



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

Reportable / Not reportable

Case no: 2721/2024

In the matter between

THE STANDARD BANK OF SOUTH AFRICA

FIRST APPLICANT

SB GUARANTEE COMPANY (RF) (PTY) LTD

SECOND APPLICANT

and

CHRISTOFFEL GERHARDUS NEL

RESPONDENT

Neutral citation:

Coram: Mahlatsi AJ

Heard: 07/11/2024

Delivered: 12/12/2024

Summary: Summary judgment – credit agreement – loan contract

ORDER

- 1 Summary judgment application is dismissed in respect of claims 1 to 3 and 6.
 - 2 Summary judgment application is granted as prayed for in the notice of motion in respect of claims 4 and 5.
 - 3 Costs are costs in the course.
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JUDGMENT

Mahlatsi AJ

Introduction

[1] The plaintiffs seek summary judgment in terms of rule 32 of the Uniform Rules of Court (rules) against the defendant. The plaintiffs' alleged claims against the defendant are contractual in nature following the credit agreements entered into between the plaintiffs, the principal debtor represented by the defendant and the defendant. The credit agreements, or loan agreements, are attached to the summons. The defendant opposed the summary judgment application and made a counterclaim. Despite the fact that these proceedings are in the form of an application, the parties are referred to in this judgment as plaintiffs and the defendant, respectively.

Background

[2] The plaintiffs' claim is founded on six contracts of loan, allegedly concluded on three unknown dates in 2012 and on 10 October 2019 between the first plaintiff, Future Indefinite Investment 254 (Pty) Ltd (the principal debtor) and the defendant. These contracts also included suretyships between the defendant and the second plaintiff and

as well as a guarantee entered into between the defendant and first plaintiff on 10 July 2019.

[3] The loan agreements in respect of claims 1 to 3 and claim 6 were entered into in the following manner:

- (i) Claim 1 is an overdraft agreement dated 30 September 2019, marked 'POC3' as per plaintiff's paginated bundle on page 84;
- (ii) Claim 2 is a Business Revolving Plan dated 02 February 2015, marked 'POC 9' as per plaintiff's paginated bundle on page 120;
- (iii) Claim 3 is a home loan agreement with mortgage loan account number 366464604 dated 17 July 2012, marked 'POC 12' as per plaintiff's paginated bundle on page 144; and
- (iv) Claim 6 is a home loan agreement with home loan account number 531326225 dated 6 December 2017, marked 'POC 23' as per plaintiff's paginated bundle on page 183.

Claim 4 is based on a credit card agreement entered into during 2022 under account number 55205784463102 as mentioned in para 35 of the particulars of claim, whereas Claim 5 is loan or overdraft agreement under account 043120539 as reflected on 'POC 19', the statement of the account.

[4] The defendant is resisting this application on several on several grounds. He filed his plea and an affidavit supporting his claim that he has a bona fide defence and a counterclaim.

[5] I will not inundate this judgment by regurgitating all such 'express terms', save to only highlight such terms as are relevant for the purpose of this judgment and to the extent necessary to arrive at a fair and just determination of the current issues. Such terms including the loan agreements, guarantees and sureties concluded by the parties which are referred to and included in the pleadings.

[6] The defendant, in his opposing affidavit, avers that the first plaintiff and the Bloemfontein liquidator are withholding information on financial statements of the principal

debtor. The defendant is unable to challenge the plaintiff(s) claim because of the lack of those financial statements which are needed for him in the discovery. Furthermore, he contends that the plaintiff and the Bloemfontein liquidator are undermining the instructions of Judge Hancke, who was the chairperson of the enquiry in the liquidation of the principal debtor by withholding financial information from the accountant.

[7] In addition, the plaintiff breached its obligation by preventing the principal debtor from being rehabilitated through a business rescue process. Furthermore, the plaintiffs breached the obligation to mitigate the effect of covid on the principal debtor and the first plaintiff prevented a better return to be archived on the sale of assets of the principal debtor.

[8] The defendant is disputing the amounts claimed by the plaintiffs and that the certificates of balance do not constitute proof of the amounts allegedly indebted to the plaintiffs.

Common cause factors

[9] The first plaintiff and the principal debtor, who was represented by the defendant, entered into different loan agreements as referred to in claims 1 to 3. The second plaintiff and the principal debtor, represented by the defendant, entered into loan agreement as referred to in claim 6. Furthermore, the first plaintiff and the defendant entered into a credit card agreement and an overdraft agreement as referred to in claims 4 and 5. There are guarantees and sureties signed by the defendant in favour of the plaintiffs as are attached in the summons.

Applicable law

[10] Rule 32 provides:

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

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of movable property; or
- (d) for ejectment;

together with any claim for interest and costs.'

[18] A defendant wishing to oppose a summary judgment has to invoke the procedure set out in rule 32(3) which provides it with the following steps to follow, namely, that: (a) he must provide to the plaintiff security to the satisfaction of the Registrar, for any judgment including costs which may be given¹ or he may, upon hearing an application for summary judgment, satisfy the court by affidavit delivered before noon on a day before the court day (which affidavit may, with leave of court, be supplemented by oral evidence) that he has a bona fide defence to the claim on which summary judgment is sought or he has bona fide counterclaim against the plaintiff.²

[19] The affidavit must disclose the nature of the defence and the material facts relied upon. The defendant need not deal exclusively with the facts and evidence relied upon to substantiate those factors but he must at least disclose the defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to determine whether the affidavit discloses a bona fide defence or not.

[20] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*³ it was held that 'the summary judgment procedure was not intended to "shut" (a defendant) out from defending, unless it was very clear indeed that he has no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.'⁴

[21] In *Cohen N.O. and Others v M*,⁵ Nichols JA stated that, '... most of the old authorities still apply in determining whether a defendant has a bona fide defence. All the defendant is required to do is disclosed a *bona fide* defence. All the defendant is required to do is disclose a genuine defence, as opposed to "a sham" defence. Prospects of success are irrelevant and as long as the defence is legally cognisable in the sense that

¹ Rule 32(3)(a).

² *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere* (1) 1978 (1) SA 160 (W); *Slabbert v Volkskas Bpk* 1985 (1) SA 141 (T).

³ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA).

⁴ *Ibid* para 31.

⁵ *Cohen N.O. and Others v D* [2023] ZASCA 56

it amounts to a valid defence if proven at trial, then an application for summary judgment must fail'.⁶

[22] On the basic requirements to be fulfilled by the plaintiff to succeed in the application for summary judgment, the court in *Gulf Steel (Pty) Ltd v Rack-Rite BOP (Pty) Ltd*⁷ held:

'In view of the nature of the remedy the Court must be satisfied 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 as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering 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. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if the plaintiff's claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court.'⁸

[23] In *AHMR Hospitality (Pty) Ltd t/a Bakenhof Winelands Venue v Da Silva*⁹ it was held that a defendant cannot, for the first time, raise defences in its affidavit opposing summary judgment where no such exist in the plea.¹⁰

[24] In *Absa Bank Ltd v Le Roux and Others*¹¹ 2014 (1) SA 475 (WCC) at 483B the following was stated:

'The purpose of the certificate is to create an evidential onus on the surety to negate the banks allegations as to the quantum and the cause of any debt in any proceedings in which it seeks to make a recovery against the surety. The certificate stands as *prima facie* proof of the substance of its contents in any litigation to exact payment under the deed of suretyship . . . It has that effect, not as an incident of any law of general application, but

⁶ Ibid para 29.

⁷ *Gulf Steel (Pty) Ltd v Rack-Rite BOP (Pty) Ltd* [1997] 4 All SA 178 (O).

⁸ Ibid at 683I-684B.

⁹ *AHMR Hospitality (Pty) Ltd t/a Bakenhof Winelands Venue v Da Silva* [2023] ZAWCHC 206 2024 (3) SA 100 (WCC).

¹⁰ Ibid para 12.

¹¹ *Absa Bank Ltd v Le Roux and Others* [2013] ZAWCHC 148; 2014 (1) SA 475 (WCC).

only because the parties have agreed in their contract that it should do.¹²

[25] Lastly, in *Senekal v Trust Bank of Africa*¹³ at 382A, the court provided that the main purpose of a certificate clause was clearly to facilitate proof of the amount of the principal debt to the bank at any given time.¹⁴

Does the defendant disclose a bona fide defence

[26] The defendant does not deny the indebtedness of the principal debtor to the second plaintiff, notwithstanding the detail provided in the certificate of balance in respect of claims 1 to 3 and 6. The defendant is disputing the amounts claimed against the principal debtor. He requests detailed financial statements and information to be in a position to defend those claims. The reason, amongst others, is that there were payments made from the proceeds of the sale of the principal debtor's properties due to its liquidation. The instruction of Judge Hanke followed to resolve the impasse between the parties. The liquidation proceedings have influence and what happened in the process is relevant to the defendant case. The issue of the owed amount by the principal debtor can be determined when the plaintiffs disclose financial information for the defendant to meet their claims.

[27] As such, the defendant has proved there are issues that need ventilation through trial proceedings in respect of counts 1 to 3 and 6. The main reasons can be based on the liquidation proceedings against the principal debtor which are not yet finalised and the proceeds of sale of the property of the principal debtor. In addition to that, the instructions of Judge Hanke were not complied with fully. As a result, the liquidity of claims 1 to 3 and 6 becomes the crux of the defendant's defence and counter-claim. Thus, the defendant has a bona fide defence. Summary judgment cannot make liquidated what is intrinsically unliquidated.

[28] The situation is different in respect to claims 4 and 5. The defendant deny his indebtedness to the first plaintiff in these two claims. He alleges that the first plaintiff was authorised by Top Matt Trading 511 CC to settle the debts in respect of the credit card

¹² Ibid para 16.

¹³ *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A).

¹⁴ Ibid at 381A.

and the overdraft. It is clear from the facts that those instructions were not communicated to the first plaintiff. Furthermore, the certificates of balance cannot be relied on for proper adjudication the amounts. This view is misplaced in my opinion because the defendant cannot say the first plaintiff is authorised to settle the debts with money in the account, and at the same time dispute the amounts. The certificate of balance stands as prima facie proof of the substance of its contents in any litigation on the exact amount owed to the bank because the parties were agreed in the contract that it should be so.

[29] Having said that, the court could not determine that the defendant has demonstrated that that he has a bona fide defence in law in respect of claims 4 and 5, which would justify this Court dismissing the summary judgment. The plaintiff is entitled to assert their rights as afforded in the rule 32.

Order

[30] Accordingly, I make the following order:

- 1 Summary judgment application is dismissed in respect of claims 1 to 3 and 6.
- 2 Summary judgment application is granted as prayed for in the notice of motion in respect of claims 4 and 5.
- 3 Costs are costs in the course.



MAHLATSI AJ

Appearances:

For the Applicants;

Adv. J-H Els

Instructed by:

EG Cooper Majiedt Inc
BLOEMFONTEIN

For the Respondents:

Adv. J Ferreira

Instructed by:

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