

**REPUBLIC OF SOUTH AFRICA**



**SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)**

CASE NO: 2012/14278

In the matter between:

**CHANGING TIDES 17 (PTY) LIMITED N.O.**

Plaintiff

and

**VITEX INVESTMENTS 878 CC**

First Defendant

**VAN DER LIST, THEODORUS JACOBUS**

Second Defendant

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**JUDGMENT**

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[1] This is an application for summary judgment.

[2] The claim arises out of a suite of agreements. Blue Banner Securitisation Vehicle RC1 (Pty) Ltd ("Blue Banner") lent and advanced a capital sum of R3 640 000 and an additional sum of R1 million to the first defendant. The South African Home Loans Guarantee Trust ("the Trust") guaranteed compliance by the first defendant with its obligations to Blue Banner in terms of the loan agreement. The first defendant executed a written indemnity in favour

of the Trust. That indemnity was secured by the registration of an indemnity bond over Portion 5 of Erf 2176, Bryanston Township, registration division IR, Province of Gauteng, held by the first defendant in terms of Deed of Transfer No. T59756/2009. The sole trustee of the Trust is the plaintiff, being Changing Tides 17 (Pty) Ltd N.O. The manager of the trustee, Changing Tides, is South African Home Loans (Pty) Ltd. The various agreements were concluded on 6 July 2010 and the indemnity bond was registered under bond No. 46670/2010 on 15 October 2010. The indemnity bond constitutes a mortgage securing the first defendant's obligations under the indemnity up to an amount of R4 million.

- [3] On 6 July 2010, the second defendant executed a written deed of suretyship in terms of which he bound himself jointly and severally to the Trust as surety and co-principal debtor for the due payment to the Trust by the first defendant of any sum owing by or claimable from the first defendant from any cause whatsoever.
- [4] The plaintiff alleges that the first defendant failed timeously to perform its obligations under the loan agreement by falling into arrears with the monthly instalments. These amounts have, despite demand, not been paid. The arrears as at 28 March 2012 amounted to R150 452,39. As at 1 February 2012, the full balance owing by the first defendant under the loan was R3 721 956,42.
- [5] The plaintiff holds the second defendant liable for the same amount in terms of the deed of suretyship.

- [6] The defendants have filed an affidavit resisting summary judgment in which they raise two points *in limine* and a defence on the merits.
- [7] The defence on the merits is based on the allegation that the financing to be provided by Blue Banner in terms of the suite of agreements, represented only 30% of the total financing required for a particular property development. The balance of the finance was to be provided by a different entity. That finance was conditional upon the first defendant's securing finance in respect of the 30% to be provided by Blue Banner in terms of the suite of agreements.
- [8] The defendants allege that they dealt with a bond originator, one "Brent" who was employed by SA Home Loans (Pty) Ltd and who gave the assurance that the registration of the indemnity bond would be a quick and simple process.
- [9] They aver further that this did not turn out to be the case. It is averred that as a result of delays on the part of SA Home Loans (Pty) Ltd, the condition upon which finance was to be provided in respect of the balance of 70%, failed. The property development could not proceed. This resulted in a loss of profits in the amount of R9 350 000. Accordingly, the defendants allege that they have a counterclaim against the plaintiff in an amount substantially in excess of the amount claimed in terms of the suite of agreements.
- [10] There is, however, a fundamental flaw with the counterclaim. For a counterclaim to be set up as a valid basis for resisting a summary judgment application, the counterclaim must obviously lie against the plaintiff. However,

on the defendant's own version, the claim lies against SA Home Loans (Pty) Ltd and not against the plaintiff, Changing Tides 17 (Pty) Ltd.

[11] On this basis alone, no bona fide defence is raised by the defendant on the merits. It is not necessary for me to consider the further argument advanced by the plaintiff that the essential elements of the counterclaim were not properly set out in the affidavit resisting summary judgment.

[12] It will immediately become apparent that, that being the only defence proffered on the merits, it is not in dispute on the defendants' affidavit, that the suite of agreements was validly concluded, that the first defendant is in default in its repayment of the loan and that the total amount due is the amount claimed by the plaintiff.

[13] I now turn to deal with the points *in limine*.

[14] The first point *in limine* is that the summons and particulars of claim are vague and embarrassing and that on this basis summary judgment should be refused. The basis upon which this is alleged is that, whilst the loan agreement, indemnity and suretyship agreement all refer to the borrower as being Vitex Investments 878 CC (ie the first defendant), having a company registration number 2007/207893/23, the indemnity bond refers to Vitex Investments 878 CC but with company registration number 2007/207889/23.

[15] Reference to the relevant CIPC records reveals that the latter number, 2007/207889/23, is in fact the registration number of a different close

corporation being “Consep Construction CC”. However, closer scrutiny of the indemnity bond documentation shows that there was an attempt to amend the registration number whereby one of the digits “8” was deleted, leaving a purported registration number of 2007/20789/23. In fact, this number is not the number of Consep Construction CC and, containing insufficient digits, is probably not the registration number of any entity.

[16] All of the other documents referred to had also referred initially to the incorrect registration number being that of Consep Construction CC but amendments had been fully and successfully effected to reflect the registration number of the first defendant. The probabilities are overwhelming that a similar attempt was made to correct the registration number reflected on the indemnity bond, but failed insofar as the deletion of the one digit “8” was not followed by the insertion of the digit “3” after the digit “9”. The first defendant is manifestly the party to that document.

[17] In any event, as was pointed out in *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd*:<sup>1</sup>

*“An exception to particulars of claim on the basis that they are vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. It must go to the ‘root of the matter’. Such an exception may not refer only to certain paragraphs of the particulars of claim; it ‘must go to the whole cause of action, which must be demonstrated to be vague and embarrassing’.”*<sup>2</sup>

[18] Accordingly, there is no substance in this point *in limine*.

<sup>1</sup> 2008 (4) SA 639 (C) at para 10.

<sup>2</sup> The cases which are, in turn, relied on for authority for the statements in this extract are *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269 I; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 899 F-G; *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 454; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1019A.

[19] The second point *in limine* challenges the certificates of balance relied on by the plaintiff. This point *in limine* is undermined from the outset by the fact that the defendants in their affidavit resisting summary judgment do not deny that the first defendant received the funds advanced, nor do they deny the quantum of the sum claimed. Accordingly, the defendants' affidavit is in itself corroboration of these components of the plaintiff's claim. I will nonetheless consider the point.

[20] The defendants contend that the certificate of balance relied on is not signed by the person envisaged in clause 20 of the loan agreement between Blue Banner and the first defendant. However, as pointed out by counsel for the plaintiff, the plaintiff's cause of action is based on the indemnity rather than the loan agreement. The relevant provision in the indemnity provides as follows:

*"5. Certificate of Indebtedness*

*The amount of my/our indebtedness hereunder at any time (including interest and the rate of interest and the manner in which same is calculated and/or charged) shall be determined and prima facie proved by a certificate signed by any manager, trustee or accountant of the South African Home Loans Guarantee Trust. It shall not be necessary to prove the identity and/or appointment of a person signing any such certificate."*

[21] The certificate of balance itself reads as follows:

*"SA HOME LOANS (PROPRIETARY) LIMITED ... (herein represented by the undersigned Amina Bassa in her capacity as its duly authorised representative) in its capacity as the duly appointed Manager of the SOUTH AFRICA HOME LOANS GUARANTEE TRUST ... (IT10713/00) ('the Trust') certifies that VITEX INVESTMENTS 878 CC is indebted to the Trust:*

- 1. in an amount of R3 721 956,42;*
- 2. plus interest on the sum of R3 721 956,42 calculated at the rate of 9,30% per annum, compounded monthly in arrear from*

*01/02/2012 to date of payment (being the Base rate of 5.60% as at 01/02/2012 plus 3.70%);*

*which indebtedness is presently owing, due and payable.*

*Dated at Durban on this the 23<sup>rd</sup> day of March 2012.*

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*SA Home Loans (Pty) Ltd*

*(herein represented by Amina Bassa) in its capacity as Manager of the South African Home Loans Guarantee Trust ..."*

[22] The point made by plaintiff's counsel is that the certificate is not purportedly signed by Amina Bassa in her own right but rather by SA Home Loans (Pty) Ltd. To the extent that it is signed by Amina Bassa, she does so only in her capacity as representative of the juristic entity SA Home Loans (Pty) Ltd. It is that entity which imposes itself as the signatory to the certificate of balance and which describes itself as "*Manager of the South African Home Loans Guarantee Trust*". This, in my view, is compliant with clause 5 of the indemnity which provides for signature of a certificate by "*any manager trustee or accountant of the South African Home Loans Guarantee Trust.*" In this regard it was common cause that SA Home Loans (Pty) Ltd is manager of the South African Home Loans Guarantee Trust.

[23] The respondent argued that reference to "*manager, trustee or accountant*" must be taken as referring to a natural and not a juristic person. However, he was not able to point to any textual basis for that interpretation other than, perhaps, the maxim *noscitur a sociis*. In my view that is not a sufficient basis for the interpretation contended for.

[24] Accordingly, there is in my view, no merit in the second point *in limine*.

[25] In argument, counsel for the defendant also challenged the capacity of the deponent to the affidavit filed in support of the application for summary judgment to swear positively to the facts verifying the cause of action and the amount claimed, as required by rule 32(2).

[26] The argument of counsel for the defendant was encapsulated in his heads of argument as follows :

*“Bearing in mind the fairly complex structure of the plaintiff’s claim it is submitted that the deponent summary judgment (sic) cannot be said to have the requisite personal knowledge of the facts upon which the plaintiff’s cause of action is based and is unable to verify and to confirm the facts recorded in the particulars of claim... It is submitted that it is clear that the deponent does not have personal knowledge and cannot commit herself under oath to the truth of the allegations made. She is simply deposing to hearsay.”*

[27] The affidavit in support of the application for summary judgment is signed by one Rashumi Missra who deposes as follows:

*“1. I am employed by SA Home Loans (Proprietary) Limited (“SAHL”) ... as a Supervisor in the litigation department. I have, save where the context clearly indicates otherwise, personal knowledge of the facts herein contained which are, to the best of my belief, both true and correct and I can and do swear positively thereto.*

*2. SAHL :*

*2.1 originates and administers loans for their duration on behalf of, inter alia, Blue Banner Securitisation Vehicle RC1 (Proprietary) Limited ... as defined in the Plaintiff’s particulars of claim and is entitled in terms of the provisions of the loan agreement to exercise all rights attaching to the Lender under the loan agreements on behalf of the Lender; and*

*2.2 administers and manages on behalf of the Plaintiff, being the sole trustee of the South African Home Loans Guarantee Trust ... the affairs of the Trust, including but not limited to protection and enforcement of the Trust’s rights under and in terms of written indemnities executed and indemnity bonds registered in favour of the Trust.*



3. *In my capacity as a supervisor in the litigation department of SAHL, I have access to and have under my control all documents, records and information to enable me to monitor and determine:*

3.1 *the status of the loans administered by SAHL (which includes the loan referred to in this action) and the compliance by borrowers (which the defendants are) with their obligations to the Lender in terms of the loans and Trust in terms of the written indemnities in the indemnity bonds; and*

3.2 *the nature and extent of the indebtedness of the borrowers (which the First Defendant is) to the Lender in terms of such loans and the Trust in respect of the written indemnities and indemnity bonds.*

*I confirm that I have familiarised myself with the contents of the aforesaid records, documents and information relating to the claims against the First and Second Defendant.*

4. *I hereby, on behalf of the Plaintiff:*

4.1 *verify and confirm the facts recorded in the Summons and Particulars of Claim and annexures thereto and I verify the cause of action of the Plaintiff against the First and Second Defendant, based on the grounds stated in the Summons and Particulars of Claim and the annexures thereto;*

4.2 *verify and confirm the amount claimed in the Plaintiff's Summons and Particulars of Claim and the relief prayed for in the Summons and Particulars of Claim by the Plaintiff as against the First and Second Defendant."*

[28] Both parties referred me to the recent decision of Davis J in the Western Cape High Court in *First Rand Bank Ltd v Huganel Trust*.<sup>3</sup> That judgment conducts a helpful and extensive survey of the relevant case law commencing with the decision of Corbett JA (as he then was) in *Maharaj v Barclays National Bank Ltd*.<sup>4</sup> He also considers the "post-Maharaj jurisprudence" including the decisions in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another*,<sup>5</sup> *First Rand Bank Ltd v Beyer*,<sup>6</sup> *Standard Bank Ltd v*

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<sup>3</sup> 2012 (3) SA 167 (WCC).

<sup>4</sup> 1976 (1) SA 418 (A).

<sup>5</sup> 2010 (5) SA 112 (KZP).

*Kroonhoek Boerdery CC and others*,<sup>7</sup> *Standard Bank of SA Ltd v Han-Rit Boerdery CC and Others*<sup>8</sup> and *Chandler Coal (Pty) Ltd v Fruin*.<sup>9</sup>

[29] On the basis of that survey he concludes as follows:

*“What is one to make of these conflicting judgments which all followed from that of Maharaj? It appears to me that there are at least three important points that should be emphasised.*

- 1. While summary judgment is an order which will prevent a defendant from having his day in court, there are many cases where the plaintiff is entitled to relief on the basis that, ex facie the papers which have been filed, there is no justification for concluding that opposition can be regarded as anything other than a delaying tactic.*
- 2. As Corbett JA emphasises in Maharaj, excessive formalism should be eschewed. Hence the substance of the dispute, together with the purpose of summary judgment, needs to be taken into account during the evaluation of the papers which have been placed before court in order to determine whether the summary form of relief should be justified.*
- 3. While a measure of commercial pragmatism needs to be taken into account, in that many of the summary judgment applications are brought by large corporations and, accordingly, it may well be that first-hand knowledge of every fact cannot and should not be required, each case must be assessed on the facts which were placed before the court. It follows therefore that the nature of the defence becomes the starting point. For example, in Maharaj’s case Corbett JA found that it was a borderline case but one which fell on the right side of the border insofar as the plaintiff / applicant was concerned. On an evaluation of both the claim and the defence, it could be concluded with justification that the deponent had sufficient knowledge to depose to the affidavit, which formed the basis of the factual matrix to sustain an application for summary judgment.*

*By contrast, there will be cases where, given the defence raised, some further knowledge is required beyond an examination of the documentation. In other words knowledge of a personal nature may be required if it is relevant to the contractual relationship as alleged*

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<sup>6</sup> 2011 (1) SA 196 (GNP).

<sup>7</sup> GNP Case No. 23054/2011; [2011] ZAGPPHC 132; 1 August 2011.

<sup>8</sup> GNP Case No. 32371/2010; [2011] ZAGPPHC 120; 22 July 2011.

<sup>9</sup> WCC Case NO. 16850/11.

*by the defendant and, if the defendant's version is proved, could constitute an adequate defence to the claim.*"<sup>10</sup>

[30] I am in agreement with this analysis. It appears to strike the necessary balance between formalism and pragmatism. The defendant in the present matter relied upon the somewhat complex suite of agreements and the wide range of parties involved, to challenge the capacity of the deponent to swear to the requisite range of factual material. That criticism might have been justified had the defendant raised a defence on the merits which pertained to the invalidity, interpretation or implementation of that suite of agreements or something else which required more from the deponent by way of personal knowledge.

[31] However, as will appear from the preceding analysis of this judgment, the defendants do not dispute either their indebtedness in terms of the suite of agreements or the quantum of their indebtedness under them. Rather, they sought to raise a counterclaim, the merits of which were conceded by the defendants, as being of no assistance to them.

[32] In those circumstances, I am not persuaded that the deponent to the affidavit supporting summary judgment lacked the requisite knowledge to do so.

[33] I am fortified in my conclusion by the following extract from the judgment of the Supreme Court of Appeal in *Joob Joob Investment (Pty) Ltd v Stocks Mavundla Zek Joint Venture*.<sup>11</sup>

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<sup>10</sup> At 176H – 177E.

<sup>11</sup> 2009 (5) SA 1 (SCA).

*“[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 a 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 of appellate level, have during that time rightfully been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 424G – 426E, Corbett JA, was keen to ensure, first, an examination of whether there has been sufficient disclosure by the 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 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.*

*[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors that are ‘drastic’ for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on a proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G – 426E.”*

[34] The defendants in this matter do not have a triable issue or a sustainable defence to offer.

[35] I accordingly grant summary judgment against –

[35.1] the first and second defendants, jointly and severally, the one paying the other to be absolved for:

[35.1.1] payment of the sum of R3 721 956,42;

[35.1.2] interest on the sum of R3 721 956,42 at the rate of 9,30% per annum, compounded monthly in arrear from the 1<sup>st</sup> day of February 2012 to the date of payment;

[35.1.3] costs of suit on the attorney and client scale;

[35.2] against the first defendant that-

[35.2.1] portion 5 of Erf 2176 Bryanston Township, Registration Division IR in the Province of Gauteng and held by Certificate of Registered Title No. T59756/2009, is declared specially executable;

[35.2.2] the Registrar is authorised to issue a warrant of execution against the immovable property as described in paragraph 35.2.1 above.

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A C DODSON AJ

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HEARD:

23 OCTOBER 2012

JUDGMENT DELIVERED:

26/10/12