up to the Republic of South Africa. The Second Defendant furnished his address in the agreement as Mpheko Administrative Area, Mthatha. The agreement itself was entered into at Halfway Totota, Scottburgh, 31 Stevens Road, Old Main Road, Park Rynie, 4182, Tel: 039 978 7500; in the province of KwaZulu - Natal. It also appears that the bus in question was registered in Scottburgh on the same day of the signing of the agreement between the parties. The Plaintiff's branch offices are recorded as 1 Wesco Park, Old Pretoria Road, Sandton, 2196. The sheriff for the High Court, Mthatha served a letter of demand and the sheriff's return of service stated that the process was served on the second defendant at Mpheko Administrative Area, Mthatha.

[25] The objects of the Superior Courts Act, No. 10 of 2013 ('the SCA') , are to, amongst others, bring the structure of the Superior Courts in line with the provisions of Chapter 8 <u>and the transformation imperatives of the Constitution</u>; and to make provision for the administration of the judicial functions of all courts[3]. Chapter 8 of the Constitution deals with, *inter alia,* the Courts, appointment of judicial officers, judicial authority and matters related thereto. It is common cause that the seat of the Eastern Cape Division is in Grahamstown, now known as Makhanda[4].

[26] In the old decision of ***Sciacero & Co v Central SA Railways***[5], Innes CJ said*:*

> *"The general rule with regard to the bringing of actions is actor sequitur forum rei. The plaintiff ascertains where the defendant resides, goes to his forum, and serves him with the summons there.*

[27] This rule has been rendered obsolete by plaintiff instituting the action at its convenience in an area where even if there is territorial jurisdiction but there are no other factors present to ground jurisdiction. Where there are at least two High Courts that have jurisdiction over the defendants the closest to their place of residence should be preferred. I say this because Google maps gives the distance between Mpheko Administrative Area and Mthatha as 14.1 km and traveling time as 34 minutes. Google

[3] The Superior Courts Act No. 10 of 2013 (the SCA); section 2 (a) (b) and (c).
[4] See: Section 6 (1) of the SCA.
[5] ***Sciacero & Co v Central SA Railways*** 1910 TPD 119 at 121.

maps gives the distance between Mthatha and Makhanda as 406.4 km via R61 and R67 and the travelling time as 4 hours 51 minutes. If one travels via R67 the travelling time is 5 hours 33 minutes and the distance is 447.6 km. In my view, the objection raised by the defendants is *bona fide* and it calls for consideration by the trial court.

[28] Chapter 6 of the SCA provides for provisions applicable to the High Court only. The provisions of section 21 (1) of the SCA do give effect to the abovementioned principle.

"Persons over whom and matters in relation to which Divisions have jurisdiction

21. (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—

(a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

(3) ..."

[29] *In casu*, the first defendant, carries on its business in Mthatha as aforementioned. In the *Sciacero* decision, the Court of Appeal regarded the place of business of a person as a place 'where its general superintendence and management takes place'[6].

[30] **Herbstein and Van Winsen**[7] state:

"The principle underlying the rule 'actor sequitur forum rei' was almost certainly effectiveness, but, today, the rule serves an important consumer protection purpose in that the consumer who is a defendant must be sued in the jurisdiction of the court where he or she resides unless there is a ground which gives the court of another area jurisdiction."

[6] ***Sciarero & CO v CSAR*** 1910 TPD page 122.

[7] The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, Fifth Edition, Volume 1 page 67.

[31] In my view, the objection to the bringing of litigation before this court is not spurious and is an issue that constitutes a triable issue. It may lead to the matter being transferred to the Mthatha High Court if the trial court is with the defendants on this issue.

Failure to file the Rule 41 A Notice

[32] Rule 41 A provides:

"41A. Mediation as a dispute resolution mechanism

(1) In this rule—

"dispute" *means the subject matter of litigation between parties, or an aspect thereof.*

"mediation" *means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.*

(2)

(a) In every new action or application proceeding, <u>the plaintiff or applicant shall, together</u> with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.

(c) The notices referred to in paragraphs (a) and (b) shall be substantially in accordance with Form 27 of the First Schedule and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated.

(d) Subject to the provisions of subrule 9(b) the notices referred to in this subrule shall be without prejudice and shall not be filed with the registrar.

(3)

(a) Notwithstanding the provisions of subrule (2), the parties may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced the parties shall obtain the leave of the court.

(b) A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation."

[33] Mr Nonkelela submitted that no notice was received by the defendants in terms of Rule 41A. Ms Sephton in response submitted that it was open to the defendants to issue such a notice. Ms Sephton's submission in this regard is correct. The relevant rule also provides for the defendants to issue a notice indicating whether they agree or are opposed to the referral of the dispute to mediation[8].

[34] It is in that notice that they must clearly and concisely state the reasons for their belief that the dispute is either capable or not of being mediated. According to the sheriff's returns of service the Rule 41A notices were served upon the defendants on 19 June 2024. The sheriff's return of service constitutes *prima facie* proof of service. This complaint must accordingly fail.

No section 129 notice

[35] The defendants complained that the section 129 notices were not delivered as they should have in terms of the NCA. Mr Nonkelela submitted that the plaintiff was obliged to issue those notices prior to the institution of the action. Ms Sephton submitted that the agreement was a large agreement and therefore section 129 does not find application. Plaintiff had instead issued letters of demand. Ms Sephton, in argument, undertook to place certain decisions, one in support of her argument that where there is a large agreement it falls outside the NCA and there is thus no requirement that a section 129 notice be served. The one dealt with whether a surety is entitled to be served with a section 129 notice prior to institution of legal proceedings. She relied on ***Shaw & another v Mackintosh & Another***[9] for the contention that the agreement was a large agreement and the section 129 notice was not required. In the agreement itself and in line with what is stated in the *Shaw judgment*, there is a clear endorsement in paragraphs 4 of the particulars of claim that the parties entered into 'a written Cost of Credit Schedule Instalment Sale Agreement (Outside the NCA), incorporating the Plaintiff's Terms and Conditions for an Instalment Sale Agreement Outside the NCA (hereinafter referred to as the Agreement). This much is also apparent from clause 18 of the agreement which is referred to above. The first defendant is a juristic person and therefore the NCA cannot come to its aid. This point in so far as it relates to the first defendant lacks merit. The application of the provisions of the NCA are excluded where

[8] Rule 41A (2)(b) and (c).
[9] ***Shaw & another v Mackintosh & Another*** (267/17) [2018] ZASCA 53 (29 March 2018).

the surety relates to an agreement involving a juristic person. Because this is a point of law that affects the second defendant who is a natural person, in my view, he is not precluded from challenging that law , if he so wishes. In relation to him as a natural person the point may be debatable at trial.

[36] Ms Sephton also relied on a judgment penned by **Satchwell J in *First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd & another***[10] for the contention that plaintiff was not required to issue the section 129 notice to the surety.

[37] In the *FirstRand Bank* case, referred to above at paragraph 23 Satchwell J stated:

> '*23. Second respondent <u>could not be and was not sued in his capacity as co- principal debtor</u> since his liability to the Bank remains that of surety who has renounced certain rights. This position is correctly referred to by the applicant in its summons*." (footnotes omitted) (my underlining)

[38] The facts and the allegations made in the *FirstRand Bank* case are not distinguishable from the facts of this case in that the plaintiff herein sues the '*second defendant <u>as surety , in solidum and as a co- principal</u> <u>debtor together with the First Defendant</u>, in favour of the plaintiff..'* He is being sued as a surety. There are numerous references to <u>surety or co- principal debtor</u> in the particulars of claim[11]. Plaintiff in the surety agreement, unlike in the agreement between it and the first defendant did not exclude the application of the NCA. Instead it stated: 'If<u> *the National Credit Act 34 of 2005 does not apply*</u> *to the agreement, the following benefits are also waived: noncausal debiti, errore calculi, non-numeratae pecuniae." (my underlining)* Be that as it may the legal position referred to above stands.

No explanation of the terms of the suretyship agreement

[39] The second defendant complains that the contents of the suretyship agreement were never explained to him because everything was done in haste.

[40] The defendants in response to allegations made in paragraphs 14 to 16 of the particulars of claim pleaded as follows :

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[10] ***First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd & Another*** Case No. 56174/2007 (Transvaal Provincial Division) dated 25 September 2008.

[11] Particulars of Claim, para 15.15, 15.16, 15.17,15.18,15.19 , 15.22 and 17.

'AD PARAGRAPH 14 TO 16

Save to admit that Second Defendant entered into a suretyship agreement with the Plaintiff, the remainder of the allegations are denied. Second Defendant further pleads that the contents of the said agreement were never explained to him, as everything was done in haste.'

[41] Plaintiff disputes these allegations and has dealt with them in the application for summary judgment. Mr Mayola stated that the second defendant was under no duress to sign the suretyship and should he have deemed it necessary he should have sought independent advice. He did not avail himself of the opportunity and as such is bound by the terms of the suretyship agreement. This response is a response that together with the allegations made by the second defendant must be tested by the trial court.

[42] In the work of **Lee and Honore'**, entitled "The **South African Law of Obligations'**, second edition at page 173 para 484 they state the following:

"**484. Duty of disclosure**

Although suretyship is not a contract uberrimae fide, a surety is entitled to be informed as to the real nature of the transaction between the creditor and the principal debtor in respect of which he promises to be liable. The extent of the duty of disclosure depends upon the circumstances of each case."[12]

[43] Caney's work entitled *"The Law of Suretyship",* sixth edition, by CF Forsyth & JT Pretorius page 64 para 3 emphasize that since the creditor and surety must be *ad idem* in making the contract, the absence of consent on the part of the surety will vitiate the contract. They further state that the principles in relation to this in the formation generally of contracts apply to the making of contracts of suretyship.[13]

[44] In a decision by the Full Bench *in Prins v ABSA Bank Ltd*[14] , the Court found that the bank official did not explain the contents of the contract to the sureties and that public interest demanded that a complicated document of this nature had to be explained to the signatory, especially where the signing of the document could have drastic consequences.

[45] The plea and the affidavit resisting summary judgment do reveal a bona fide defense. In addition, the determination of whether or not the suretyship contract was explained to the second defendant or whether there was full disclosure of the contents thereof is a triable issue. Sutherland J (as he then was) stated in ***Absa Bank Ltd v Jenzen and a***

[12] Caney 38, 39; ***Trans Drakenssberg Bank Ltd v Guy*** 1964 (1) SA 790 at 797 -8 (D); See also (1961) 78 SALJ 137.

[13] ***Keens Group Co (Pty) Ltd v Lotter*** 1989 (1) SA 585 (C); ***Prins v ABSA Bank Ltd*** 1998 (3) SA 904 (C) Caney's: The Law of Suretyship page 64 para 3.

[14] ***Prins v ABSA Bank*** page 371 F-H para 24.

Similar Case[15] stated that assuming that the allegations on which the defendants relied for disputing the terms of the loan agreements eventually, at the trial, turned out to be spurious, the only way that such outcome was possible, was after evidence in that regard had been presented at the trial and the meritless of the allegations had been proved.

The payment of the debt

[46] The plaintiff relied on the certificate of balance for the claim. However, at paragraph 16 of the particulars of claim plaintiff alleged:

> "16. The Second Defendant, on behalf of the First Defendnat (sic), entered into a suitable payment arrangement with the Plaintiff's Attorneys of Record on 11 September 2023, but has defaulted on payments. The account remains substantially in Arrears, as is evident by the Detailed Statement attached hereto and marked 'I'.

[47] There is no statement marked "I" on record and on the index compiled by the plaintiff. The details of the suitable payment arrangement are not given and there is no statement marked "I" as aforementioned. That detailed statement is also not attached to the summary judgment application. Had the plaintiff given those details and the defendants simply denied them, the approach I adopt herein would be different.

[48] I am satisfied that there is a bona fide defense raised by the defendants. It follows that summary judgment must be refused.

ORDER

[49] **I accordingly make the following Order :**

1. **Summary judgment is refused.**
2. **First and Second Defendants are granted leave to defend the action.**
3. **Costs are reserved.**

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T.V. NORMAN

[15] ***Absa Bank Ltd v Jenzen and a Similar Case*** (unreported, GJ, case nos. 2014/ 877 and 2014/7728 dated 2 August 2021 at para 18).

JUDGE OF THE HIGH COURT

APPEARANCES:

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Matter heard on : 03 September 2024

Judgment delivered on : 10 September 2024