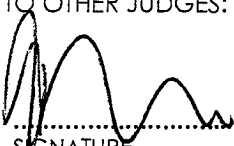


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA



(1)	REPORTABLE: YES / <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES / <input checked="" type="radio"/> NO
(3)	REVISED.
27/7/2017	
DATE	SIGNATURE

Date of hearing: 11 July 2017

Date of judgment: 27 July 2017

In the matter between:

Case number 2017/17761

SANLAM LIFE INSURANCE COMPANY LIMITED

Applicant

and

NZALO WHITE CONSULTING CC

First Respondent

GORDON SIPHO NZALO

Second Respondent

JUDGMENT

BRENNER, AJ:

1. This is an opposed application for summary judgment in which the applicant has claimed payment from the defendants, jointly and severally, of R263 763,02 plus interest and costs.
2. The applicant is Sanlam Life Insurance Limited ("Sanlam") and the first and second respondents are Nzalo White Consulting CC ("the corporation") and Gordon Sipho Nzalo ("Nzalo").
3. The cause of action is founded on a written acknowledgment of debt executed by the corporation and Nzalo on 6 August 2015 in favour of Sanlam ("the AOD"). The claims giving rise to the AOD were for payment of arrear rent owing under two lease agreements. Mention is made in the AOD of these agreements.
4. Under the first lease agreement, executed on 10 August 2012, the amount of R283 913.31 was owed for the lease of premises at building 5, ground floor offices 02 and 04, 19 Frikkie de Beer Street, Menlyn, Pretoria ("the first lease"). Mention is made in the AOD of this claim having been prosecuted under case number 4040/2015.
5. Under the second lease agreement, executed on 13 December 2012, the amount of R139 995,04 was owed for the lease of premises at building 1, ground floor offices 02 and 03, 19 Frikkie de Beer Street, Menlyn, Pretoria ("the second lease"). Mention is made in the AOD of this claim having been prosecuted under case number 3832/2015.
6. The AOD contains a joint and several acknowledgment of the above debts and an undertaking to pay same, this by both the corporation and Nzalo. They agreed to pay a once-off initial payment of R25 000,00 on or before 3 August 2015, followed by further payments of R10 000,00 per month, commencing on 1 September 2015, and thereafter, on the first day of every succeeding month. In the event of the breach of any obligation, including any payment on its due date, the full amount then outstanding would become immediately due, owing and payable.

7. The AOD was breached on 3 August 2015 when the debtors failed to pay the initial instalment of R25 000,00. Sporadic payments were thereafter made, but not timeously so. This resulted in the enforcement by Sanlam of the acceleration clause in the AOD.
8. The corporation and Nzalo raised several defences in the affidavit resisting summary judgment.
9. Firstly, they averred that this Court had no jurisdiction over the matter but rather the Pretoria High Court or Magistrates Court. This because, inter alia, the leases were concluded in Pretoria, the corporation traded in Pretoria and Nzalo resided in Pretoria.
10. Secondly, they contended that the claim in casu was the subject matter of the same claims in the Pretoria High Court under case numbers 27202/2016 and 27203/2016. In the result, they asserted that there was already a lis pendens regarding the claim, and that this Court should not have to entertain same, as Sanlam's conduct constituted "forum-shopping".
11. Thirdly, it was averred that section 15(2)(f) of the Matrimonial Property Act number 88 of 1984 ("the MPA") prohibited Nzalo binding himself to the AOD without the consent of his spouse, to whom he was married in community of property.
12. Finally, the corporation and Nzalo contended that the corporation enjoyed a counterclaim for a refund of amounts erroneously overpaid to Sanlam.
13. Concerning the point on jurisdiction, this had no foundation and was conceded as much at the hearing. In terms of a determination by the Minister of Justice on 13 January 2016, the High Courts in Johannesburg and Pretoria have concurrent jurisdiction until delineation has occurred in terms of section 6(3)(c) of the Superior Courts Act number 10 of 2013.
14. Concerning the issue of lis pendens, the only documents attached to the affidavit resisting summary judgment were the special plea, plea and counterclaim of the corporation in the Pretoria High Court action under

case number 27202/2016, coupled with a notice to remove cause of complaint, in the Pretoria High Court action under case number 27203/2016.

15. Only the corporation is sued in these actions. Moreover, on a conspectus of the pleas and counterclaim in the action under case number 27202/2016, it is plain that Sanlam's cause of action is based on the written lease agreement concluded on 13 December 2012, and not on the AOD. On a conspectus of the notice in the action under case number 27203/2016, it is plain that Sanlam's cause of action is based on the written lease agreement concluded on 10 August 2012, and not on the AOD. The particulars of claim of Sanlam in both such actions are not attached to the opposing affidavit.
16. Both leases are attached to the affidavit. The duration of the first lease is from 1 August 2012 to 31 July 2012. The termination date therefore preceded the date of conclusion of the AOD. The duration of the second lease is from 1 February 2013 to 31 January 2016. It therefore ran for almost six months after the conclusion of the AOD. From this, one may infer that claims for rent under this lease may potentially have arisen after the AOD.
17. A defence of *lis pendens* may only succeed where the claims are founded on the same cause of action. It is apparent from the actions launched in the Pretoria High Court that same are based on the two leases and not on the AOD. For this reason simpliciter, the requirements for a defence of *lis pendens* have not been satisfied. See **Nestle (South Africa) (Pty) Ltd v Mars Inc 2001 (4) 542 (SCA) at paragraph 17.**
18. I refer to the defence that Nzalo's wife's consent was required by section 15(2)(f) of the MPA as a prerequisite to his signing the AOD. This argument is premised on the AOD constituting a credit agreement which falls within the purview of the National Credit Act number 34 of 2005 ("the NCA"). The provenance of the AOD was Sanlam's claim for arrear rent,

and this is expressly excluded from the application of the NCA. Vide **Grainco (Pty) Ltd v Broodryk NO en andere 2012(4) SA 517 (FB)**.

19. Moreover, under section 15(6), the provisions of section 15(2)(f) do not apply when the act in question is performed by a spouse in the ordinary course of his profession, trade or business. Finally, under section 15(9) of the MPA, the transaction is deemed to have been concluded with spousal consent if the other contracting party did not know or could not reasonably have known that the transaction required such consent. Nzalo could and should have dealt with the material facts relating to this issue raised by him but failed to do so.

20. I refer to the counterclaim. The corporation and Nzalo aver that overpayments were made for what they term "rental units", which were not accommodated in the lease agreements. These totalled R190 548,34. This claim was based on a misinterpretation of the leases. A schedule annexed to both leases refers to parking fees payable for the use of under cover, shade net and open parking bays for the duration of the leases. From the schedule, it is apparent that consideration was payable for the use of the applicable parking bays. The counterclaim is accordingly without substance.

21. I refer to the dictum in **Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008(3) SA 371 (SCA)**, at paragraph 13, which, while dealing with disputes of fact, traverses the consequences of bare allegations, (my emphasis included):

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in

finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader factual matrix of circumstances all of which needs to be borne in mind when arriving at a decision.

22.I quote from paragraph 25 F et sequitur, at page 232 of the case of

Majola v Nitro Securitisation 2012(1) SA 226 SCA:

"The purpose of summary judgment is to "enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim." It is a procedure that is 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".

23.The corporation and Nzalo were unable to prove bona fide, genuine, prima facie defences on the merits. Their opposing affidavit is devoid of any relevant factual or legal substantiation for the defences raised by them.

24.Sanlam having been successful, costs must follow the result. The AOD provides for a claim to payment of costs on the attorney and client scale.

25.The defendants are directed, jointly and severally, to pay to the plaintiff the following, namely:

- a. The sum of R263 763,02;
- b. Interest on the above amount at 9% per annum from 2 February 2017 to date of final payment;
- c. Costs of suit on the attorney and client scale.


T. BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG
27 July 2017

Appearances

Counsel for the Applicant:	Advocate JG Dobie
Instructed by:	Reaan Swanepoel Attorneys
Counsel for the Respondent:	Advocate NS Nxumalo
Instructed by:	Tshabalala Attorneys