REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA) 20/11/2012

CASE NO: 56697/2011

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

2012.12.20 .....
DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED Plaintiff

and

THE CURE GROUP CC First Defendant

ALKL J J Second Defendant

KENNEDY R Third Defendant

J U D G M E N T

MAKGOKA, J:

[1] On 11 September 2012 I granted summary judgment in favour of the plaintiff against the defendants jointly and severally, in the following terms:

1. Payment of the sum of R2 781 208. 78.

2. Interest on the aforementioned amount at the rate of 6.90% per annum, calculated and capitalized monthly, form 12 April 2011 to date of final payment.
3. An order in terms whereof the immovable property described below is declared specially executable:-
   HOLDING 75 CHARTWELL AGRICULTURAL HOLDINGS, REGISTRTION DIVISION JQ, PROVINCE OF GAUTENG, MEASURING 2 7409 HECTARES, HELD BY DEED OF TRANSFER T150347/2007.
4. Costs of suit as between attorney and client.

[2] When I made the order I indicated that any of the parties wishing to have written reasons for the order, could make a written request in that regard. On 18 September 2012 the defendants did so. Here are the reasons. The plaintiff had issued summons against the defendants, alleging that the defendants had breached the terms of a loan agreement concluded between it and the first defendant. The plaintiff claimed payment of a sum of R2 781 208.78 together with finance charges and interest. The plaintiff further sought an order declaring the first defendants' immovable property executable for the claimed amount and costs. The loan agreement was secured by a first covering mortgage bond registered in favour of the plaintiff over the first defendant`s immovable property.

[3] The second and third defendants, respectively, in written deeds of suretyship, bound themselves as sureties and co-principal debtors jointly and severally with the first defendant to the plaintiff for the repayment on demand of all or any sums of money which the first defendant may owe to the plaintiff.

[4] The affidavit resisting summary judgment was deposed to by Mr. Richard Lawton Kennedy, a member of the first defendant. Four preliminary points were

raised in the affidavit. First, that the plaintiff has failed to comply with Rule 17 (3) in that it has failed to set out an address within 8 kilometers of the office of the registrar of this court. The plaintiff has provided an address in Parktown, Johannesburg.

[5] Second, that the parties to the action had concluded a further agreement, a so-called 'Help-u-Stay' agreement, the terms of which supersede the agreement relied upon by the plaintiff. In terms of that agreement the first defendant was obliged to make monthly payments of R14 000.00 towards the loan amount, which in fact the first defendant made.

[6] Third, that the amount claimed by the plaintiff is not readily ascertainable and therefore summary judgment was incompetent. In this regard it is stated that since summons was issued, there have been various amounts paid to the applicant, which have not be taken into consideration.

[7] Fourth, it is contended that the applicant's claim is not liquidated, as the interest rate levied by the applicant has been subject to fluctuation and therefore cannot be said to be fixed at 6.9%. This, it is submitted, would require extensive calculation and therefore the liquidity of the applicants claim had been destroyed.

[8] There is no merit in any of the points raised by the first defendant. I will deal with them in turn. The first can be disposed of summarily. The defect has since been cured. An address within the prescribed radius now appears on all subsequent process delivered by the plaintiff. With regard to the second contention, it is often said that confusion is the art of defence. The first defendant has attempted to

obfuscate the issues in this matter. The matter is quite simple. The allegation is that the first defendant borrowed monies from the plaintiff, which it failed to repay as agreed. First, the defendants have elected not to attach a copy of the alleged agreement or plead its relevant provisions. In any event, there is no indication by the defendants that this agreement is a compromise or novation to the initial cause of action and therefore a bar to the institution of these proceedings. The first defendant makes save for a bald and sketchy allegation that it has made payments in terms of the 'Help U stay agreement'. There appears no reason why the first defendant should not have disclosed the information as to when and in what amounts it made such payments. The absence of any such detail casts doubt on the defendants' *bona fides,* and implicitly, that of the opposition. Compare *Traut v Du Toit* 1966 (1) SA 71; *Frank Keevy (Pty) Ltd v Koos van der Merwe Beleggings (Kroonstad) (Edms) Bpk 'n Ander* 1970 (3) SA 432.

[9] As to the third point, the fact is that the first defendant has borrowed monies from the plaintiff in capital amount of R 2 750 000.00 and an additional amount of R 550 000.00. The plaintiff and the first defendant also agreed that the certificate of balance will be *prima facie* proof of the balance outstanding to the plaintiff. The plaintiff therefore claims an amount of R 2 781 208.78 as reflected in the certificate of balance.

[10] Finally, with regard to the interest. Once more, the defendants rely on bald and sketchy averments. The allegation regarding interest is a positive one. In terms of clause 7 of the mortgage bond, interest was to be calculated in the manner or rate determined in term of a written agreement concluded or to be concluded between

the parties, provided that the rate shall not exceed the legal maximum rate. The plaintiff alleges that that rate is 6.90%. For the defendants to successfully meet the allegation, it can not simply contend itself with a bald denial. It is expected of it to aver facts, which if true, could destroy the plaintiff's allegation. There is no allegation to controvert what the plaintiff states in the summons. The fact that the interest rate fluctuates from time to time does not destroy the liquidity of the claimed amount.

[11] Lastly, it was contended that there had been no demand made on the defendants. The short answer is that service of summons also constitutes demand. See *Standard Bank of South Africa Ltd v Hand* 2012 (3) SA 319 (GSJ) at para [22].

[12] A defendant wishing to resist summary judgment has to demonstrate a *bona fide* defence, which is one set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim: See *Bentley Maudsley & Co. Ltd v Carbural" (Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88. None of the points raised by the defendants, either severally or cumulatively, constitutes a *bona fide* defence

[13] I am quite aware of the drastic nature of the remedy of summary judgment. On the other hand, the court would be remiss in its duties if unmeritorious defences, clearly devoid of any *bona fides*, stand in the way of a plaintiff who is clearly entitled to relief. The ever-increasing perception that any defence, whatever its merits, is sufficient to stave off summary judgment, is misplaced and not supported by the trite general principles developed over many decades. See for example the well- known

decision of the then Appellate Division in *Maharaj v Barclays National Bank Ltd* (supra). See also generally, *Herb Dyers (Pty) Ltd v Mohamed and Another* 1965 (1) 31 (T) at 31H-32A; Caltex *Oil (SA) Ltd v Webb and Another* 1965 (2) SA 914 (N) at 916D-H; *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA (C) at 303F-H; *Shepstone v Shepstone* 1974 (2) 462 (N) at A-H and *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) 226 (T).

[14] Recently the Supreme Court of Appeal (SCA) restated the purpose of summary judgment procedure in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[1] 2009 (5) SA 1 (SCA). At paras 31 and 33 the following is stated:

> "... 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"
>
> "Having regard to its purpose and its proper application, summary judgment proceedings do not hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E."

[15] For all the above considerations I came to the conclusion that the defendants' defence was not set up *bona fide* or honestly, but solely for delaying purposes. I accordingly granted summary judgment, as set out in para [1] above.

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[1] 2009 (5) SA 1 (SCA)

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD	: 11 SEPTEMBER 2012
JUDGMENT DELIVERD	: 20 NOVEMBER 2012
FOR PLAINTIFF	: ADV I OSCHMAN
INSTRUCTED	: *BEZUIDENHOUT VAN ZYL INC RANBURG AND PETZER, DU TOIT & RAMULIFHO,* PRETORIA.
FOR THE FIRST, SECOND, AND THIRD DEFANDANTS	: ADV RC DE ALCANTARA
INSTRACTED BY	: *ALLIS* ATTORNEYS, *HYDERPARK AND FRIEDLAND HART SOLOMON & NILCOSON,* PRETORIA