REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO:25205/2013

(1) REPORTABLE: YES / NO

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

(3) REVISED.

....
DATE SIGNATURE

In the matter between: DATE: 28/2/2014

NEDBANK LIMITED Plaintiff

and

MMATADI HENDRIETTA MAREDI First Defendant

MMATADI HENDRIETTA MAREDI
(In her capacity as duly appointed executrix
in the estate of the late Mr Taote Israel Maredi) Second Defendant

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J U D G M E N T

MAKGOKA, J:

[1] This is an opposed application for summary judgment. In its combined summons, the plaintiff alleges that the defendant, both in her personal and in her capacity as the executrix in the estate of her late husband (the deceased) has breached the terms of a loan agreement entered into between herself and the deceased, on the one hand, and the plaintiff, on the other, by failing to make regular instalments as they fell due.

[2] The loan agreement was secured by a mortgage bond in favour of the plaintiff over the property of the defendant and the deceased, whom, for the sake of convenience, I shall refer to as 'the consumer parties'. The plaintiff claims payment of a sum of R147 085.34, together with finance charges, interest and costs. The plaintiff further seeks an order declaring the defendant's property executable for the amount claimed and further that the issuing of a warrant of execution in respect of the property, be authorised. For the sake of convenience, I shall refer to the defendant in her two capacities simply as 'the defendant.

[3] Before I consider the contentions on behalf of the parties, I deem it pertinent to set out the jurisprudential framework within which an application for summary judgment should be considered, which is trite and established. In order to stave off summary judgment, the defendant has to disclose a *bona fide* defence, which means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim (*Bentley Maudesley & Co. Ltd v "Carburol"(Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88). The defendant must satisfy the court that he has a *bona fide* defence to the plaintiff's claim and the full nature and grounds thereof.

[4] In *Oos-Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk* 1978 (1) SA 164 (W) at 171 it was stated that not a great deal is required of a defendant but that he or she must lay enough before the court to persuade it that he or she has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a valid defence. All that the court enquires into is whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts disclosed so disclosed the defendant appears to have a defence which is

bona fide and good in law. See also, *Maharaj v Barclays National Bank* 1976 (1) 418 (A) at 426.

[5] In the present matter, the defendant raised three points in her affidavit resisting summary judgment. First, that the plaintiff was statutorily obliged, to inform her and the deceased, as the consumer parties, of an option to take out a life cover insurance policy to secure the loan, or cede a policy of their choice to the plaintiff for that purpose. The defendant avers that the plaintiff failed to comply with the alleged duty and therefore, disputes liability to repay the loan, and insists that the plaintiff should settle the bond account. Second, and flowing from the first, is that the alleged failure by the plaintiff to advise the defendant and the deceased of a need to take out life insurance, had been referred to the banking ombudsman, and that a decision in that regard is pending. Third, although not seriously pressed during argument, it seems that the defendant alleges that the plaintiff's balance of certificate is unreliable, and so is the amount reflected in it. I deal with these points, in turn.

The plaintiff's obligation to advise the defendant and the deceased of a life cover

[6] As stated earlier, the defendant contends that the plaintiff had a statutory obligation to inform the consumer parties of an option to take out life cover. For this contention, the defendant relies on s 44 of the Long Term Insurance Act 52 of 1998, of which s 44(1) reads:

> 'If a party to a contract in terms of which money is loaned, goods are leased or credit is granted, requires, whether as a condition thereof or otherwise, that a long term policy or its benefits be made available and used for the purpose of protecting the interests of a creditor, the person who is so required to make that policy or those policy benefits available shall be entitled, and shall be given prior written notification of that entitlement, to a free choice-
>
> (a) as to whether he or she wishes to enter into a new policy and make it available for that purpose, or wishes to make available an

existing policy of the appropriate value for that purpose, or wishes to utilise a combination of those options…'

(my underlining)

[7] It is clear on a plain reading of the section that the construction that the defendant places on it, is misconceived. The section, as is clear from the underlined portion, is for the benefit of the credit provider to protect its own interest, and it arises only at the instance of the credit provider if it elects to make it a condition of a contract that an insurance policy be taken out, to secure its interests. Simply put, the section only applies if a credit provider, such as the plaintiff, imposes a condition or otherwise on a consumer, that an insurance policy or its benefits be made available, to protect the interests of the credit provider. In the present case, the home loan agreement did not contain any condition or terms otherwise, that the consumer parties had to take out any life cover insurance policy to secure the loan. It is therefore clear that the defendant's reliance on s 44 is misplaced.

Dispute pending before the banking ombudsman

[8] The defendant alleges that the 'dispute' concerning the plaintiff's alleged failure to comply with its supposed statutory duty as discussed earlier, had been referred to the banking ombudsman. The contention is therefore that these proceedings are premature. In this regard, the provisions of s 129 of the National Credit Act 34 of 2005 are relevant, in terms of which a credit provider informs the consumer of its breach, the options available to a consumer[1] in the event it disputes any issue, and of the credit provider's intention to proceed with legal proceedings should the breach not be remedied, or the options available to the consumer, not be exercised, within 20 business days of the notice.

[1] The consumer may refer any dispute to the following institutions:
(a) A debt counsellor
(b) An alternate dispute resolution agent
(c) The consumer court
(d) The ombudsman for banking services

[9] In the present case, the plaintiff sent to the defendant a notice in terms of s 129 by registered mail on 4 March 2013, in which the defendant's right to refer the matter to, among others, the ombudsman for banking services, was explained. No issue is taken in respect of the s129. The defendant obliquely states that the matter has been referred to the banking ombudsman. No further details are furnished as to the date on which the matter was sent. What is more, it is instructive that the defendant does not claim to have exercised the option open to her, that is, of referring any dispute to the banking ombudsman, within the 20-day period stated in the s 129 notice. The defendant's only written complaint, on the papers, is dated 31 July 2013, and it is not to the banking ombudsman, but to the plaintiff, which itself would be of no consequence, as it was made after summons had been issued (on 26 April 2013).

[10] If the defendant was able to attach a complaint sent to the plaintiff, there should not be any difficulty in doing the same with a complaint to the banking ombudsman, if any. The upshot of this is that even accepting that the defendant has laid a complaint with the banking ombudsman, if it was done during the same period as the complaint to the plaintiff, it would similarly be of no consequence for the same reason that by then, summons had been issued already. That is so because the banking ombudsman has no jurisdiction to consider a dispute once legal proceedings, concerning the same issue, are instituted. Therefore, on the papers as they stand, either there has not been any referral at all, or such referral is of no consequence because it was made after summons had been issued. It is for the defendant to set out fully all the factual averment on which her defence is based, and she has not done so. There is therefore no merit in this point.

Balance of certificate

[11] In this regard, the defendant simply makes valiant, bald and unsubstantiated denial of the correctness of the full outstanding balance as set out in the plaintiff's certificate of balance. It is to be borne in mind that the certificate of balance constitutes *prima facie* proof of the amount owing, and in the absence of any evidence to the contrary, the amount reflected in it should be accepted by the court as correct. There is nothing to displace this position. Similarly, therefore, there is no merit in this contention.

[12] I am keenly aware of the drastic nature of the remedy of summary judgment. At the same time, 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-B; *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 467A-H and *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) 226 (T).

[13] Recently the Supreme Court of Appeal (the SCA) restated the purpose of summary judgment procedure in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 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."

[14] A *bona fide* defence means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim: See *Bentley Maudesley & Co. Ltd v "Carburol"(Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88. In the present case, the defendant has not placed in dispute the indebtedness of the deceased's estate and her towards the plaintiff or that they are in default of their obligations in terms of the agreement. She has contented herself with three defences, none of which is worthy of reference to a trial.

[15] In the result I conclude that the defendant discloses no *bona fide* defence to the plaintiff's claim. The plaintiff is therefore entitled to summary judgment. Given the defendant's assertion that there are sufficient funds in the estate to meet the plaintiff's claim, I am disinclined to authorise the issuing of a warrant of execution, at this stage.

[16] In the result I make the following order:

1. Summary judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:
   (a) Payment of the sum of R147 085,34;
   (b) Interest on the above amount at the rate of 6% *per annum* calculated and capitalised monthly in arrears from 28 February 2013 until date of final payment, both dates inclusive;
   (c) Costs of the action on the scale as between attorney and client scale.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 26 NOVEMBER 2013

JUDGMENT DELIVERED : 28 FEBRUARY 2014

FOR THE PLAINTIFF : ADV LW DE BEER

INSTRUCTED BY : VEZI & DE BEER INC., PRETORIA

DEFENDANT'S ATTORNEYS : MACHABA ATTORNEYS, JOHANNESBURG