IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) ~~REVISED~~.

DATE 25/3/2022 SIGNATURE

Case number: 46883/2020

In the matter between:

JOHN ANTHONY WALLS Applicant

and

GARY OSCAR HURWITZ Respondent

JUDGMENT

MADIBA AJ

[1] This is an application in which the applicant seeks relief in terms of Rule 32 of the Uniform Rules of Court. The relief sought is on the following basis:

(i) Payment in the sum of R187 500.00;

(ii) Interest on the above amount at a rate of 10 % per annum *a tempore morae;*

(iii) Costs of suit;

(iv) Further and/or alternative relief.

[2] The respondent is resisting the application on the following grounds:

(i) That the agreement entered between the parties is a credit agreement and that the applicant failed to comply with the provisions of the National Credit Act 34 of 2005;

(ii) That the sum claimed is not due and payable; and

(iii) The respondent never received the amount as claimed from the applicant.

Factual background

[3] The applicant and the respondent entered into an oral agreement during 29 April 2018 in terms of which the applicant lent and advanced the sum of R187 500.00 to the respondent. It is averred by the applicant that the sum of money lent and advanced was payable on demand.

During 29 April 2018 the respondent acknowledged in writing his indebtedness to the applicant in the amount of R187 500.00 together with interest thereon and 10 % per annum as at 1 July 2018. Despite demand, the respondent failed to repay the sum of R187 500.00 to the applicant. As a result of non-payment the applicant issued summons against the respondent.

The applicant launched a default judgment application against the respondent who entered notice to defend. A plea was later filed by the respondent which prompted the applicant to apply for a summary judgment. The summary judgment is opposed.

Issues requiring determination

[4] (1) Whether the respondent has a *bona fide* defence to the applicant's claim.

(2) Whether there are triable and mitigating issues deserving to be entertained by the trial court.

Legal principles finding application

[5] The purpose of summary judgment is to afford a plaintiff who has an action against the defendant who does not have a defence to have a relief without resorting to a trial.

In terms of Rule 32(2)(b) the plaintiff has to identify any point of law and the facts relied upon which his claim is based. The plaintiff has to briefly explain why the defence pleaded does not raise any issue for trial. It will not be enough to merely state that the defendant has no *bona fide* defence. All that the defendant has to do is to at least disclose his defence and the material facts upon which his defence is based with sufficient particularity and completeness to enable the court to make a determination as to whether he has a *bona fide* defence or not. The onus rests with the plaintiff to show that the defendant does not have a defence on the merits of the case.

Rule 32 as amended provides as follows:

> *"(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgments on each of such claims in the summons as is only –*
>
> *(a) on a liquid document;*
> *(b) for a liquidated amount in money;*

(c) for delivery of specified movable property, or

(d) for ejectment, together with any claim for interest and costs.

(2) (a) Within 15 days after the date of the delivery of a plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in sub-rule 2(a) verify the cause of action and the amount; if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial. If a claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application will be set down for hearing on a stated day not being less than 15 days from the date of delivery thereof."

Prior to the amendment of Rule 32 the plaintiff was not required to state the grounds on which he bases his opinion that there exists no *bona fide* defence or that the appearance to defend has been delivered solely to delay the plaintiff's action. He was not supposed to give any detail in his verifying affidavit. See ***Barclays National Bank Ltd v Swartzberg*** **1974 (1) SA 133 (W)** at 134C-D.

It is trite law that the defendant may *in limine* advance any legal argument to show that the application does not comply with the requirements for validity of a summary judgment application.

The attack on the summary judgment must however be on legal grounds which are reasonable and which should they eventually be proved at the trial, will constitute a defence.

[6] The respondent has raised the following points *in limine* to the summary judgment application.

Point *in limine* 1

(a) Plaintiff's claim not a liquidated amount;
(b) Non-verification of the cause of action by the plaintiff; and
(c) Non-joinder.

Claim not a liquidated amount

The respondent avers that the applicant's case is not capable of speedy and prompt ascertainment. It is argued by the respondent that the amount allegedly lent and advanced was not paid to the respondent in its entirety (R187 500.00). The sum of R180 000.00 was paid to the applicant's ex-wife's account with the sum of R7 500.00 unaccounted for. Only R52 000.00 was deposited by the respondent's ex-wife into the respondent's account.

The respondent contends that the amount in dispute cannot be regarded as a liquidated amount as it is not easily determinable and requires proof as to how the alleged money was paid. He denies that the applicant paid the sum of R187 500.00 to him.

On the contrary, the applicant submits that an acknowledgement of debt agreement entered between the parties qualifies as a liquid document. The terms of the acknowledgement clearly stipulate in no uncertain terms that the amount agreed upon is easily determinable according to the applicant. It is argued that the mere fact that the sum of R180 000.00 was channelled via respondent's ex-wife's account is of no moment. By signing the acknowledgment of debt the respondent confirmed that he is indebted to the applicant in the sum of R187 500.00 according to the applicant.

When the amount of R52 000.00 was deposited into the respondent's account by his wife then (now ex-wife), he never questioned where the money came from and why is it paid to him. The respondent is quite certain that R180 000.00 was paid through his ex-wife's bank account by the applicant. For the respondent to now aver that he never received all the lent and advanced money directly from the applicant is disingenuous. As to how the sum of R187 500.00 was paid over to him as a loan is neither here nor there. It is not in dispute that indeed an acknowledgement of debt was entered between the parties for R187 500.00. A determination can be made from the acknowledgement of debt as to the amount agreed upon which in my view is easily ascertainable.

All that Rule 32(1) requires among others is that in order for the plaintiff to be entitled to seek summary judgment, he should show that his claim is based on a liquid document, for a liquidated amount in money which is agreed upon or is capable of prompt ascertainment.

I hold the view that the acknowledgment of debt agreement between the parties herein is an unconditional acknowledgment of indebtedness and can be speedily determined. There is accordingly compliance of Rule 32(1) by the applicant in this instance. The point *in limine* raised herein lacks merit and I cannot find any defect in the cause of action.

Point *in limine* 2

Non-verification of cause of action

The respondent contends that the applicant is supposed to verify the cause of action in his affidavit and the amount claimed and identify the point of law relied upon. It is contended that the applicant omitted to state material facts verifying the cause of action.

The further submission made is that the applicant is not expected to amplify the facts relied upon in his affidavit in the application for summary judgment. The applicant stated in his affidavit that the National Credit Act does not apply in their agreement herein and that the parties were in a familial relationship and did not expect to gain advantage in the acknowledgement of debt agreement. It is argued by the respondent that the applicant should have pleaded the aforesaid facts in his particulars of claims which he failed to do.

In complying with the provisions of Rule 32(2) applicant avers that he verified the cause of action in that the respondent is indebted to the applicant upon the grounds set forth in the particulars of claim. The failure to except to the particulars of claim is testimony that the summons was not vague thus not excipiable. By relying on technicalities of the wording is an attempt to avoid summary judgment by the respondent, so submitted the applicant.

In terms of Rule 32(2)(b) the plaintiff shall verify the cause of action and the amount claimed and identify any point of law and facts relied upon which his claim is based. The plaintiff has to briefly explain why the defence pleaded does not raise any issue for trial. If a claim is founded on a liquid document a copy of the document shall be annexed to such affidavit.

The plaintiff may verify the cause of action by referring to the allegations contained in the summons and verifying them. What is required is that all the facts which the action is based must be verified.

See ***All Purpose Space Heating Co of SA v Schweltzer*** **1970 (3) 560 (D)** at 563F-H.

However, the applicant is precluded from amplifying the facts relied upon on its particulars of claim in the summary judgment. It is indeed correct that the issue of whether the National Credit Act 34 of 2005 is applicable in the parties' agreement was only raised in the applicant's affidavit. The particulars of claim did not disclose that there is a familial relationship between the parties and this fact appears for the first time in the application for summary judgment.

I am not persuaded that the cause of action in this matter is properly verified.

Point *in limine* – non-joinder

The respondent takes the point that the applicant's ex-wife should have been joined as she has a substantial interest. It is argued that the ex-wife was the recipient of the sum of R180 000.00 paid by the applicant into her account and benefited immensely from the proceeds thereof as she only deposited R52 000.00 to the applicant's account.

Counsel for the applicant submitted that the point taken by respondent of non-joinder is baseless. For the ex-wife to be joined as a party to the proceedings, she must have a direct and substantial interest in the subject matter in litigation. The fact that the lent and advanced money was paid into her account and she used a portion thereof is of no assistance to the respondent's attempt to resist summary judgment. The applicant argues that the fact that money was paid into the respondent's ex-wife's account does not make her a party to the acknowledgement of debt agreement between the parties in this matter.

It is settled law that a third party should be joined in a matter if it appears that the third party has a direct and substantial interest in the subject matter.

In ***Amalgamated Engineering Union v Minister of Labour*** **1949 (3) SA 637 (A)** the court held that a third party who may have a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be substantiated or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings.

The test is whether the party that is alleged to be a necessary party for a purpose of joinder had a legal interest in the subject matter of litigation which may be affected prejudicially by the judgment of the court in the proceedings concerned.

It is apparent from the papers in this matter that the respondent's ex-wife played no role in the parties' acknowledgment of debt agreement except standing as a witness thereto.

The respondent acknowledged his indebtedness to the applicant in the amount of R187 500.00. Whether the advanced money is paid directly into the applicant's account or the ex-wife's account is irrelevant. It is the respondent who is responsible and liable for the debt incurred. The order sought by the applicant against the respondent herein will have no effect on the respondent's ex-wife in the event it is granted.

I hold that the respondent's ex-wife has no direct and substantial interest in the proceedings before court.

The point *in limine* raised is therefore far-fetched.

The respondent pleaded two special pleas namely that the applicant failed to comply with the provisions of Rule 41A(2)a) and the National Credit Act.

According to the respondent, the applicant failed to notify the respondent as to whether he agrees or refuses to engage in a mediation process.

Rule 41A(2)(a)

The applicant contended that non-compliance with Rule 41A(2)(a) does not prohibit the applicant to institute an action against the respondent as the parties may before judgment refer the matter to mediation. It was submitted by the applicant that the respondent failed also to satisfy the requirements of Rule 41A(2)(a). The applicant in any event did file his notice in terms of Rule 41A(2)(a) at a later stage.

The respondent averred that since the parties' agreement is a credit agreement, the applicant was supposed to have registered as a credit provider and should have complied with section 129(1)(a) and 130(1) of Act 34 of 2005. He (the respondent) argues that the special pleas raised be treated in the same way as an exception as there is no difference between them. Applicant submitted that indeed the parties' agreement qualifies as a credit agreement, but denies that the provisions of Act 34 of 2005 do apply in their case. The reason proffered is that the applicant and respondent are not dealing at arms' length as required in terms of Rule 4(2)(iii)(b) of the Credit Agreement Act.

As aforementioned the respondent has to show that he pleaded defences that are a subject of a trial court. The respondent has to satisfy the court that he has a *bona fide* defence and need not prove his defence. The respondent will

avoid summary judgment should he advance facts which can reasonably be argued in a trial.

See ***Barclays National Bank Ltd v Smith*** **1975 (4) SA 675 (D)** at 684A.

In ***Maharaj v Barclays National Bank Ltd*** **1976 (1) SA 418 (A)** the court decided that in determining whether the defendant has established a *bona fide* defence the court has to enquire whether the defendant has with sufficient particularity disclosed the nature and grounds of his defence and the material facts upon which his defence is based. It is expected of the applicant on the other hand to convince the court that he has made out a case for summary judgment.

In my view the defences raised in the special pleas which are contested by the applicant call for evidence that needs to be thoroughly and properly interrogated as well as the contestation thereof by the applicant. Are the motion proceedings a proper forum to ventilate the issues as raised? I do not think so. The court is not in a position to can determine whether the burden of proof resting on the parties has been discharged by either party or not. All what the court is to ascertain is whether there is a *bona fide* defence based on the material facts sufficiently disclosed which raises triable issues.

[7] The respondent argues that the application for summary judgment was not necessary in view of the special pleas raised. It is submitted by the respondent that the applicant should have known that the respondent has a *bona fide* defence which are triable in court. The persistence with the summary judgment is an abuse of the correct process under the circumstances so contended the respondent. It cannot be said in my view that the applicant abused the process

of the court in that at some stage the applicant tried to remove the matter from the roll but was met with resistance.

The courts, as alluded above, are vested with an unfettered discretion which has to be exercised judicially. Summary judgment may be refused even where there is compliance with Rule 32(2) and the defendant having failed to discharge the onus upon him in terms of Rule 32(2)(b). In other words, summary judgment will therefore be granted in the event where the plaintiff has made out an unanswerable case against the defendant who simply wants to unnecessarily delay the plaintiff's case.

See (i) ***Standard Bank of South Africa Ltd v Roestof*** **2004 (2) SA 492 (W)** at 497; (ii) ***Maharaj v Barclays National Bank Ltd*** **1976 (1) SA 418 (A)** at 423E-498C.

The applicant's cause of action which constitutes its foundation in this application is under attack and met with special defences deserving a hearing in a trial court.

The defences raised by the respondent are not merely technical in nature but calls for an answer. I cannot say without reservations that the plaintiff's case is not answerable.

I am therefore satisfied that there is a reasonable probability that the defendant's plea be fully argued in a trial court.

Costs

[8] The applicant submitted that since he was not dealing at arms' length with the respondent, but was in a familial relationship, the respondent being his brother-in-law, Act 34 of 2005 does not find application. It is argued that the special pleas raised by the respondent are bad in law and do not raise triable issues. Accordingly, the respondent does not dispute entering into an acknowledgement of debt agreement with applicant, but states the money was not paid to him.

The applicant argues that the notice to defend has been entered solely to delay the finalisation of the action as respondent has failed to disclose defences that are *bona fide* and triable in the trial court. A punitive costs order on attorney and client scale to be taxed should therefore be awarded against the respondent.

The respondent seeks a punitive costs order against the applicant. It is argued by the respondent that the applicant knew that the special pleas pleaded entitles the respondent to defend the action.

By bringing a defective application which is non-compliant with Rule 32(1), it resulted in the respondent incurring unnecessary costs. According to the respondent, the provisions of Rule 32(9) should be applied. The action in this matter should be stayed until the applicant has paid the taxed costs on attorney and client scale.

The issue whether to award costs is primarily based on two basic rules namely:

(a) That the award of costs is a matter of judicial discretion by the court; and
(b) That the successful party should as a general rule be awarded costs.

The purpose of an award of costs to a successful litigant is to indemnify him for the expense which he has been unnecessarily put through.

Costs on attorney and client scale will only be awarded in appropriate and exceptional circumstances. A punitive costs order may be awarded in the event, among others, that a litigant has been dishonest, reckless, vexatious, frivolous and fraudulent. Such an order may also be granted where the exceptional circumstances and consideration justify that a punitive costs order be awarded. See ***Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597.**

It is not unusual for the court to order a successful party to pay the costs if there are appropriate circumstances justifying such an order. The facts of each and every case are to be considered by the court when exercising its discretion and has to be fair and just to all the parties.

In ***Ferreira v Levin NO and Others* 1996 (2) SA 621 (CC)** at 624 the court said that the award of costs unless expressly otherwise enacted is in the discretion of the court which discretion is to be exercised judicially.

Considering the facts of this matter, it cannot be said that there is a flagrant disregard of the Rules applicable in summary judgment application. The respondent's contention that the applicant knew or is supposed to have known that the *bona fide* defences raised a triable case cannot be sustained. I am of the view that the application for summary judgment is not defective and its purpose was not to delay the proceedings at an unnecessary expense.

[9] In the premises the following order is made:

(a) Leave to defend is granted;

(b) Costs on a party and party scale are payable to the respondent.

S.S. MADIBA

ACTING JUDGE OF THE HIGH COURT

CASE NO: 46883/2020

HEARD ON: 7 March 2022

FOR THE APPLICANT: ADV. A.C.C. BARREIRO

INSTRUCTED BY: Coombe Commercial Attorneys Inc.

FOR THE RESPONDENT: ADV. J. VAN DER MERWE

INSTRUCTED BY: Couzyn Hertzog & Horak Attorneys

DATE OF JUDGMENT: 25 March 2022