



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: 4342/2023

Reportable Yes/No

In the matter between:

**ABSA HOME LOANS GUARANTEE COMPANY
(RF) PROPRIETARY LIMITED**

First Plaintiff

Registration number [.....]

ABSA BANK LIMITED

Registration number [.....]

Second Plaintiff

and

NTOMBOMZI JAJI N.O

Defendant

ID [.....]

JUDGMENT

Cengani- Mbakaza AJ

Introduction

[1] On 12 August 2024, the plaintiff filed a notice of motion for summary judgment against the defendant, in accordance with Rule 32 of the Uniform Rules of Court, as amended. The application seeks payment of R3,824,857.36, in addition to interest at a rate of 12.25% per annum from 12 October 2023 until the final payment is made. Furthermore, the plaintiff seeks payment of 930,158.39, with interest calculated at 13.75% per annum from 11 October 2023 until the date of the final payment. The application is opposed by the defendant.

[2] The first plaintiff is a corporation that has been properly registered and established under the company laws of the Republic of South Africa. The second plaintiff is a publicly traded company with limited liability, appropriately registered in accordance with the company laws of the Republic of South Africa, and further recognized as a commercial bank under the provisions of the Bank Act 94 of 1999, as well as a credit provider according to section 40 of the National Credit Act 34 of 2005 (the NCA).

[3] The defendant is the widow and surviving spouse of the late judge Ndumiso Patric Jaji (the deceased). Sadly, her husband passed away on 12 July 2020. After his demise, the defendant was officially appointed as the Executrix of the deceased's estate. She is being sued in her capacity as the Executrix and not as an individual.

The pertinent facts

[4] At this point, it is important to outline the relevant background information regarding the material facts that have led to the plaintiffs' request for summary judgment, thereby framing the issues involved. It is crucial to note from the onset that at all relevant times, the defendant signed home loan agreements with the plaintiffs as an individual, thereby taking on personal liability for the responsibilities arising from those agreements. The following is the sequence of how those agreements were entered into. On or about 12 September 2018, the deceased and the defendant entered into a home loan agreement with the plaintiffs. In accordance with this agreement, the second plaintiff provided a loan amounting to R2,891,299.54 to both the deceased and the defendant. The agreement specified that the principal amount,

along with interest, would be reimbursed to the second plaintiff through 240 monthly payments of R29,321.12 each.

[5] Around 25 September 2018, the second plaintiff, the deceased, and the defendant entered into a second loan agreement (the second agreement). Under this second agreement, the second plaintiff agreed to provide an additional amount of R720,000 to the deceased and the defendant, which was secured by a home loan bond. According to the terms of the second agreement, the principal amount owed was to be paid back by the defendant and the deceased in 120 monthly payments of R10,398.91 each, along with interest, throughout the specified term.

[6] In order to secure the repayment of a loan obligations, a mortgage bond having a face value of R3,600,000, was properly registered in plaintiff's favour over the immovable property situated at Erf [...], Gqeberha. The plaintiffs contend that the defendant is in breach of the terms and conditions of both loan agreements, having failed to meet the repayment obligations, thereby stimulating the increase of the debt, and entitling the plaintiffs to claim the full outstanding amount, plus interest and costs.

[7] Subsequent to the issuance of the notices in terms of section 129 of the NCA to the defendant, the sheriff's returns of service mostly indicated that such notices had not been properly brought to the attention of the defendant. Undiscouraged, the plaintiffs proceeded to serve the summons to the defendant on 16 January 2024. On 27 May 2024, the defendant filed a notice of exception to the plaintiffs' particulars of claim, specifically alleging that they are vague, embarrassing and fail to disclose a cause of action. The exception specifically focused on the terms and conditions of the contract, contending that the particulars of claim lack sufficient clarity and specificity regarding crucial aspects, thereby hindering the defendant's ability to formulate a comprehensive plea. It is undisputed that following receipt of the summons, the parties mutually agreed to engage in a mediation process as contemplated by Rule 41A of the Uniform Rules of Court.

[8] Regrettably, despite this initial consensus, the mediation process stalled, and no further meaningful step either party took to facilitate it. Upon receipt of the

summons, the defendant raised objections of non-joinder and jurisdiction. Thereafter, the plaintiffs filed an application for summary judgment. When the matter came up for hearing, no plea was filed on the merits of the case. The defendant's case on the merits including the defence is fully asserted and set forth in the opposing affidavit that has been duly filed in response to the plaintiffs' application for summary judgment.

The parties' submissions

[9] Ms *Olowookorun*, the defendant's legal representative, strongly argued that the application for summary judgment is premature citing unresolved legal issues that justify further consideration. A pivotal aspect of her argument is focused on Mrs Ntombomzi Jaji (Mrs Jaji), the surviving spouse, as an interested party in the proceedings. Ms *Olowookorun* emphasized that Mrs Jaji's rights as the surviving spouse, are not merely a matter of convenience, but rather a necessity that must be acknowledged and respected. The terms of the agreements do not indicate that Mrs Jaji would waive her rights to be informed or notified of any proceedings that would eventually impact her individual rights. Furthermore, Mrs Jaji's right to exercise her choice to either settle the debt or assume responsibility for it was overlooked. By failing to join Mrs Jaji as an interested party and neglecting to consider her rights, the application is flawed and should be dismissed, so she argued.

[10] Ms *Olowookorun* further argued that the plaintiffs' choice of jurisdiction, specifically the Makhandha High Court is unjustified given that the defendant resides in Gqeberha where the property in question is situated, and her attorneys have offices in Gqeberha. By selecting Makhandha High Court as the jurisdiction, she asserted, the plaintiffs have imposed unnecessary inconvenience and expenses on the defendant, thereby exacerbating the overall cost and complexity of the litigation. Considering these issues, she argued, the court should reconsider the jurisdiction and transfer the matter to a more convenient and cost-effective forum.

[11] Ms *Sephton*, counsel for the plaintiffs, countered by arguing that the deceased and Mrs Jaji were married in a community of property of profit and loss. Consequently, there existed only one joint estate, comprising all assets, rights, and

obligations. Upon the deceased's passing, the community of property dissolved, and the entire joint estate vested in the Master of the High Court, subsequently devolving upon Mrs Jaji in her capacity as the duly appointed Executrix. Ms *Sephton* emphasised that, as evident from the particulars of claim, the defendant is indeed Ntombomzi Jaji, sued both as the Executrix of the deceased's estate and the surviving spouse. By virtue of her dual roles, Mrs Jaji is accountable for the debts and the obligations of the joint estate, including those incurred under the agreements in question.

[12] Ms *Sephton* addressed the second plea by arguing that the Makhanda High Court indeed possesses the jurisdiction to hear the matter as it shares concurrent jurisdiction with other courts. Therefore, so she asserted, the plaintiffs' choice of forum is valid and lawful, and the court is fully empowered to resolve the dispute.

The law

[13] Rule 32 of the Uniform Rules of Court provides :

“ (1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only—

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment;

together with any claim for interest and costs.

(2) (a) within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit

made by the plaintiff or by any other person who can swear positively to the facts.

(b) the plaintiff shall in the affidavit referred to in subrule (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......

(3) The defendant may:

(a).....

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.' (accentuation added)

[14] It is trite that when granting an application for summary judgment, judicial oversight plays a significant role in striking a balance between the rights of the plaintiff and the defendant. The summary judgment procedure serves as an essential mechanism, enabling the plaintiff to secure swift judgments against the defendants in cases where no bona fide defence to the claim exists. The expedited process is essential for avoiding unnecessary costs associated with prolonged litigation, particularly in instances where a defendant fails to raise a valid defence.¹

¹ In *Joob Joob Investments (Pty) Ltd v Stocks MavundlaZek Joint Venture* (161/08)[2009] ZASCA 23 (27 March 2009), the Supreme Court of Appeal, in holding that the time has perhaps come to discard labels such as 'extraordinary' and 'drastic', stated at para 32:

'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then

[15] Where it is evident that a meaningful ventilation of evidence is necessary to enable the court to render a just decision, summary judgment cannot be granted. In such instances, the court requires a more comprehensive examination of facts and evidence, which cannot be adequately achieved through a summary judgment process.

[16] Although the application for summary judgment is considered as an impeccable process,² it is significant to consider such applications in accordance with section 34 of the Constitution of the Republic of South Africa³ which guarantees the right of access to courts.

This fundamental right is instrumental in ensuring that the parties are given a fair and reasonable opportunity to present their case and have it adjudicated upon.

The issues

[17] The pivotal questions are whether the defendant has raised a bona fide defence to the plaintiff's claim and whether it is premature to seek summary judgment in instances where points of law remain unresolved.

Analysis by the court

[18] It is crucial to note that the filing of a plea upon receipt of the summons and particulars of claim is a peremptory step, as it enables the court to scrutinise the cause of action and determine whether the defendant has raised a bona fide defence that is valid in law. I acknowledge the standard set by our courts that a bona fide defence is not examined according to the strict standards of the pleadings. In the

bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor. Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E.'

² *Joob Joob Investments (Pty) Ltd v Stocks MavundlaZek Joint Venture* fn 1 (*supra*) at para 32.

³ Act 108, 1996 (The Constitution).

present instance, given the absence of a filed plea, the court will scrutinize the special pleas raised, alongside the opposing affidavit, to determine whether the defendant has provided sufficient disclosure regarding the nature and grounds of her defence. Furthermore, the court will assess whether the disclosed defence is both bona fide and valid in law. As contemplated in the rules, the onus rests squarely on the defendant to demonstrate that she has a bona fide defence to the claim.

[19] The defendant's defence hinges on the following apposite contentions: To begin with, she asserted that she ought to have been joined as the interested party in the proceedings. Additionally, she highlighted that a letter was addressed by the defendant's attorneys to the plaintiffs' agent on 17 November 2022, exploring the possibility of settling the matter amicably under the agreements, thereby rendering her personally accountable for the repayment of the loans. Furthermore, she contended that given the deceased's position as a judge, the minor children are entitled to receive financial support in the form of annuity payable to the surviving spouse. This, she submitted, presents a potential avenue for the settling of the matter.

[20] Notably, despite the proposal to refer the matter for mediation in terms of Rule 41A of the Uniform Rules of the Court, no concrete steps were taken by the plaintiff after having been invited to initiate the mediation process that both parties had agreed on. Moreover, the exception that is still pending will necessitate the amendment of the summons and particulars of claim.

[21] This court is not required to determine whether Mrs Jaji should be joined in the proceedings in her personal capacity or not. Even though one can easily accept that the Makhanda High Court has concurrent jurisdiction, it is not for this court to pronounce on these matters. In my opinion, these issues constitute special pleas that may be appropriately raised and decided upon during the trial proceedings rather than on summary judgment proceedings. Most importantly, even though Mrs Jaji has not been joined in the proceedings in her individual capacity, it is not disputable that she executed the home loan agreements in her personal capacity. It is further common cause that by so doing, she assumed personal liability for the obligations and debts incurred. Furthermore, as an individual consumer, her rights

are protected by the NCA, a piece of legislation that is also obligated to protect the rights of the plaintiffs as creditors.

[22] Upon examination of the facts presented by the defendant in the opposing affidavit coupled with the principles distilled in *Joob Joob v Stocks (supra)*⁴ as well as Rule 32(b) and (c) of the Uniform Rules of Court, there is no basis to conclude that the pleaded defence is a sham. In the exercise of my discretion, I am satisfied that the pleaded defence raised by the defendant is not morally justifiable due to her failure to pay the arrears, it is valid and enforceable in law. There is no valid and satisfactory explanation as to why the court should not allow the matter to proceed to trial, where the parties can engage in a comprehensive examination of the disputed issues and present evidence in support of their positions. Consequently, the application for summary judgment must fail.

Order

[23] In the result, the following order is issued:

1. The application for summary judgment is dismissed.
2. The defendant is granted leave to defend the action, if so advised.
3. The plaintiffs shall pay costs on a scale “A” as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

⁴ Footnote 1.

Counsel for the Plaintiffs : Adv S. A. Sephton
Instructed by : Sanderbergh Nel Haggard
C/O Huxtables Attorneys
Makhanda

Defendant's Attorney : Bukky Olowookorun Attorneys
c/o Mabece Tilana Inc
Makhanda

Heard on : 15 October 2024
Judgment Delivered on : 14 January 2025