



Republic of South Africa

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

Case No.s: 11461/2012 and 11463/2012

Before: The Hon Mr Justice Binns-Ward

In the matter between:

Plaintiff

ABSA BANK LIMITED

and

**EFM INVESTMENTS CC
AND SIX OTHER DEFENDANTS**

First Defendant
Second to Seventh Defendants

and

In the matter between:

Plaintiff

ABSA BANK LIMITED

and

**THE LAKES CC
AND SIX OTHER DEFENDANTS**

First Defendant
Second to Seventh Defendants

JUDGMENT DELIVERED: 26 OCTOBER 2012

BINNS-WARD J:

[1] In terms of a judgment handed down on 28 August 2012, summary judgment was granted in favour of the plaintiff against the first defendant in case no. 11461/2012 ('the EFM Investments' matter) and against the first, second, third and fourth defendants, and

against the fifth to seventh defendants in their respective capacities as trustees of the Naude Familie Trust in case no. 11463/2012 ('The Lakes CC matter'). Certain ancillary relief concerning direct execution against the immovable property hypothecated by the principal debtor in each case was also granted. The parties against whom judgment was granted have applied for leave to appeal. In order to succeed in their applications, they had to persuade this court that there is a reasonable prospect that another court might be persuaded on appeal that they should have been granted leave to defend the respective actions.

[2] I do not propose to go back over the reasons why summary judgment was granted against the defendants anymore than is strictly necessary. Those reasons were fully set out in the principal judgment. The essential reason why the defendants' opposition to the application for summary judgment was unsuccessful was that they failed, in my judgment, to meet the threshold requirement of setting out a *bona fide* defence. The classical statement of the requirements in this respect is that given in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A), at 425G-426E. The remedy of summary judgment is not intended to shut out defendants who are able to demonstrate a *bona fide* intention to defend the action. It does require them, however to show what their intended defences are. It must appear from what they say in this respect that the defences are legally sustainable and that they are maintained in good faith. They are expected to do this by setting out in their opposing affidavits the nature and grounds of the defence and the material facts upon which it is founded. If the averments made by a defendant in the opposing affidavit are vague, or markedly lacking in the particularity that might be expected in the circumstances of the case, then the court is likely to hold that a *bona fide* defence has not been disclosed, and summary judgment will follow.

[3] The most recent wisdom of the Appeal Court on the subject of the summary judgment procedure is to be found in *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA),

at para. 25, where Plasket AJA, writing for the court (Brand, Ponnar, Bosielo JJA et Petse AJA concurring), observed (footnotes omitted):

It is necessary to say something regarding the grant of leave to appeal in cases in which summary judgment has been granted. The purpose of summary judgment is to 'enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim'. It is a procedure that is 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'. If a court hearing an application for summary judgment is satisfied that a defendant has no *bona fide* defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure.

Those remarks, quite obviously, bear pertinently on the current applications.

[4] Turning then to the applications themselves.

[5] As counsel for the plaintiff correctly highlighted, the grounds given in support of the applications for leave to appeal do not engage with the central finding in the principal judgement that a *bona fide* defence had not been made out because of the vagueness and lack of particularity in the opposing affidavits. Absent such engagement, the grounds set out in paragraph 2 of EFM Investments' application for leave to appeal do not appear to me to advance the case for leave to be granted. The ground set out in paragraph 1 of EFM Investments' application, and also that of the application in the The Lakes CC matter, likewise does not establish any basis why there should be a reasonable prospect that another court might hold that this court was misdirected in the reasoning set out in paragraph 8-10 of the principal judgment.

[6] The variable interest rate provisions in the mortgage loan agreement referred to in ground 3 of EFM Investments' application were not even mentioned in the affidavit opposing the summary judgment proceedings. They are a red herring. The defence set out in the opposing affidavit was that the plaintiff had recovered interest in an amount exceeding that to which it was entitled in the sum of R109422,77 and that, consequently, repayment of the debt had not been in arrears. That allegation was premised on the calculations of Mr van

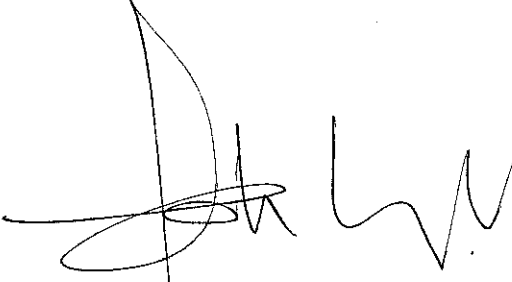
Jaarsveld. But, as pointed out in the principal judgment, van Jaarsveld's interest calculations disregarded more than R380 000 of the capital amount claimed by the plaintiff. There is nothing in van Jaarsveld's calculations to suggest that the plaintiff did not apply the variable interest rates in accordance with the terms of the mortgage loan agreements.

[7] The same observations concerning variable interest rates pertain to sub-paragraphs 2.1 – 2.3 of the grounds of appeal in the application in the The Lakes CC matter. As the plaintiff's counsel tellingly pointed out, with reference to van Jaarsveld's calculations in respect of the debt in issue in that matter, it appears, even on the defendants' own opposing papers, that the total amount paid by the principal debtor over the relevant period fell short - by over R104 000 - of the interest which the defendants' expert calculated had fallen due during that time, even on the more generous of the alternative calculations done. This feature puts beyond doubt the soundness of the observations made in paragraph 15 of the principal judgment. It is simply impossible to understand in the circumstances how the defendants could maintain that the payments on that account were not in arrears, or that another court might be persuaded to allow the defendants to go to trial on the issue.

[8] The defendants' counsel, while not abandoning the point taken in paragraph 3 of the grounds for leave to appeal in the The Lakes CC matter that there is a reasonable prospect that another court might find that this court '*erred in holding the Second to Seventh [defendants] did not, as sureties, enjoy valid defences to the [plaintiff's] claims against them when each of them, respectively, enjoyed the defence of fraud against the [plaintiff's] said claim*', advisedly did not pursue it in oral argument. The allegation in the affidavit opposing the summary judgment application was that the plaintiff had obtained the suretyships from the fourth to seventh defendants in respect of *The Lakes CC* debt on the basis of a misrepresentation, made in August 2010, that it would, after obtaining the suretyships, advance R1,3m to *EFM Investments*. The allegation was that this misrepresentation had been

made to obtain suretyships additional to those already furnished by the second and third defendants in respect of The Lakes CC's debt in July 2010. The lie is given to these allegations, however, when regard is had to the terms of the deed of suretyship executed on behalf of the fourth defendant company. It appears from that that the company undertook the suretyship obligation 'by virtue of a resolution dated 20 *July* 2010' (the same date as the suretyships provided by the second and third defendants had been executed). This not only refutes the averments on which the allegation of fraud is premised, it also tends to confirm that the suretyships, (in the case of the second, third, fifth, sixth and seventh defendants limited to a capital sum of R3.375m) given were given in support of the acquisition, in August 2010, by the principal debtor (The Lakes CC) of an immovable property with the assistance of a mortgage facility of R3,375m granted to it by the plaintiff, and quite independently of any commitment by the plaintiff to advance a further R1,3 to EFM Investments. (As apparent in the principal judgment, the fourth to seventh defendants had indeed furnished separate suretyships in respect of EFM Investments' indebtedness. the fifth to seventh defendants' liability in respect of those suretyships was limited to R2,5m, apparently calculated with regard to the R1,2m already advanced to EFM Investments plus the additional R1,3m which it had been contemplated would be advanced.)

[9] In the result the applications for leave to appeal are dismissed with costs.



A.G. BINNS-WARD
Judge of the High Court