IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable

Case no: **2097/2024**

In the matter between

THE STANDARD BANK OF SOUTH AFRICA LIMITED

(Registration no: 1962/000738/06) **APPLICANT**

and

ZADA TECH (PTY) LTD

(Registration no: 2012/021285/07) **FIRST RESPONDENT**

PIETER GERHARD CROTS **SECOND RESPONDENT**

Neutral citation: *The Standard Bank of South Africa Limited v Zada Tech (Pty) Ltd and Another (2097/2024)*

Coram:	**Mpama AJ**
Heard:	**17 October 2024**
Delivered:	**08 November 2024**
Summary:	summary judgment- instalment sale agreement- bona fide defence

ORDER

1. The application for summary judgment is granted against the First and the Second Defendants as per prayers 1-4 of the Notice of Motion.

2. The First and the Second Defendants are ordered to pay the Plaintiff's cost for the application on Scale A as contemplated in Rule 67A of the Uniform Rules of the Court, jointly and severally, one paying the other to be absolved.

JUDGMENT

Mpama AJ

[1] This is an opposed application for summary judgment brought in terms of rule 32 of the Uniform Rules of the Court against the first and second defendants. The cause of action is based on a written sale agreement entered into between the applicant (plaintiff in the main action) and the first respondent (first defendant in the main action) on 1 April 2022. The second respondent (second defendant in the main action) stood as surety for any obligation due to the plaintiff by the first defendant. In this matter, the parties will be referred to as in the main application.

[2] In terms of the agreement, the plaintiff sold to the first defendant an Agrico 2 Tower Pivot Complete with serial no. SAN033594. The principal debt to be advanced to the first defendant was an amount of R401 364.30. The cost of the agreement including interest, costs, charges and Value Added Tax (VAT) would be an amount of R542 451.05 payable in four annual instalments of R108 490.21 and a final payment of R108 490.21.

[3] The plaintiff alleged that there was a failure to comply with the obligations in terms of the agreement by the first defendant and consequently, instituted action proceedings against the first and second defendant, jointly and severally, the one paying the other to be absolved. When the defendants filed their plea, the plaintiff caused this application to be issued against the defendants.

[4] In an affidavit resisting summary judgment, the defendants averred that the amounts claimed by the plaintiff in the particulars of claim do not align with the figures reflected on the statement and there are 'contradicting figures of the various letters of demand, certificates of balance and the statement (SJ3) do not align.'

[5] Summary judgment enables a plaintiff to obtain judgment against a defendant without the necessity of going to trial when a defendant has no defence to a claim based on a liquid document, for a liquidated amount of money, for delivery of movable property and for ejectment. The court must be satisfied that that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a bona fide defence. Even before a court considers whether the defendant has established a bona fide defence, it is necessary for the court to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in order.[1]

[6] The defendant resisting summary judgment must set out a bona fide defence by disclosing fully the nature and grounds of the defence and the material facts relied upon. The defence must be disclosed with sufficient completeness and particularity to enable the court to decide whether or not the affidavit discloses a bona fide defence.[2]

[7] Van Loggerenberg indicates:

'[T]he nature and grounds of the defence and the material facts relied upon therefore in the affidavit should be in harmony with the allegations in the plea. In this regard the plea should comply with the provisions of R18(4) and 22(2), i.e it should clearly and concisely state all the material facts relied upon for the defence in order for the plaintiff, in the context of summary judgment proceedings, to consider whether or not the defence as

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[1] *Gulf Steel (Pty) Ltd v Rack-Rite BOP (Pty) Ltd and Another* 1998 (1) SA 679 (O) at 683J-684A.

[2] *Maharaj v Barclays National bank Ltd* 1976 (1) SA 418 (A) at 426.

pleaded raises any issue for trial.'[3]

[8] In *Absa Bank Ltd v Meiring Bank*[4] it was said:

'It follows that a defendant in a summary judgment application which has failed to plead all its defenses will be required to apply to amend its plea, if it seeks to add any, for the purposes of its opposition to a summary judgment. A defendant's failure to have pleaded such defenses initially will be material and, in addition to all the usual requirements to obtain the indulgence of being granted leave to amend, will require convincing explanation if it is to exclude the possibility that a court might infer delaying tactics and a lack of bona fides. An additional effect will be that such defendant will ordinarily have to bear the wasted costs of the application for leave to amend and those occasioned by the attendant postponement of the summary judgment application'.[5]

[9] The defence raised in the affidavit to resist summary judgment must be consistent with the plea. The plaintiff alleges that the defendants breached the terms of the agreement in that they failed to make payments as agreed in the written agreement. The defendants do not dispute the failure to pay. On their own admission, they are in arrears as they failed to make a repayment to the plaintiff. However, in their plea they raised the following defence: that the amounts claimed by the plaintiff were incorrectly quantified.

[10] The defendants' defences in the affidavit resisting summary judgment are:

Contradicting amounts:

(i) The defendants contended that the amount claimed by the plaintiff contradicts what is due by them in terms of the written agreement between the parties. In terms of the written contract, the first defendant's repayments to the plaintiff were as follows: 4 payments of R108 490.21 and a final payment of R108 490.21. The letters of demand delivered to the defendants dated 22 February 2023 and the particulars of claim speak to the same amounts. The certificate of balance and the statement of account serve as prima facie proof of the defendants' indebtedness. Acknowledging the payments made by the first defendant after the issue of summons, the amounts claimed by the plaintiff have

[3] Van Loggerenberg *Erasmus: Superior Practice*, vol 2, D1-416B16A.
[4] *Absa Bank Ltd v Meiring Bank* 2022 (3) SA 449 (WCC) para
[5] Ibid para 20.

been and still are consistent throughout the proceedings.

(ii) It is so that the plaintiff, referring to the first defendant's responsibilities in its affidavit, averred that the first defendant's repayments were monthly and not annual repayments. The plaintiff argued that it was an error as in terms of the written agreement the first defendant is to make an annual payment. I do not think that this is a matter that should detain us longer than necessary. Apparent from the affidavit is that this was a 'typographical error' as the amounts indicated in the affidavit clearly indicate so, and a contrary view cannot be sustained as the amounts to be paid by the first defendant would far exceed the amount owed to the plaintiff.

Non-compliance with the NCA

(iii) During the oral submissions, Counsel for the defendants argued that the provisions of the National Credit Act 34 of 2005 (NCA) are applicable to the second defendant. It was further argued that failure by the plaintiff to comply with the NCA is dispositive of the application. The plaintiff entered into an agreement with the first defendant. The second defendant's role is secondary as he only stood as a guarantor. The provisions of the Act are not applicable in the contract. In addition, the plaintiff in its particulars of claim pleaded that the provisions of the NCA were not applicable. This was not denied by the defendants and, furthermore, it was not raised as a possible defence by the defendants in their affidavit resisting summary judgment. This argument has no merit and is an afterthought by the defendants intended to delay the proceedings.

[11] I am satisfied that the plaintiff's claim has been clearly established and the defendants have failed to raise a bona fide defence thereto.

[12] The general rule is that costs follow suit. The plaintiff has requested a punitive cost order against the defendants. An award of costs is at the discretion of the court and needs to be exercised judiciously. In an unreported judgment it was said the '[i]t is known to the parties that in awarding costs this court has a discretion which should be exercised judicially upon the consideration of the facts in the matter and that in

essence, a decision be made where fairness to both sides should be considered.'[6] In *Public Protector v South African Reserve Bank*[7] it was said that 'costs on an attorney and client scale are to be awarded where there is a fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court processes.'[8] I have no reason to deviate from the general rule applicable to the award of costs. However, the defendants' conduct does not warrant costs on an attorney and client scale.

ORDER

[13] In the result, I make the following order:

1. The application for summary judgment is granted against the first and the second defendants as per prayers 1-4 of the Notice of Motion.

2. The first and the second defendants are ordered to pay the plaintiff's cost for the application on Scale A as contemplated in Rule 67A of the Uniform Rules of the Court, jointly and severally, one paying the other to be absolved.

[redacted]

L MPAMA, AJ

[6] *Mulder v Kuhn* (41405/19) [2022] ZAGPPHC 336 para 5.

[7] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC)

[8] Ibid para 8.

APPEARANCES

On behalf of the applicant:	Advocate I Macakati
Instructed by:	Vezi & De Beer Inc C/O Blair Attorneys Bloemfontein
On behalf of the respondents:	Advocate M Froneman
Instructed by:	Van Wyk & Preller Attorneys Bloemfontein