

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case no: 25116/11

In the matter between:

PAROW MOTORHANDELAARS (PTY) LTD Plaintiff/Applicant

and

ERIC AFRICA First Defendant

DOREEN MAGDALENE AFRICA Second Defendant

JUDGMENT

SAVAGE AJ

[1] This is an application for summary judgment in which the plaintiff seeks judgment against the respondents for an amount of R1 380 272.45 with interest and costs arising out of the respondents' default under a mortgage bond agreement, as well as an order declaring the subject

property to be specially executable. The agreement is a credit agreement and the National Credit Act of 2005 applies to it.

- [2] On 10 February 2012, the application was postponed *sine die* pending the debt review of the defendants which was ordered to resume in terms of section 86(11) of the National Credit Act, 34 of 2005.
- [3] The Magistrate's Court subsequently dismissed the application for debt review on 23 August 2012 and the defendants now seek a further postponement of the application for summary judgment on the basis that they intend to appeal against the judgment of the Stellenbosch Magistrate's Court dismissing their application for debt review, with reasons having been requested from the Magistrate.
- [4] It appears from the papers that the defendants are an elderly couple residing in Jamestown, near Stellenbosch. The first defendant has a primary school education and the second defendant is physically disabled. The mortgage bond on which the claim plaintiff's claim is based secured a loan apparently extended to the defendants by the plaintiff in circumstances in which a commercial bank refused to do so.
- [5] The defendants oppose the application for summary judgment on the basis that their application for debt review was before the Magistrate's Court. In support of this opposition, an affidavit deposed to by the debt counsellor was annexed. It is in this affidavit, confirmed by the defendants in confirmatory affidavits, that it is contended that "a fraction of the R780 000" loaned was paid to the defendants, with copies of various cheques annexed in support of the claim that these were not banked by the first respondent. In this affidavit it is stated that the first defendant received payment of the loan by way of cash payments from the late Mr Van der Merwe of the plaintiff and that the extension of the loan secured by the mortgage bond amounted to the grant of reckless credit to the defendants.
- [5] I am not persuaded that there exists any basis to justify the postponement of the application for summary judgment in order to provide the defendants with an opportunity to appeal the decision of

the Magistrate's Court. The effect of such a postponement would be akin to a stay of the proceedings before this court in circumstances in which an appeal has not as yet been lodged and in which there has been a dismissal of the application before the Magistrate's Court. The dismissal of the application before that court had the effect that there is nothing upon which can be operated and even if an appeal were to be noted, the noting of the appeal could result in nothing that can be suspended.¹ Accordingly, even had an appeal been noted, the noting of the appeal against a decision in terms of section 87 of the National Credit Act to dismiss an application before it provides no basis on which to justify the postponement of this application for the reasons set out above. In such circumstances, the application for the postponement of the summary judgment application is refused.

[6] Given the extraordinary and stringent nature of the remedy of summary judgment, a court has an overriding discretion to refuse such application.² Where there exists a *bona fide* defence to a claim, summary judgment should be refused so as not to "deprive a defendant with a triable issue or a sustainable defence of his/her day in court".³ I am satisfied that there appears to exist a dispute of fact as to whether the full loan amount was received by the defendants, illustrated further by a dispute as to the manner and form in which such payments were received. In the circumstances, a *bona fide* defence to the claim has been raised and the defendants should be provided with the opportunity to defend the claim against them.

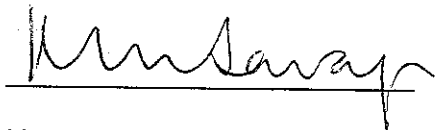
[7] In the result, I make the following orders:

1. The application for summary judgment is refused.
2. The defendants are granted leave to defend the plaintiff's claim.
3. Costs stand over for later determination.

¹ *The MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd* 2000 (4) SA 746 (A)

² *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 10-11

³ *Joob Joob Investments* at 32-33



K M SAVAGE

ACTING JUDGE OF THE
HIGH COURT

Heard: 16 October 2012

Judgment: 24 October 2012

Appearances:

Adv A Heyns for Plaintiff

Instructed by Fourie Basson & Veldtman

Mr H Joubert of Joubert Attorneys for First and Second Defendants