

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION) **DATE: 27/7/2005**

CASE NO: 13509/2005

In the matter between:

Nedbank Limited

Plaintiff

and

**Andre Geldenhuys
Amanda Geldenhuys**

**First Defendant
Second Defendant**

JUDGEMENT

MAKHAFOLA, AJ

The applicant (plaintiff in the main case) applies for summary judgment. The application is based on rule 32(1) of the Uniform Rules of Court.

The plaintiff sued the defendants for payment of R 99 926=56 together with interest at the agreed rate of 10,5% per annum and further prayed for an order declaring the mortgaged property

executable for the sums and costs on the scale as between attorney and client as provided for in the schedule. The summons alleged that the amount claimed was a balance of moneys due, owing and payable by the defendants and was in respect of a loan under two covering mortgage bonds.

The defendants entered and filed a notice of their intention to defend the action. The plaintiff lodged an application for summary judgment. The application is opposed by the 2nd defendant, an adult, female who is married in Community of Property to the 1st defendant.

The affidavit in support of the summary judgment application was deposed to by Dirk Louis Malherbe who is the Manager Mortgage Collections legal of the plaintiff. He alleged in the affidavit that in the nature and scope of his capacity as manager he has access to all records in this matter and the facts of the action. The cause of action and the underlying facts are within his personal knowledge. He was duly authorised to make the supporting affidavit.

He further verified the cause of action and the defendants' indebtedness to the plaintiff in the amounts claimed in the summons.

He further stated that according to his opinion the defendants have no bona fide defence to the plaintiff's action averring that appearance to defend has been entered solely for the purposes of delay.

The following points in limine were raised and argued by counsel on behalf of the 2nd defendant:

1. That Dirk Louis Malherbe lacked the necessary authority to depose to the affidavit because he did not attach a resolution, from the plaintiff to the application arguing that the plaintiff cannot make any affidavit.
2. That the summons was excipiable as it did not disclose the cause of action.

It was further argued on behalf of the 2nd defendant that they are not in arrears with payments on the bonds; the plaintiff had no entitlement to claim full, outstanding balance at the time of the issue of the summons; they denied that the full outstanding balance was due owing and payable at the time of issue of summons; from the summons it is unclear why the action was instituted as they were afforded an opportunity to pay the bond off in instalments; that the plaintiff has clearly miscalculated all payments on the bond account.

On the other hand, it was argued on behalf of the applicant that all the defences raised were not, bona fide; that the applicant has complied

with the requirements of rule 32(1). The applicant referred the court to numerous decided cases to bolster the fact that there is no requirement that a company's resolution be attached to the supporting affidavit for the purposes of succeeding with the application for summary judgment.

The applicant contended that the deponent's supporting affidavit is not defective because as the Manager Mortgage Collections he has access to all records arming him with personal knowledge of all accounts relating to the matter, and facts, in the cause of action by plaintiff and for the purposes of summary judgment.

It is clear from the applicant's papers on summary judgment application, the summons and certificate of balance that the amount alleged to be due, owing and payable to the plaintiff is reflected as one and the same amount. The deponent clearly states that he has access to the records relating to these accounts of plaintiff implicitly saying his personal knowledge that the records are true and correct is drawn from his access to the said records.

On the other hand the defendants' averments in opposition is that the summons is excipiable for lack of cause of action. The 2nd defendant denies any indebtedness in the amount claimed to be due, owing and payable at the time of the issuing of summons by the plaintiff. There is

also an allegation that the plaintiff has clearly miscalculated all payments made on the bond. As the crux of the defence pivots on the defendants having paid, the opposing affidavit ought to address this point of the merits fully. It should clearly disclose the miscalculations of the plaintiff; state the amount that has been paid by the defendants to directly negative the amount alleged to be owing. This fact appears to be the material point to the nature and ground of the defendants' defence. If the court is to be asked to dismiss the application for summary judgment, the defendants' defence should be placed before court and the plaintiff, in such a manner that the defendants' bona fide defence is found based with sufficient particularity.

Vide: Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 420

The following points of facts and law having arisen during the proceedings I now turn to address them.

- (a) As to the excipiability of the summons not disclosing the cause of action regard should be had to Rule 17 (2)(b). It provides that: "in every case where the claim is for a debt or liquidated demand, the summons shall be as near as may be in accordance with Form 9 of the First Schedule."
- (b) Rule 32(3)(b) provides that: the opposing affidavit. "shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

(c) Rule 32(2) does not require the supporting affidavit to be made by the plaintiff only but by any other person who can swear positively to the facts verifying the cause of action and the amount, if any,"

(d) Special Authority from Plaintiff:

Deponent of the supporting affidavit in the application for summary judgment, if he is not the plaintiff, does not need a special authority to depose to such an affidavit on behalf of plaintiff.

Vide: Barclays National Bank Ltd v Love 1975 (2) SA 514 (D & CLD)

To my mind the principles of law enunciated in the above cited cases relating to summary judgments are correct and that is also my view of the law in that regard.

The above having been said it is my view that:

3. the summons complies with Rule 17(2)(b) of the Uniform Rules of Court, and sets out the plaintiff's cause of action "in concise terms"
2. the supporting affidavit to application for summary judgment complies with Rule 32(2) because the deponent has averred that "the facts are within my personal knowledge" which is sufficient for the purpose of the Rule.
3. Rule 32 (governing the application for summary judgments) does not require a deponent deposing to a supporting affidavit

to annex any authority to the application if she or he makes an affidavit on behalf of the plaintiff.

4. the supporting affidavit verifies the facts upon which the plaintiff relies for its cause of action. It is also clear from the supporting affidavit which cause of action is being verified

Vide:

Barclays National Bank Ltd v Swartzberg 1974 (1) SA 133 (W)

Esso Standard SA (Pty) Ltd v Virginia Oils and Chemical Co

(Pty) Ltd 1972 (2) SA 81 (O)

5. Rule 32(3)(b) of the Uniform Rules of Court has not been complied with by the defendant's opposing affidavit in that it does not disclose fully the nature and grounds of the defence, and the material facts relied upon therefor.

6. the bona fide defence of the defendants is wanting from the opposing affidavit, regard being had to the facts deposed to therein. At best the defendants ought to have stated the sum which is not the result of any miscalculation which according to them is the correct calculation of the amount which is due, owing and payable to the plaintiff in future, and at the time of the issue of summons. This would create a dispute to the sum claimed and display doubt that the plaintiff's case is unanswerable and unimpeachable. To my mind, this

would enable the court to assess the bona fide defence in favour of the defendants and this would meet the test of "full disclosure of the nature and grounds of the defence raised and the material facts upon which this is founded"

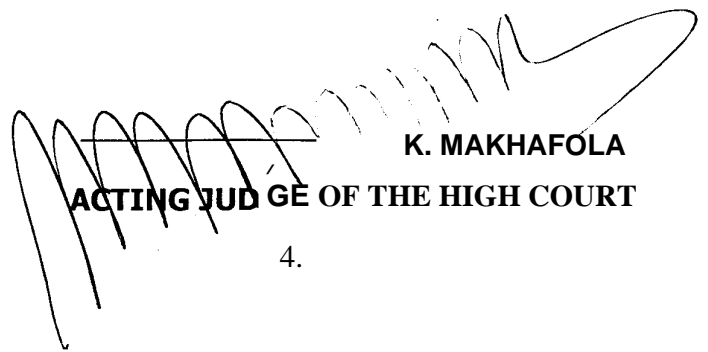
Vide:

- Tesven CC and Another v South African Bank of Athens
2000 (1) SA 268 (SCA) at 275 J and 276 A-B

In the circumstances, the defendants' case on the merits and the points *in limine* is untenable and, therefore, decided against the defendants.

Summary judgment is granted to the plaintiff against the 1st and 2nd defendants jointly and severally the one paying the other to be absolved as follows:

- 1. Payment of the sum of R 99 926-56;**
- 2. Erf 800 Croydon Extension I Township Registration Division IR Gauteng
In extent: 1070 square metres
Held by Deed of Transfer T 54612/03 is executable**
- 3. Payment of interest on the amount of R 99 925=56
at
10,50% per annum compounded monthly and
calculated in arrears as from 2 April 2005 to date of
payment.**
- 4. Costs of Suit.**



K. MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT