



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

APPEAL CASE NO.: 627/2017

GP CASE NO.: 71053/16

1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/ NO
(3) REVISED. YES/ NO
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DATE
SIGNATURE

In the matter between:

ABSA BANK LIMITED

Appellant

and

**UMMI PROPERTIES (PTY)LTD
(REG. NO: 1993/001976/07)**

Respondent

JUDGMENT

Mfenyana J, (Basson, J and Kumalo, J concurring)

Background

[1] This is an appeal against the judgment and order of this court, handed down by Sardiwalla AJ (as he then was) on 30 March 2017 in which he granted summary judgment in favour of UMMI Properties (Pty) Ltd (UMMI), the respondent in this appeal. UMMI was the plaintiff in the application for summary judgment. The reasons for the order were provided by the learned judge on 23 January 2023. The appeal is with leave of the Court *a quo*.

[2] In the notice of appeal and the supplementary notice of appeal, the applicant, ABSA Bank Limited (ABSA) – the defendant/respondent in the court *a quo*) sets out the following grounds of appeal:

That the court *a quo* erred:

- 2.1 In its application of rule 32(2)(b) which came into operation on 1 July 2019 whereas the application for summary judgment was heard and decided on 30 March 2017 which was prior to the amendment of rule 32.

2.2 In that it misinterpreted the Court's discretion to be an "unfettered discretion" which it is not. In this regard, ABSA submitted that the Court has a residual discretion to refuse summary judgment where the plaintiff's (UMMI) claim is not compliant with the requirements of the Rule, and where the plaintiff has not discharged its onus. Conversely the Court does not have a discretion to grant summary judgment when a defendant has disclosed a *bona fide* defence.

2.3 In conflating, alternatively confusing the defences raised by ABSA to UMMI's application for a declaratory order made under case number: 54941/15 with the defences raised by ABSA to UMMI's claim for payment under case number: 71053/2016 (in the court *a quo*), the Court erred in not considering and assess each of the defences upon which ABSA relied upon in opposing summary judgment. More particularly, the defence that the amount relied upon by UMMI is not liquid, and therefore that UMMI's particulars of claim do not disclose a cause of action.

2.4 In holding that ABSA had failed to provide an explanation for having continued to deduct payments (from UMMI's account) *after* the expiry of the term of the loan, in circumstances where:

2.4.1 ABSA denied that UMMI had paid an amount exceeding its indebtedness to it.

2.4.2 ABSA stated that UMMI had repaid its indebtedness to the appellant only on 8 June 2016 (immediately whereafter summons was issued and no further payments were made). It submitted that the learned judge erred by holding that ABSA had admitted the averment that the debt had been repaid.

2.5 ABSA contends in this regard that, it relied on the bank statements relating to UMMI's account, the schedule of reconstruction of the interest calculations on UMMI's account reflecting payments made and the outstanding balance from time to time and which was confirmed under oath by the author thereof. According to ABSA this demonstrated in particular that UMMI had not paid any amount exceeding its indebtedness to it.

2.6 That the claim, already pointed out, is not for a liquidated amount.

2.7 ABSA contends that the court *a quo* ought to have held that it had disclosed a *bona fide* defence to UMMI's claim that it had overpaid ABSA.

Facts before the court in the summary judgment application

[3] UMMI, as plaintiff, instituted proceedings against ABSA for an amount of R1 016 066.29 arising from overpayments made by UMMI to ABSA in respect of its loan account with ABSA. The loan agreement had been concluded by the parties

on 13 February 2003, in terms whereof ABSA provided bond finance to UMMI in the amount of R10.5 million (the first loan agreement).

[4] On 23 January 2004 UMMI applied for a restructuring of the loan, which was approved by ABSA. The terms and conditions of the restructured loan agreement were accepted by UMMI on 26 January 2004. At this stage, the balance on the 'first loan agreement' stood at R10 366 384.00. UMMI made a lumpsum payment of R6.4 million, reducing the restructured loan amount to R3 966 384.00, payable in monthly instalments inclusive of interest, over a period of 10 years until 1 April 2014. The first payment in terms of the second loan agreement was payable on 1 April 2004. ABSA granted a covering mortgage bond in the amount of R3 966 384.00 (the second loan agreement).

[5] UMMI contends that, despite having complied with all its obligations in terms of the prevailing agreement, ABSA continued to debit its bank account. It further contends that from 1 April 2014 (being the termination date of the agreement) to date of institution of the proceedings in September 2016, ABSA had debited a further amount of R1 016 066.29 in *excess* of what was payable by UMMI. It is on that basis that UMMI avers that ABSA has been unduly enriched in the amount of R1 016 066.29 as the amounts debited were not owing.

[6] ABSA defended the action. Upon entering appearance to defend, but before filing a plea, UMMI filed an application for summary judgment on the basis that

ABSA had no defence, and in accordance with the provisions of the erstwhile rule 32. It was submitted that ABSA had entered appearance to defend, solely for purposes of delaying judgment.

[7] In opposing the application, ABSA denied that it was indebted to UMMI in any amount, and that, to the contrary, the respondent was indebted to it. ABSA further detailed a previous application launched by UMMI on 15 July 2015 wherein it sought a series of orders, *inter alia*, a declarator that the loan account had been fully paid and therefore terminated, and that any variations on the interest rate payable under the loan account should be declared invalid ("the 2015 application").

[8] The 2015 application was also opposed by ABSA, raising various defences, no less of which, were prescription and estoppel. Importantly, ABSA further contended that the application was fraught with disputes of fact. In that matter the parties had reached an agreement that UMMI would withdraw the application, on the understanding that it would then institute action proceedings, and that the matter would be referred to trial. ABSA claims that at the time UMMI launched the application for summary judgment, it had not yet withdrawn the 2015 application despite the agreement reached between the parties. The net effect of ABSA's contention is that the 2015 application is still pending before this court and thus constitutes *lis alibi pendens*.

[9] In September 2016, UMMI issued summons, the particulars of which form the basis of the present proceedings. ABSA reiterated that the claim, alternatively, a substantial portion of it, had become prescribed. It relied on all the defences it raised in its opposition to the 2015 application, presumably in the understanding that the same defences were also applicable in the application for summary judgment.

[10] ABSA further contended that there is a dispute of fact as the basis for UMMI's claim is the loan agreement. As regards prescription, ABSA contended that UMMI's sole cause of action could only arise from a *condictio indebiti*, which claim arose in 2006. Further in 2010, ABSA contended, UMMI had already addressed correspondence to ABSA challenging the interest rate. Considering that UMMI had been aware of the interest rate since 2006 and only objected thereto in 2010, whilst continuing to make monthly instalment payments until June 2016, it is estopped from relying on this issue, as it does in its particulars of claim. ABSA thus contended that UMMI had accepted the interest rates applicable at the time and has paid all amounts due in terms of the interest rates applied.

[11] ABSA also submitted that when the application for summary judgment was launched on 26 October 2016, UMMI was fully aware of ABSA's contention that there were disputes of fact on the papers and that the 2015 application was still pending. On all of these grounds, ABSA contended that the application for

summary judgment was vexatious and amounted to an abuse of the process of court.

Counter-application

[12] In opposing the appeal, UMMI filed a counter-application for the dismissal of the appeal, on the basis that the appeal has lapsed as ABSA had not taken any further steps since the filing of the supplementary notice of appeal and the appeal record on 27 June 2023. In particular, UMMI assails ABSA's failure to provide security for costs, in prosecuting the appeal and that its failure to apply for condonation for the late filing of the supplementary notice of appeal, justifies the dismissal of the appeal.

[13] ABSA filed an application for condonation of its non-compliance with the rules relating to provision of security, seeking a waiver of the provisions, *alternatively* that the late filing of the guarantee provided by ABSA be accepted as security for UMMI's costs. At the hearing of the matter, it was agreed that the issue of security for costs was not an issue that should detain the court, as ABSA had in any event provided a guarantee, albeit belatedly. As regards the filing of the supplementary notice of appeal and the application for a date of hearing, ABSA sought condonation for the late filing thereof, and the reinstatement of the appeal in terms of rule 49(6)(b).

Condonation

[14] In the affidavit in support of the condonation application, the deponent, Willem Adriaan Du Randt ("Du Randt") asserts that when ABSA applied for leave to appeal in April 2017, the court order was not available. Leave to appeal was ultimately heard in September 2017 and granted. The appeal was subsequently enrolled for 16 October 2019 whereafter ABSA filed its heads of arguments. It appears that on the day of hearing, UMMI requested a postponement occasioned by the late filing of its heads of argument which were filed 14 October 2019, some 7 months after ABSA filed its heads of argument.

[15] Du Randt laments the non- response from the attorneys for UMMI to correspondence he had sent to them between 2017 and 14 October 2019. It later transpired that this was due to the instructing attorney's ill-health. On 16 October 2019 the matter was postponed *sine die* as there were no reasons provided by Sardiwalla AJ (as he then was). The reasons were ultimately provided only on 23 January 2023. Du Randt states that the judgment only came to his attention in March 2023 whereafter he attended to update the record of appeal. He then served a supplementary notice of appeal on 27 June 2023.

[16] Concerning the period subsequent to the filing of the supplementary notice of appeal, Du Randt states that this notice was received on 6 July 2023 and in August 2023, the appellant applied for, a date of hearing. In October 2023 the appellant ascertained from the appeals office that they were required to upload

heads of argument on Caselines before a hearing date could be allocated. It is worth noting that ABSA's heads of argument had been filed in March 2019 and had to be supplemented. This was only done in 2024. Du Randt states that this was occasioned by the unavailability of counsel who had a bereavement at the time.

[17] An application for a new hearing date was made on 26 February 2024 and ABSA's heads of argument were filed on 20 March 2024. ABSA attributes this to the confusion pertaining to when heads of argument needed to be filed. The Registrar had advised them that the Rules of the Supreme Court of Appeal required that heads of argument be filed before a date is allocated. As such, explains Du Randt, the appellant was waiting for allocation of the date of hearing, while the Registrar was awaiting the filing of heads of argument.

[18] It is trite that a party seeking condonation must give a full explanation for its non-compliance with the Rules and that sufficient cause exists for the granting of condonation. The granting or refusal of condonation involves the exercise of a discretion. In *Melane v Santam Insurance Co Ltd* the then Appellate Division held that:

" In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually

decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."¹

[19] On a conspectus of facts before us, this court is inclined to grant condonation for the late prosecution of the appeal. As for the provision of security, it appears to be a fair proposition that the guarantee issued by ABSA, albeit belatedly, be accepted as security for the respondent's costs. As such, condonation for the late provision of security is granted.

[20] Ultimately the issue turns on whether the court *a quo* was justified in granting summary judgment.

Evaluation of the order granting summary judgment

[21] In its judgment, the court *a quo* considered whether ABSA had a *bona fide* defence, and whether it had raised any triable issues. The court found that the

¹ 1962 (4) SA 531 (A) at 532C- G.

defences were not *bona fide* and could not be sustained at a subsequent trial. In arriving at this finding, the court *a quo* noted that UMMI had averred that ABSA had conceded in its answering affidavit that the debt had been paid in full. On this basis, it found that ABSA had no defence.

[22] The court further considered that ABSA took issue with the interest rate, which was not UMMI's cause of action. Its cause of action was that UMMI had a fixed term loan agreement with ABSA, and that, despite its termination on 1 April 2014, ABSA had continued to debit UMMI's account for over two years in the sum of R1 016 066.29. I understand this to mean that it was thus not open to the ABSA to debit UMMI's account beyond 1 April 2014. The court further noted that all that ABSA could have done to adjust the amount to be debited, over the duration of the loan, if it had given written notice to UMMI, to alert them to whatever changes there may have been in interest rates.

[23] Pertaining to the interest rate, the court *a quo* found that there was no dispute, as UMMI had accepted the interest rate applied by ABSA. The court also rejected ABSA's defence of *lis alibi pendens* and found that the causes of action as well as the relief sought in the 2015 application and the action proceedings, were different. In so doing, the court *a quo* accepted the contention by UMMI that the 2015 application was for different relief and filed under a different case number. The court also accepted that the application was based on incorrect

interest rates and calculations, and was overtaken by events, namely, the effluxion of 10 years.

[24] The crisp issue for determination is whether UMMI had extinguished the debt.

Condictio indebiti

[25] Before us, there was an extensive debate on the intricacies of the *condictio indebiti*. In the summons, UMMI claimed that ABSA has been enriched in the amount of R 1 016 066.29. ABSA in its affidavit resisting summary judgment stated as follows: Although it is a *condictio indebiti*, it is calculated on a factual interpretation of an interest rate which is not a liquid amount since the facts pertaining to the interest rate supplied are not common cause". On the issue of the *condictiones*, UMMI's simple submitted that the loan was for a fixed period and that it ensured that there were enough funds in its bank account to cover the deductions, but that ABSA continued to debit amounts for a further 26 months even *after* the 10-year period had expired. It had done so, despite the fact that UMMI never missed a payment in terms of the loan agreement. UMMI further contended that, on ABSA's own version as reflected in the schedule provided by ABSA, it is clear that there has been an overpayment, and therefore, UMMI was entitled to summary judgment.

[26] UMMI submitted that it never placed reliance on the *condictio indebiti* and that its action was premised on the *condictio sine causa* which, according to the argument, required of UMMI to prove that there was receipt of money without a valid *causa*. We do not, for purposes of this appeal deal with the legal intricacies regarding a claim based on the *condictio sine causa* and a claim based on the *condictio indebiti*. This was not before the court *a quo* in the summary judgment application.

[27] Moreover, it was only in argument at the hearing of the appeal that the issue of the *condictio sine causa* was raised by UMMI. The court *a quo* could not, and therefore did not deal with this distinction between the two *condictiones*. All it was required to do at that stage of the proceedings was to determine whether the defences advanced by ABSA raised a triable issue, and if so, dismiss the summary judgment and afford the defendant an opportunity to file its plea and defend the matter. The court *a quo* did not have to determine whether those defences would succeed at trial, only that they raised a triable issue.

[28] It is not difficult to see that the issue of whether the indebtedness under the loan agreement had been extinguished by UMMI on 1 April 2014, is an issue highly contested between the parties. It matters not in my view, as argued by UMMI, that ABSA was in control of the account, and effected the debits. This is a matter which the trial court would be required to determine at a hearing of the matter in due course.

[29] In my view, there is merit to ABSA's averment that UMMI's reliance on the 10-year period is at odds with the terms of the agreement, in particular, clause 5 which stipulates that the loan is repayable over a period of 10 years. This is different from saying that the agreement would terminate after 10 years, so the contention went. At the very least, this indicates that a dispute exists between the parties that should be ventilated at trial. ABSA's contention is that UMMI had not discharged its responsibilities in terms of the loan agreement and only paid the full outstanding amount on 8 June 2016. UMMI's contention on the other hand is that it had paid off its debt, or ought to have, as the loan term had come to an end.

[30] In these circumstances, it is difficult to comprehend the basis on which the court *a quo* resolved these competing versions. Such is not apparent *ex facie* the judgment. The court *a quo* ought not to have granted summary judgment. UMMI's contention that because the debiting of its account was within the control of ABSA does not change the situation. At summary judgment stage, if the defendant (ABSA) raises a triable issue, summary judgment cannot succeed.

[31] In respect of costs, the appellant also seeks an order setting aside the cost order granted by the court *a quo* as a sequel to the granting of the summary judgment application. It would seem that the court *a quo* relied on the time-honoured principle that costs follow the event. Naturally, it would follow that if the order granting summary judgment is set aside, the order for costs attendant

thereto should also be set aside. In relation to the costs of this appeal, it would only be fair that such costs should follow the event.

Order

[32] In the result, the following order is made:

- a. Condonation for the late prosecution of the appeal is granted.
- b. The appeal is reinstated.
- c. The late provision of security by the appellant is condoned. The guarantee provided by the appellant shall serve as security for the respondent's costs.
- d. No order as to costs in respect of the orders in paragraph (a), (b) and (c) above.
- e. The order of the court *a quo* is set aside and substituted with the following:

'(1) The application for summary judgment is dismissed.

(2) The defendant is granted leave to defend the plaintiff's claim.

(3) Costs are reserved for determination by the trial court.

- f. The respondent is ordered to pay the costs of this appeal on scale C.


S MFENYANA
JUDGE OF THE HIGH COURT
PRETORIA

I agree


A BASSON
JUDGE OF THE HIGH COURT
PRETORIA

I agree


M KUMALO
JUDGE OF THE HIGH COURT
PRETORIA

Appearances

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Date of hearing

23 January 2025

Date of judgment

14 May 2025