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

Case No: 11271/2012

In the matter between:

LOUIS LE ROUX BENADE First Applicant

JACOBA SOPHIA BENADE Second Applicant

and

ABSA BANK LIMITED Respondent

JUDGMENT: 16 MAY 2014

PILLAY AJ:

INTRODUCTION

1. On 11 June 2012 the Respondent ("ABSA Bank") instituted legal proceedings against the Applicants by way of Simple Summons.

2. On 26 July 2012 ABSA Bank delivered an application for summary judgment, which application was dismissed with costs on 4 September 2012.

3. On 15 October 2012 ABSA Bank delivered its Declaration. In its Declaration:

3.1. ABSA Bank claimed an amount of R 6 181 893. 26, interest and costs from the Applicants. It also sought an Order declaring Erf 680 Witsand ("the property") executable.

3.2. ABSA Bank sought payment pursuant to an agreement that was concluded between it and the Applicants in or about July 2002.

3.3. The Second Applicant ("Mrs Benade") was cited in her capacity as the principal debtor and the First Applicant ("Mr Benade") was cited by virtue of a suretyship agreement that he had signed.

3.4. ABSA Bank alleged that as security for the amounts owing, it had registered covering bonds over the property. In its claim, ABSA Bank alleged that it does not know if the property sought to be declared executable is the primary residence of the principal debtor or whether it is occupied or not but that it accepts that the Court will have to consider all relevant circumstances in order to determine whether the property should be declared executable.

4. On 16 November 2012 the Applicants delivered a notice in terms of Rule 23 (1) and Rule 30 in terms whereof they alleged that the Declaration is vague and embarrassing and that it constitutes an irregularity in terms of Rule 30.

5. On 4 February 2013 ABSA Bank delivered a notice of bar.

6. On 14 February 2013, ABSA Bank instituted an application for default judgment.

7. The Applicants instituted this application on 26 March 2013 to uplift the bar and give the Applicants leave to deliver their exception.

THE LAW

8. Rule 27(1) provides as follows:

> "27 Extension of Time and Removal of Bar and Condonation
>
> (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet."

9. It is well established that the requirement of "good cause" gives a Court a wide discretion.[1]

10. Three requirements have been crystallised in this regard:

10.1. An Applicant should file an affidavit satisfactorily explaining the delay. In this regard, it has been held that a defendant must at least furnish an explanation of his or her default sufficiently fully to enable the Court to understand how it really came about and to assess his or her conduct and motives.[2]

[1] Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O) at 216H to 217A.
[2] Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A.

10.2. An Applicant should satisfy the Court on oath that he or she has a bona fide defence.[3] In this regard, it has been held that at a minimum the applicant must show that his or her defence is not patently unfounded and that it is based upon facts which, if proved, would constitute a defence.[4]

10.3. The grant of the indulgence sought must not prejudice the plaintiff in any way that cannot be compensated for by a suitable order as to postponement and costs.[5]

HAVE THE APPLICANTS SATISFACTORILY EXPLAINED THE DELAY?

11. According to the Applicants:

11.1. After delivery of their notice in terms of Rule 23(1), it was their intention to proceed with the exception and their attorney held such instructions.

11.2. By the time that the Applicants' attorney closed his offices on 21 December 2012, there had been no response to the Rule 23(1) Notice from ABSA Bank's attorneys; there had also been no response from ABSA's attorneys by the time the Applicant's attorneys reopened office in January 2013.

12. According to the Applicants' attorney:

[3] Dalhouzie v Bruwer 1970 (4) SA 566 (C) at 572A.
[4] Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O) at 217H.
[5] Dalhouzie v Bruwer 1970 (4) SA 566 (C) at 572A.

12.1. He enquired in writing from his correspondent on 21 January 2013 as to whether ABSA Bank had responded to the Rule 23 Notice.

12.2. He telephonically contacted ABSA Bank's attorneys on 21 January 2013 in order to inter alia get confirmation that they were considering an amendment to the Particulars of Claim after having received the Rule 23(1) Notice. The Applicants' attorneys also wanted confirmation that it was not necessary to deliver the exception in terms of Rule 23. During this conversation, he spoke to one Miranda Britz and asked: (a) whether their client intended amending their Particulars of Claim; and (b) if so, when they would be in a position to deliver the amended Particulars of Claim. Ms Britz informed the Applicants' attorney that she could not provide him with an answer at that stage but that she would revert to him. Ms Britz, according to the Applicants' attorneys, created the impression that he did not have to do anything until she called him back. On this basis, it is alleged that the Applicants attorneys did not deliver a formal exception.

12.3. On 25 January 2013, the Applicants' attorneys' secretary phoned ABSA Bank's attorneys to speak to Ms Britz in order to ascertain a response to his previous enquiry. It is alleged that Ms Britz was not available and a message was left for her.

12.4. On 28 January 2013 the Applicants' correspondent attorneys confirmed in writing that they had had no response to the Rule 23(1) notice. Thereafter, as stated a notice of bar was delivered.

12.5. There is a practice in this division that attorneys warn one another before a demand for a plea is delivered. This, according to the Applicants is a universal practice that is complied with; ABSA Bank does not dispute this allegation and it is common cause that ABSA's attorneys gave no such prior warning.

13. According to Ms Britz, she only attended to the file until August 2012. However, despite this allegation, the record shows that on 15 October 2012 she sent an email to the Applicants' attorney concerning this matter.

14. No explanation is provided for the time lapse between the Notice of Bar having been delivered and the institution of these proceedings. This notwithstanding, I am willing to accept that the explanation provided by the Applicants is a satisfactory one in relation to the delay in that it explains the Applicants' default in responding to the Notice of Bar and enables me "to understand how it really came about" and to assess the Applicants' conduct and motives.

DO THE APPLICANTS HAVE A BONA FIDE DEFENCE?

15. In support of their contention that they do have a bona fide defence, the Applicants contend as follows:

15.1. The parties concluded an agreement whereby ABSA Bank would sell the property, and until the property had been sold ABSA Bank would not institute proceedings against the Applicants.

15.2. They have a defence of lis pendens as there is a pending action under case no. 17447/2011.

15.3. The Applicants contend that credit was provided in a reckless manner contrary to the terms of section 80 and 81 of the National Credit Act No. 34 of 2005 ("the National Credit Act").

15.4. The Declaration is vague and embarrassing.

The Agreement

16. The Applicants contend, as one of their defences that the parties concluded an agreement whereby ABSA Bank would sell the property, and until the property had been sold, ABSA Bank would not institute proceedings against the Applicants. In this regard, the Applicants allege that they entered into a partly written, partly oral agreement with ABSA Bank.

17. ABSA Bank denies the alleged agreement contended for by the Applicants. In amplification, it attaches a Help-u-sell agreement together with a special power of attorney, signed on 15 September 2011. The Help-u-sell agreement ("the agreement") is signed by both Applicants but not signed by ABSA Bank. Despite this, ABSA Bank relies on its terms.

18. Key aspects of the agreement are as follows:

18.1. The agreement is signed by Ms Benade in her capacity as the principal debtor. It is also signed by Mr Benade in his capacity as first surety.

18.2. Under the heading “General” inter alia, the following is stated:

“7.1. Notwithstanding anything to the contrary herein, the BANK may proceed with legal action against debtors (including obtaining judgment against debtors) in terms of the credit agreement, pending implementation of this agreement.

....

7.3. This is the entire recordal of the terms and conditions agreed upon between the parties in respect of the debt. [The debt is defined as R 5 815 566.93 in respect of monies lent and advanced by the Bank to the PRINCIPAL DEBTOR in terms of a mortgage bond backed agreement account number ....].

7.4. No addition to, variation, novataion or agreed cancellation of any provision of this agreement shall be binding upon the parties unless reduced to writing and signed by or on behalf of all the parties.

7.5. No indulgence or extension of time which any party may grant to the other shall constitute a waiver of or, whether by estoppel or otherwise, limit any of the existing or future rights of the grantor in terms hereof, save in the event and to the extent that the grantor has signed a written document expressly waiving or limiting such right.”

19. The effect of the aforementioned provisions is that the Applicants' contention for a partly written, partly oral agreement is unlikely to be sustained. Furthermore, all the terms of the partly written partly oral agreement as contended for by the Applicants is irreconcilable with clause 7.1 of the agreement signed by the Applicants.

20. In addition, on 21 May 2012 the Applicants addressed an email to the attorneys for ABSA Bank in which:

    20.1. They acknowledged that they signed a Help-you-sell agreement during September 2011.

    20.2. They requested whether the attorneys would be willing to approach ABSA Bank for more time to try and sell the property.

21. In my view, there would have been no need for the latter request had the agreement between the parties been that until the property had been sold, ABSA Bank would not institute proceedings against the Applicants.

22. In the circumstances, I am not persuaded that the agreement contended for by the Applicants constitutes a bona fide defence.

Lis Pendens

23. The defence of lis pendens is, in my view, not seriously pursued by the Applicants. Indeed, in the replying affidavit the following is stated: "ek was nie bewus van die feit dat saaknommer 17447 behoorlik terug getrek is nie" and in

paragraph 3.2.1. “dit blyk nou date die Respondent wel die saak terrug getrek het.”

24. In any event, the complaint appears to be that there was no proper withdrawal of the action both on the party in question and the Court. In this regard, it cannot be disputed that the Applicants received notice of this when the answering affidavits in this application were served.

25. I am accordingly of the view that this defence unduly technical and cannot be sustained.

The Declaration is vague and embarrassing.

26. As a further defence, the Applicants contend that the Declaration is excipiable on the grounds that it is vague and embarrassing.

27. It is well accepted that an exception is in fact a pleading and thus falls squarely within the wording of rule 26.[6]

28. It must, however be remembered that even a successful exception does not result in a dismissal of the Plaintiff’s action.[7] Accordingly, the contention that the Declaration is vague and embarrassing, does not in my view constitute a defence to the action.

[6] Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others 2010 (3) SA 81 (ECM) at par 13 and Tyulu and Others v Southern Insurance Association Ltd 1974 (3) SA 726 (E).
[7] Group Five Building Ltd v Govt of the RSA (Minister of Public Works & Land Affairs) 1993 (2) SA 593 (A).

The Applicants' contention that credit was provided in a reckless manner contrary to the terms of section 80 and 81 of the National Credit Act.

29. As regards the contention that credit was provided in a reckless manner, it is alleged that ABSA Bank loaned an amount of R 2 000 000 to the First Respondent in a reckless manner and contrary to the provisions of section 80 and 81 of the National Credit Act.

30. In amplification, it is alleged that ABSA Bank:

    30.1. neglected to do a proper investigation into the Second Applicant's financial position;

    30.2. neglected to ascertain whether the Applicants had a general understanding and appreciation of the risks and costs of the intended credit;

    30.3. neglected to ascertain and ensure that the Applicants understood their rights and obligations as consumers in terms of the credit agreement;

    30.4. neglected to do a proper investigation into the Applicants' financial means, prospects, commitments and capacity to be able to repay the debt.

31. ABSA Bank does not specifically deny these allegations but contends that not a single shred of evidence is provided in support of the contention that credit was extended recklessly and no positive averments are made as to the Applicants

financial position at the time. Indeed, ABSA Bank does not explain the process that was follow prior to the loan of R 2 million having been extended.

32. Instead, in response to the Applicants' averments I was referred to the dictum in **Die Dros (Pty) Ltd v Telefon Beverages CC** 2003 (4) SA 207 (C) where it was held as follows:

> "[28] It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the Court (see Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (W) at 323G) for the benefit of not only the Court but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A; Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 78I.) Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C - E) and accordingly do not constitute evidential material capable of supporting a cause of action."

33. In my view, the allegations made by the Applicants as regards reckless credit are indeed sufficient to give rise to a bona fide defence:

33.1. First, section 81(2) of the National Credit Act imposes certain obligations on a credit provider. It provides as follows:

> "(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-
> (a) the proposed consumer's-
> (i) general understanding and appreciation of the risks and costs of the proposed credit,

and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

33.2. In light of the aforegoing, I am of the view that a litigant is entitled to allege non compliance with these obligations without anything further.

33.3. While I accept that this defence pertains to only R 2 million of the total amount claimed, this is, in my view sufficient to constitute a defence for the purposes of the present application. Should the relief sought herein not be granted, the consequence is that even this limited defence will not be placed before a Court for adjudication and determination.

33.4. Of relevance in this regard is the judgment of **COE Absa Bank v Coe Family Trust and Others** 2012 (3) SA 184 (WCC) at 191D (though in the context of an application for summary judgment), where this Court held:

> "I cannot apply these considerations to this dispute because this court is dealing with a summary judgment application. Therefore, to the extent that Barkhuizen and Brisley are relevant, evidence as indicated may be relevant to the determination of the issues at trial, that is, the circumstances in which the agreement was entered into and the kind, if any, of assessment that was entered into by the plaintiff in terms of s 81(2), and whether this was insufficient for the purposes of the Act as I have outlined it. In this way, the kind of balance of

> interests foreshadowed in Barkhuizen supra can be properly assessed.
>
> In all of these circumstances it appears to me that the defendants have placed before this court a defence sufficient to raise issues which could only be determined by a trial court. Therefore, summary judgment is dismissed with costs; ..."

34. I am of the view that the defence of the reckless provision of credit does indeed constitute a bona fide defence and is sufficient to pass the threshold hurdle of showing that the defence is "not patently unfounded".

35. Finally, in the exercise of my discretion I do not think it would be just and fair to punish a litigant on account of the conduct of their legal representative.[8] Of relevance in this regard is the fact that the Applicants' legal representatives held instructions to proceed with the exception subsequent to the filing of the Rule 23(1) Notice.

36. Furthermore, I am mindful of the fact that the Applicants are two persons of advanced age and that they reside in the property that is the subject of these proceedings.

37. As regards the question of costs, I do not believe that the opposition to the application was ill advised or unnecessary. In my view it was indeed reasonable.

CONCLUSION

38. In the result, I make the following Order:

[8] Creative Car Sound and Another v Automobile Radio Dealers Association 1989 (Pty) Ltd 2007 (4) SA 546 (D) at par 43.

38.1. The bar to the Applicants' pleading in Case No 11271/2012 is removed.

38.2. The Applicants are given leave to deliver their exception within a period of ten days from today.

38.3. The Applicants' are ordered to pay the Respondent's costs jointly and severally, the one paying the others to be absolved.

38.4. The application for default judgment is postponed sine die.

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PILLAY, AJ

Acting Judge of the Cape High Court

16 May 2014