IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED:

Date: ***10th NOVEMBER 2017*** Signature: _____

CASE NO: 2017/0023133

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

DRC AUCTIONS & SALES CC First Defendant

JANSE VAN VUUREN: CHRISTIAAN ANDRIES Second Defendant

JUDGMENT

ADAMS J:

[1]. This is an application by the plaintiff for summary judgment against the first and second defendants. Although the defendants admit their indebtedness to the plaintiff, or put more accurately they do not dispute their indebtedness to the plaintiff for the amounts claimed, they do oppose the application on the basis of a number a technical defences. My reading of the defendants' opposing papers is that they do not dispute the fact that the plaintiff had lent and advanced to the first defendant certain amounts of money, in respect of which loans the second defendant had stood surety.

[2]. The defendants deny that the amounts claimed by the plaintiff are due and payable because the main agreement on which the loan was based was subject to a suspensive condition, which condition had not been fulfilled, which, according to the defendants, means that the agreement between the parties is void *ab initio* for non – fulfilment of a suspensive condition. The defendants also allege that the particulars of plaintiff's claim are excipiable and therefore the plaintiff is not entitled to summary judgment.

[3]. Plaintiff's has preferred three claims against the defendants. The first claim is for payment of the sum of R1 176 077.55 and is based on an overdraft facility which was made available to the first defendant by the plaintiff. The second claim is based on a fleet management facility extended to the first defendant by the plaintiff and is for an amount of R35 898.55. The third claim is for an amount of R90 404.79 and is based on a credit card facility made available to the first defendant by the plaintiff.

[4]. In their affidavit resisting summary judgment, the defendants allege that the plaintiff's claim 'A', which is based on an 'Overdraft Facility Agreement', should fail because the said agreement contained a suspensive condition (a condition precedent), which was not fulfilled. Therefore, so it was submitted by

the defendants, the agreement is void *ab intio*. Clause 2 of the agreement provided as follows under the heading 'Suspensive Conditions':

> 'Use of the facilities referred to in this letter are subject to the following suspensive conditions having been completed to our satisfaction:
>
> 2.1 The collateral referred to in the "Collateral" clause below has been correctly provided;

[5]. The 'Collateral' clause 3.1 expressly provides as follows:

> 'We hold and require the following collateral:
>
> Supporting Collateral in the name of C A Janse Van Vuuren
>
> - Unrestricted cession of loan account in DRC Auctions and Sales Close Corporation with an undertaking not to reduce the loan account to less than R1,500,000.00 without the bank's prior written consent'

[6]. This condition was not complied with by the first and second defendants in that the loan account of the second defendant in the first defendant was never ceded to the plaintiff. Therefore, so it was submitted by the defendants, the agreement never came into being due to non – fulfilment of the condition precedent. Mr Reineke, who appeared on behalf of the plaintiff, countered this submission by pointing out that it is recorded in the agreement that the cession is already held by the plaintiff. The agreement draws a distinction between 'collateral held' and 'collateral required'. The cession of the loan account appears under the heading 'collateral held', which is evidence that the condition had been complied with as and at the date of the signing of the agreement. The *ipse dixit* of the second defendant to the contrary can therefore safely be rejected as far – fetched. I agree with this submission.

[7]. The defendants also allege that the particulars of plaintiff's claim are excipiable. The first ground on which the defendants allege excipiablity relates to the above suspensive condition. In that regard, the defendants submit that the plaintiff has not pleaded fulfilment of the suspensive condition. For the reason mention supra this ground of exception should fail. If regard is had to the wording of the agreement, which is incorporated into the particulars of claim by reference, the plaintiff has pleaded that it already holds the cession of the loan account as required by the agreement.

[8]. The defendants also allege that the particulars of plaintiff's claim 'A' are excipiable in that no cause of action is disclosed. The plaintiff has not pleaded the grounds on which it alleges that it is entitled to call up the overdraft facility. In the absence of an allegation to the effect that the first defendant is in breach of a term of the agreement entitling the plaintiff to call up the loan, so the defendants submit, no cause of action is made out. This submission conveniently loses sight of the letter of demand addressed to the defendants prior to the institution of the action, which specifically points out that the plaintiff would be suspending the facilities as there had been a material deterioration in the financial position of the first defendant, which entitled the plaintiff to call up the facilities. In any event, the facilities were afforded by the plaintiff to the first defendant expressly at the 'sole discretion' of the plaintiff. The letter of demand was incorporated into the particulars of claim by reference. In any event, if regard is had to the wording of the 'Banking Facilities Letter', all amounts owing become immediately due and payable to the plaintiff on suspension.

[9]. There is therefore no merit in the defendants' grounds of exception.

[10]. As far as plaintiff's claim 'B' is concerned, the defendants allege that the particulars are excipiable because the plaintiff has not furnished a copy of the agreement. This non – compliance with Uniform Rule 18(6) renders the particulars excipiable, so it was submitted on behalf of the defendants. This very

technical defence raised by the defendants is not sustainable for the simple reason that there is no prejudice to the defendants. The plaintiff's cause of action as pleaded is that the first defendant owes it (plaintiff) money which is now due and payable.

[11]. Uniform Rule of Court 32(3)(b) requires the defendant to satisfy the court by affidavit that they have a bona fide defence to the plaintiff's claim. *'Satisfy'* does not mean *'prove'*. What the rule requires is that the defendants set out in their affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

[12]. While it is not incumbent upon the defendants to formulate their opposition to the summary judgment application with the precision that would be required in a plea, none the less when they advance their contentions in resistance to the plaintiff's claim they must do so with a sufficient degree of clarity to enable the court to ascertain whether they have deposed to a defence which, if proved at the trial, would constitute a good defence to the action. Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a *bona fide* defence for the purpose of the rule. If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*.

[13]. If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendant's *bona fides* but it may still, in an appropriate case,

exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable.

[14]. All that the court enquires, in deciding whether the defendants have set out a *bona fide* defence, is: (a) whether the defendants have disclosed the nature and grounds of their defence; and (b) whether on the facts so disclosed the defendants appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

[15]. The defendants are not at this stage required to persuade the court of the correctness of the facts stated by them or, where the facts are disputed, that there is a preponderance of probabilities in their favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The court merely considers whether the facts alleged by the defendants constitute a good defence in law and whether that defence appears to be *bona fide*. In order to enable the court to do this, the court must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.

[16]. In terms of subrule (5): *'The court may enter summary judgment.'* The word *'may'* in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.

[17]. Applying these principles *in casu*, I am satisfied that in their resisting affidavits the defendants have not demonstrated a *bona fide* defence on the

merits of the plaintiff's claim. The plaintiff is therefore entitled to summary judgment.

Order

Accordingly, I make the following order:

Summary Judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, as follows:

1. Payment of the sum of R1 176 077.55 (one million, one hundred and seventy six thousand and seventy seven rand and fifty five cents).

2. Payment of interest on the said amount of R1 176 077.55 at the rate of 13.25% per annum, calculated daily and compounded monthly in arrears, from the 25th May 2017 to date of final payment, both days inclusive.

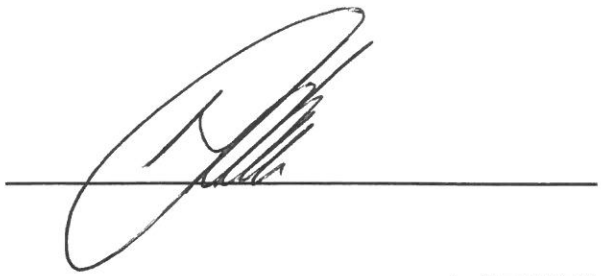
3. Payment of the sum of R35 898.55 (thirty five thousand, eight hundred and ninety eight rand and fifty five cents).

4. Payment of interest on the said amount of R35 898.55 at the rate of 12.50% per annum, calculated daily and compounded monthly in arrears, from the 1st June 2017 to date of final payment, both days inclusive.

5. Payment of the sum of R90 404.79 (ninety thousand, four hundred and four rand and seventy nine cents).

6. Interest on the said amount of R90 404.79 at the rate of 24.2% per annum, calculated daily and compounded monthly in arrears, from the 26th May 2017 to date of final payment, both days inclusive.

7. Cost of suit.



L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	7th November 2017
JUDGMENT DATE:	10th November 2017
FOR THE PLAINTIFF:	Adv M Reineke
INSTRUCTED BY:	Ramsay Webber Attorneys
FOR THE SECOND DEFENDANT:	Adv M Jacobs
INSTRUCTED BY:	W W B Botha Attorneys