IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number**: 8343/2020**

In the matter between:

NEDBANK LIMITED	**Plaintiff**
And	
BRAGANZA PRETORIUS BELEGGINGS (PTY) LTD	**First Defendant**
BRAGANZA PRETORIUS BELEGGINGS	**Second Defendant**
BRAGAFIN CC	**Third Defendant**

Date of hearing: 17 November 2020
Delivered electronically: 1 December 2020

JUDGMENT

LEKHULENI AJ

INTRODUCTION

[1] This is an application for summary judgment. The plaintiff seeks judgment against the defendants for the sum of R 930 125.17 (*nine hundred and thirty thousand one hundred and twenty-five rand seventeen cents)*, together with interest and ancillary

relief. The plaintiff further filed an application in terms of Rule 46A of the Uniform Rules in terms of which it seeks an order declaring the first defendant's property specially executable.

FACTUAL BACKGROUND

[2] The plaintiff issued summons against the defendants for payment of the sum of R930 125.17 (*nine hundred and thirty thousand one hundred and twenty-five rand seventeen cents)* arising from two credit facilities that the plaintiff allegedly made available to the first defendant on 31 August 2004 and 12 October 2005 respectively. The plaintiff averred that the first defendant failed to pay instalments on due date and that the balance of the facility amount has become due and payable. The second and third defendant bound themselves, individually, jointly and severally as sureties and co-principal debtors, that is *in solidum* for the payment of all amounts which the first defendant may be indebted to the plaintiff plus interest and costs. The plaintiff also seeks an order against the first defendant to the effect that the property mortgaged to the plaintiff by the first defendant be declared executable.

[3] The defendants filed a notice to defend and subsequently a plea. In their plea, the defendants denied any indebtedness to the plaintiff. The defendants also denied the contents of the agreement that was reached between the parties and attached to the summons that were served upon them by the sheriff. To this end, the defendants denied that the plaintiff held covering security for the obligations of the first defendant towards the plaintiff in terms of the agreement pleaded by the plaintiff. The defendants also

averred that plaintiff failed to comply with the provisions of sections 129(1) and 130(1) and 130(3) of the National Credit Act 34 of 2005 (*"the NCA"*) and that to this end, the court must refuse this application.

[4] The plaintiff applied for summary judgment against the defendants on the basis that the defendants raised a bare denial. The plaintiff averred that the denials of the defendants are puzzling and call for an explanation. The defendants admitted that the agreement was entered into but deny its terms without any expansion or explanation. The plaintiff contended that in as far as the defendants suggested that another or other agreements existed they do not plead what those agreements are. To this end, it was the plaintiff's opinion that the defendants have not disclosed a *bona fide* defence to the action and have entered appearance to defend solely for the purposes of delay.

[5] The defendants resisted the application for summary judgment and filed the necessary opposing affidavit. They denied that they are indebted to the plaintiff as alleged in the summons. The defendants raised a number of defences in their opposing affidavit. The defendants averred that the agreements on which the plaintiff rely are credit agreements envisaged in the NCA and that the plaintiff failed to comply with sections 129(1), 130(1) and 130(3) thereof. They also averred that Ms Motlekar who deposed to the affidavit in support of the plaintiff's claim for summary judgment did not have access to and did not have regard to all the relevant documents, correspondences, files records, and annexures attached to the particulars of claim regarding the defendants. The defendants further averred that there are no annexures

marked ‘A’ to ‘B’ attached to the plaintiff’s particulars of claim, only various unmarked documents.

[6] The defendants also contended that paragraph 6 of the plaintiff’s particulars of claim refers to annexure ‘A’ allegedly being a written Facility Agreement concluded on or before 31 August 2004 for a facility of R1 000 000 (*one million rand)* of which R902 000 (*nine hundred and two thousand rand)* was advanced to the first defendant. According to the defendants, there is no document marked ‘A’ attached to the particulars of claim. The defendants pleaded that the first defendant did not enter into a written facility agreement concluded on or about 31 August 2004 for a facility of R1 000 000 (*one million rand)* of which R902 000 was advanced to the first defendant as alleged in paragraph 6 of the particulars of claim. According to the defendants, no advance was made to the first defendant under the Facility Agreement as pleaded.

[7] The defendants also pleaded that paragraph 7 of the plaintiff’s particulars of claim refer to annexure ‘B’ allegedly being a written addendum concluded on 12 October 2005 for an increase of the existing facility by an amount of R540 000 (*five hundred and forty thousand rand)*. The defendants stated that there is no document attached to the particulars of claim marked ‘B’. The defendants noted that there is an unmarked document with a heading “Facility Agreement” attached to the particulars of claim. The document shows that it was entered into on 12 October 2005 but it is not for an amount of R540 000 (*five hundred and forty thousand rand)* as alleged in paragraph 7 of the particulars of claim but for R1 000 000. The defendants implored this Court to

dismiss the summary judgment application as well as the application in terms of Rule 46A.

PRELIMINARY ISSUE

[8] At the hearing of this application, Mr Grobelaar for the defendants submitted that the summons which was served upon the defendants was incomplete. The Counsel further submitted that annexure ‘A’ and ‘B’ referred to in the plaintiff’s particulars of claim was not attached to the summons which were served upon the defendants. To this end, he applied in terms of Rule 32(3)(b) of the Uniform Rules to lead viva voce evidence of the second defendant and his wife with a view to confirm the incomplete documents (annexures to the summons) that they received from the Sheriff.

[9] Mr Van Reenen for the plaintiff opposed the application to lead *viva voce* evidence and submitted that the defendants have already filed opposing affidavits resisting summary judgment. Counsel argued that the defendants cannot have it both ways. In other words, the defendants cannot lead *viva voce* evidence, notwithstanding the fact that they have filed opposing affidavits. It was argued that the Court should either consider the affidavits or the *viva voce* evidence and not both. Reference was made to the commentary on Erasmus Uniform Rules of Court at D-410 where the learned author argued that Rule 32(3)(b) allowed the defendant, by leave of the court to present oral evidence as an alternative to an opposing affidavit, not in addition to it.

[10] It should be stressed that this Court did not understand the author to be suggesting that a defendant who has filed an opposing affidavit resisting summary judgment is precluded to lead oral evidence in a summary judgment application to clarify certain technical or relevant aspects of his defence detailed in an opposing affidavit resisting summary judgment. If the suggestion is that the rule is inflexible to the effect that once a defendant has filed an opposing affidavit he cannot be allowed to lead any evidence in any manner whatsoever, with respect, I do not agree with that proposition. Such an interpretation in my view leads to an absurdity. For the sake of brevity, the relevant parts of Rule 32(3)(b) provides as follows:

> *"(b)* The defendant may satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), **or with the leave of the court by oral evidence** of such defendant or of any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor (emphasis added)."

[11] From the reading of this subrule, it is abundantly clear that the court has an unfettered discretion to allow a defendant or any person to give oral evidence to prove that the defendant has a bona fide defence to the plaintiff's claim. The subrule is not rigid and peremptory. The leading of oral evidence can only be allowed by the court in the exercise of its discretion. That discretion must be exercised judicially bearing in mind the constitutional imperatives envisaged in section 34 of the Constitution. In my view, the literal interpretation of the subrule allows the defendant, by leave of the court, to present oral evidence as an alternative to an opposing affidavit, not in addition to it.

However, the subrule does not preclude a court in the exercise of its discretion and after considering all the relevant facts to allow the leading of oral evidence to supplement the affidavit resisting summary judgment. In my considered view, this subrule has to be given a purposive interpretation which should be congruent with the right of access to courts envisaged in section 34 of the Constitution.

[12] What is intended by the subrule is that at the hearing of an application for summary judgment, the defendant may satisfy the court by delivering an affidavit five days before the day on which the application is to be heard which affidavit may with the permission of the court (after considering all relevant facts) be supplemented by oral evidence to the effect that the defendant has a *bona fide* defence to the claim on which summary judgment is sought. (See *Phillips v Phillips and Another* (292/2018) [2018] ZAECGHC 40 (22 May 2018) at para 21).

[13] In *casu,* the defendants have filed an opposing affidavit and further intended to demonstrate that the summons served upon them was incomplete and that they did not have annexures 'A' and 'B' as referred to by the plaintiff. To that extent, the Court granted the defendants permission to lead oral evidence.

ISSUES FOR DETERMINATION

[14] The issues that this court is enjoined to consider can be summed up as follows:

Whether the plaintiff's application for summary judgment is competent and if so, whether the immovable property mortgaged to the plaintiff by the first defendant can be declared executable in terms of rule 46A of the Uniform Rules of Court.

ARGUMENTS BY THE PARTIES

[15] Mr Van Reenen for the plaintiff contended that the plaintiff's application in terms of Rule 46A is dependent on the outcome of the summary judgment application. It was argued that the defendants did not disclose a *bona fide* defence as required by Rule 32(3)(b) of the Uniform Rules. Counsel argued that the defendants denied liability based only on the annexure attached to the summons. It was plaintiff's submission that in terms of the Sheriff's return of service, the sheriff confirmed that he served the 'combined summons, particulars of claim and Annexures 'A – H' of the summons. It was stated that the defendants elected not to attach what was served upon them in their opposing affidavit. It was also contended that there is no explanation from the defendants as to what was served upon them. Furthermore, the defendants did not state in their opposing affidavits what were the documents that were served upon them. Clearly, the deponent in support of the summary judgment application did have personal knowledge of the facts giving rise to the claim and that the only basis on which the defendants contend otherwise is due to the incorrect allegations regarding the annexures to the particulars of claim.

[16] It was submitted that the documents attached to the particulars of claim accord with the agreements which have been pleaded and that the defendants have not denied with any substance the allegations that the agreements were concluded. Much emphasis was made to the fact that the NCA did not apply in this matter as the NCA does not apply to claims against sureties. It was plaintiff's argument that the defendants did not place any facts before this court to indicate why they are not indebted to the plaintiff for the amount claimed. To this end, it was contended that if the application is dismissed, the trial court will have nothing to consider.

[17] Mr Grobbelaar for the defendants argued that from the defendants' plea, the defendants denied paragraph 6 of the plaintiff's particulars of claim which refers to an alleged Facility Agreement in terms of which the plaintiff allegedly made available to the first defendant a facility of R1 000 000 (*one million rand)* of which the sum of R902 000 *(nine hundred and two thousand rand)* was advanced to the first defendant in terms of an initial Facility Agreement marked 'A'. What made matters worse is the fact that the defendants received incomplete documents from the plaintiff. It was contended that despite the fact that the defendants denied the agreement in paragraph 6 of the plaintiff's particulars of claim, the plaintiff did not attach the relevant documents even in its application for summary judgment. He stated that the defendants only received the complete documents during the plaintiff's reply in the Rule 46A application.

[18] The defendants' Counsel advanced an argument that what is pleaded in the particulars of claim did not accord with the bond agreement. It was submitted that the annexures to the particulars of claim served on the defendants are not marked and that

there is no written facility agreement attached to the summons concluded on 31 August 2004 for a facility of R1 000 000 *(one million rand)* of which R902 000 *(nine hundred and two thousand rand)* was advanced to the first defendant as pleaded in paragraph 6 of the plaintiff's particulars of claim. The denial is borne out by the fact that no such agreement was attached to the plaintiff's particulars of claim. Similarly, there is no annexure 'B' concluded on 12 October 2005 for an increase of the existing facility agreement by an amount of R540 000 *(five hundred and forty thousand rand)* which increased the first defendant's facility to R 1 540 000 *(one million five hundred and forty thousand rand)* allegedly being a written addendum to the initial Facility Agreement referred to in paragraph 7. It was categorically denied that there was indeed such written Facility Agreement.

[19] In essence, it was argued that the mortgaged bonds attached to the summons do not support the plaintiff's claim. In fact, one of the bonds was concluded in the year 2000 for R540 000 *(five hundred and forty thousand rand)* and the other bond was for R1 000 000 *(one million rand)* in the year 2004. These dates do not correspond with the first and second loan agreement as pleaded in the particulars of claim being 2004 and 2005 respectively. The defendants contended that the bond documents do not correspond to the loan agreement on which the plaintiff relies. To this end, it was argued that the plaintiff is entitled to summary judgment only when he can establish his claim clearly.

ANALYSIS AND LEGAL PRINCIPLES

[20] It must be emphasised that the purpose of the summary judgment procedure is to afford an innocent plaintiff who has an unanswerable case against an elusive defendant a much speedier remedy than that of waiting for the conclusion of an action. *See Meek v Kruger 1958 (3) SA 154 (T) at 156 and 158; Joob Joob Investments (Pty) Ltd v Stock MavundlaZek Joint Venture 2009 (5) SA 1 SCA 11C-G; Also Majola v Nitro Securitisation 1 (Pty) Ltd 2012 (1) SA 226 A SCA at 232 F-G.*

[21] In *Raumix Aggregates (Pty) Ltd v Richter Sand CC, Similar Matters* 2020(1) SA 623 (GJ) at 627E-F the full bench of South Gauteng High Court stated as follows:

> *'The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution'*.

[22] In this case, the defendants denied indebtedness to the plaintiff as pleaded in the summons. The defendants denied that they have entered into a Facility Agreement or into an addendum to the Facility Agreement with the plaintiff as pleaded in the summons. They denied the contents of the allegedly incomplete Facility Agreement that the plaintiff served upon them. They averred that Annexure 'A' and 'B' referred to by the plaintiff in the summons was not attached to the summons served upon them. In paragraph 2 of the defendants' plea the defendants denied the contents of the Facility Agreement that the plaintiff alleged was concluded between the first defendant and the plaintiff. This was also confirmed by the defendants in their opposing affidavit. From

what could be gleaned from Exhibit A which was by agreement handed in to court, it is clear that the documents which were served upon the defendants were incomplete. There is no annexure 'A' and 'B' that is referred to in the plaintiff's particulars of claim. The documents which purports to be annexure 'B' consists of paragraphs 1 and 2 on the first page and on the second page it starts from paragraphs 6.1.4. The pages dealing with paragraphs 3 to 5 of the said agreement are missing. What is concerning is that the defendants have denied the agreement alleged by the plaintiff in their plea. Notwithstanding this denial, the plaintiff did not deem it necessary to attach the complete agreement in its application for summary judgment. The plaintiff only saw it fit to attach the correct and complete documents in the replying affidavit of the rule 46A application. From the perusal of all the documents filed, it is unmistakably clear that the plaintiff's documents served upon the defendants are not in order.

[23] To this end, I agree with the views expressed in *Gulf Steel (Pty) Ltd v Rack-Hire Bop (Pty) Ltd* 1998 (1) SA 679 (O) (at 683H–684B) where it was held that before even considering whether the defendant has established a *bona fide* defence, the court must be satisfied that the plaintiff's claim has been clearly established and that his pleadings are technically in order; if either of these two requirements is not met, the court is obliged to refuse summary judgment, even if the defendant has failed to put up any defence or has put up a defence which did not meet the standard required to resist summary judgment. In *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality* [2016] 4 All SA 895 (FB) at para [31] the court held that the prejudice to a defendant resulting from a defective application is a material factor to be taken into account by a court in deciding to refuse summary judgment.

[24] In this matter, I am satisfied that the annexures to the summons that were served upon the defendants were incomplete. The defendants' plea is based on the summons and incomplete annexures served upon them. In the circumstances, it cannot be said that the defendants did not raise a *bona fide* defence when the summons of the plaintiff are made up of an incomplete supporting evidence. This defect was made known to the plaintiff timeously when the plea was filed. The plaintiff failed to remedy the error by attaching these documents in his application for summary judgment. This discrepancy should not count against the defendants. In my view, the fact that the incomplete annexures where served upon the defendants is a material factor which this court is bound to consider in considering the plaintiff's application for summary judgment. This discrepancy should weigh heavily in favour of the defendants. The plaintiff's claim has not been clearly established to warrant the granting of the summary judgment application. The annexures to the summons served upon the defendants are so inapt and ill-contrived so much that this cannot be overlooked by the court.

[25] I am acutely aware that the defendants have raised a number of defences in their opposing affidavits. However, during the hearing of this matter they did not pursue those defences save for the fact that they denied the agreement as pleaded by the plaintiff. Pursuant to the finding that I have reached hereinabove, I deem it unnecessary to consider these defences in detail. In any event, the gravamen of these defences is premised on the fact that the documents that were served upon the defendants were incomplete such that it cannot be said that the deponent to the affidavit in support of the summary judgment application had full knowledge of the incomplete documents.

[26] With regard to the application by the plaintiff to declare the property of the first defendant executable, it is my view that such order at this stage would be incompetent, if due regard is to be heard to my finding on summary judgment.

ORDER

[27] In the result, I grant the following order:

27.1 The plaintiff's application for summary judgment is dismissed.

27.2 The defendants are granted leave to defend the action

27.3 The Application in terms of rule 46A is dismissed.

27.4 Costs will be costs in the action.

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LEKHULENI AJ
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff	Advocate D Van Reenen
Instructed by	VANDERSPUY CAPE TOWN (Ref: Y. Cariem)
For the Defendants	Advocate E Grobbelaar

Instructed by Attorneys West & Rossouw
(Ref: D. Rossouw)

1/12/20: LEKHULENI, AJ **CASE NO. 8343/2020**

The following order is made:

1. **The plaintiff's application for summary judgment is dismissed.**

2. **The defendants are granted leave to defend the action.**

3. **The Application in terms of rule 46A is dismissed.**

4. **Costs will be costs in the action.**

1/12/20: LEKHULENI, AJ **CASE NO. 8343/2020**

The following order is made:

1. **The plaintiff's application for summary judgment is dismissed.**

2. **The defendants are granted leave to defend the action.**

3. **The Application in terms of rule 46A is dismissed.**

4. **Costs will be costs in the action.**