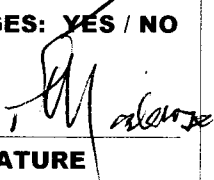




IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
16-7-2013
DATE

SIGNATURE

CASE NUMBER: 42730/12

DATE: 16 July 2013

NEDBANK LIMITED

PLAINTIFF / APPLICANT

✓

MASTERPROPS 439 (PTY) LIMITED

FIRST DEFENDANT /RESPONDENT

ZIGIRIADIS, PANAGIOTIS

SECOND DEFENDANT /RESPONDENT

DOMENICO CIOFFI

THIRD DEFENDANT /RESPONDENT

JUDGMENT

MABUSE J:

1. This matter came before me as an application for summary judgment. On 26 April 2013 I made the following order and promised that I would furnish reasons for the said order later, that:

“1. the application for summary judgment is refused;
2. the defendants are hereby granted leave to defend;
3. costs are reserved.”

These are therefore the reasons for the said order. At the heart of the matter was, as required by the provisions of Rule 32 (3), whether the defendants had disclosed fully the nature and grounds of their defence and the material facts upon which they relied. Tersely the issue was whether the defendants had disclosed any bona fide against the plaintiff's action. This is the touchstone in opposing any application for summary judgment.

2. The plaintiff is a public company duly incorporated according to the company laws of this country and has its principle place of business at Braampark Office Park, Hoofd Street, Braamfontein. The plaintiff trades as a registered deposit taking institution in terms of the provisions of the Banking Act 94 of 1990. In terms of the provisions of section 40 of the National Credit Act 34 of 2005 (“the Act”) the plaintiff is a registered credit provider. The first defendant is a company duly registered in accordance with the company laws of this country and has its registered address at 3 Street Peter Road, Gauteng Estate. It is represented in this matter by Panagiotis Zigiriadis, its director; the second defendant is an adult male who presently resides at 93 Nondela Road, Waterkloof Heights, Pretoria, and the third defendant is an

adult male who resides at 13 Toulouse Minot Place, Morningside Manor in Johannesburg.

3. By a summons issued by the Registrar of this court on 23 July 2012 the plaintiff claimed from the defendants jointly and severally, the one paying and the others to be absolved: (1) payment in the sum of R1 110 808.70, it being the balance due and owed under mortgage bond no. B185655/2007 ("the bond") which bond was passed by the first and second defendants in favour of the plaintiff. The plaintiff was the legal holder of the said bond. On 25 September 2007, and at Johannesburg, the second and third defendants interposed and bound themselves unto and on behalf of the plaintiff as sureties jointly and severally *in solidum* and co-principal debtors for the due payment by the first defendant to the plaintiff of all sums of money which might at any time be or become owing by or claimable from the first defendant or by the plaintiff from any cause of debt whatsoever; (2) Interest at the rate of 7.40% per annum compounded monthly from 1 May 2012 to date of payment, both days inclusive, due and payable under the said Mortgage Bond.
4. The defendants failed to comply with the obligations in terms of the mortgage bond. Consequently on or about 3 February 2012 the first defendant entered into a Distressed Restructure Agreement in respect of the abovementioned home loan. The plaintiff contended that in terms of the mortgage bond and the Distressed Restructure Agreement the said amount was then due and payable by reason of the fact that the first, second and third defendants failed to pay punctual instalments

provided notwithstanding demand by way of a notice in terms of the provisions of section 129, read with section 130, of the National Credit Act 34 of 2005. The plaintiff claimed furthermore an order declaring the said property to be executable for the said sums provided for in the agreement of loan which constituted the basis of the mortgage bond.

5. The application for summary judgment was opposed by the defendants who had, to that end, filed an affidavit deposed to by the second defendant. In the opposing affidavit the defendants had raised three points in *limine*, namely:

- 1) that the plaintiff had not complied with the provisions of Rule 18(6) of the Uniform Rules of Court;
- 2) that the plaintiff's cause of action whether the Mortgage Bond or Distressed Restructure Agreement was excepiable; and
- 3) that the plaintiff's summons was vague and embarrassing.

6. Apart from the afore going points in *limine* there was furthermore another ground defence of *res judicata* raised through an affidavit filed by Hermanus Jacobus Kriel ("Kriel"), the defendants' attorneys of record. The Court had to deal with this issue of *res judicata* even though it had not been raised in the papers. It was, in my view, a valid point and for fairness and justice the Court could not have ignored it. What was of paramount importance in my view was both parties were afforded an opportunity to effectively ventilate the point. At any rate a duty rests on the Court to satisfy itself that a party has made out a good case that entitles it to the remedy it seeks. If relevant facts that are not placed before it, its ability to formulate a

balanced assessment of the matter before it will, to the disadvantage of either of the parties, be handicapped.

7. The crux of the affidavit by the said Mr. Kriel was that the plaintiff already had obtained judgment against the first defendant in the South Gauteng High Court under case no. 15349/09 arising from the same cause of action; that pursuant to the aforementioned judgment a writ of execution was issued and that the property in question was duly attached as a result. That there is already a judgment granted against the first defendant in favour of the plaintiff in Johannesburg was confirmed by Adv. Mollentze, counsel for the plaintiff in the current matter. During argument I asked him what the difference was between the amount of the judgment obtained in Johannesburg and the current claim and he confirmed to this Court that the difference represented interest. Mr. Schoeman submitted that in view of the existence of the judgment already obtained in Johannesburg this Court could, under such circumstances, not grant the application for summary judgment. On the other hand, Mr Mollentze argued that the defence of *res judicata* could not be successful because target of the said defence was home loan agreement not the Distressed Restructure Agreement. He conceded furthermore that it was the aforementioned judgment that led to the Distressed Restructure Agreement. The centrepiece of his submission was that the plaintiff's claim was not based on upon substantially the same set of facts. In view of the fact that the issue regarding *res judicata* constitutes one of the battlegrounds another Court still has to decide, it is, in my view sufficient to state that it constitute a valid and debatable issue. In the face of such an issue it

would not have been proper for the Court to grant the application for summary judgment.

8. On the other hand Rule 41(2) of the Uniform Rules of Court states as follows:

“Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof by such judgment or decision abandoned in part shall have effect subject to such abandonment.”

9. The judgment that the plaintiff obtained in Johannesburg has, although it has not been satisfied, not been abandoned. Accordingly the defendants have raised, in my view, a *bona fide* defence against the plaintiff for summary judgment. The judgment so obtained remains valid until it is satisfied or abandoned. Once the plaintiff's cause of action against the defendants has been exhausted by reason of judgment whether based on a mortgage bond or not, no more room exists in principle for enforcing the same claim under the guise of a Distressed Restructure Agreement. On this point above, even without referring to the point in *limine*, I was satisfied that the defendants had disclosed fully the nature and grounds of their material defence as well as the material facts upon which they relied. They had satisfied the Court that they had a bona fide defence against the plaintiff's action. It was on this basis that I made the order referred to in paragraph 1 supra.



P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Plaintiff's Attorneys: *Rossouws Lesie Inc*

Plaintiff's Counsel: *Adv. JH Mollentze*

Defendants' Attorneys: *Machobane Kriel Inc*

Defendants' Counsel: *Adv. Z Schoeman*

Date Heard: *26 April 2013*

Date of Judgment: *16 July 2013*