

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 53401/2009

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

3/12/2015

EIM Bush

3/12/2015

In the matter between:

ABSA BANK LIMITED

PLAINTIFF

and

JURGENS SCHNEIDER

1ST DEFENDANT

CORNELIUS FREDERICK SCHNEIDER

2ND DEFENDANT

SUSARA SUSANNA DE KLERK

3RD DEFENDANT

J U D G M E N T

KUBUSHI, J

- [1] The plaintiff in support of its claim for summary judgment relies on a written mortgage loan agreement entered into between the plaintiff and the late first defendant, the second defendant and the third defendant, in terms whereof monies were lent and advanced by the plaintiff to the three defendants. Pursuant to the said loan agreement a mortgage bond was registered as a continuing covering security for the monies lent and advanced by the plaintiff to the defendants. The defendants failed to make regular payments, notwithstanding demand, consequently, the amount of loan and interest thereon became due and payable.
- [2] The provisions of the National Credit Act 34 of 2005 ("the National Credit Act") are applicable to the transaction in question. It is not in dispute that the plaintiff has properly complied with the relevant provisions of the National Credit Act and more specifically s 129 (1) (a) thereof.
- [3] The late first defendant was married in community of property to the second defendant and the first defendant having passed away, they are now substituted by the current first and second defendants who are appointed as executors of their joint estate.
- [4] Only the third respondent is opposing the summary judgment application. The application for summary judgment is proceeding on an unopposed basis in respect of the first and second defendants.

- [5] It should also be stated that the third defendant has in her opposing affidavit tendered the return of the property in that she has agreed to the sale thereof. These proceedings are only in respect of any money judgment that may be outstanding after such sale.
- [6] The third defendant does not deny her liability and indebtedness to the plaintiff in that she admits signing the agreement. Her opposition to the summary judgment application is mainly based on the ground that the provision of the credit to her was "*reckless credit*" within the meaning of the National Credit Act. This ground is supported by the following factual averments in the opposing affidavit, that:
- 6.1 prior to signing the loan agreement no assessment was conducted by the plaintiff as to her credit worthiness.
- 6.2 there was no enquiry conducted into her personal finances whatsoever.
- 6.3 her income and expenses were not asked for and in fact at the time of the conclusion of the agreement, she was in fact unemployed.
- [7] The plaintiff's contention is that the broad-brush allegations made by the third defendant contradicts and flies in the face of clause 11 of the loan agreement which is a declaration and confirmation by the third defendant that she understood the "risks and costs as well as her rights and obligations in terms of the agreement" and further that she truthfully answered all requests for information directed to her by the plaintiff in the course of and preceding the

signing of the loan agreement. The submission by the plaintiff's counsel is that the third defendant does not in her opposing affidavit tell the court about clause 11 of the loan agreement and makes no attempt to explain why it should not be taken at face value or why she came to sign the agreement.

[8] The plaintiff's further submission is that "*reckless credit*" cannot be raised as a defence in the circumstances where the opposing affidavit does not, as in the present matter, set out sufficient facts and details to enable the court to come to a conclusion that it has been persuaded that the credit provided to her was a "*reckless credit*".

[9] The plaintiff's counsel conceded in argument that the defence of "*reckless credit*" raised by the third defendant is indeed a defence in law, as envisaged in uniform rule 32, but, she argues that in the circumstances of this matter the defence has not been raised *bona fide*. There is no sufficient information before me to enable me to determine whether the defence is made *bona fide* or not. The contention is that the defence has been raised and fabricated in an attempt to avoid summary judgment. In this regard the plaintiff's counsel referred me to the judgment in *SA Taxi Securitisation (Pty) Ltd v Mbatha*; *SA Taxi Securitisation (Pty) Ltd v Molete*; *SA Taxi Securitisation (Pty) Ltd v Makhoba*¹ wherein the following was stated:

"The principle enunciated in *Breitenbach v Fiat* (1976 (2) SA 226 (T) at 228) are no less applicable when the defendant deposing to an affidavit resisting summary

¹ 2011 (1) SA 310 (GSJ) para 26.

judgment is relying upon defences based upon sections of the NCA (National Credit Act). Since the enactment of the NCA, there seems to be a tendency in these courts for defendants to make bland allegations that they are “*over-indebted*” or that there has been “*reckless credit*”. These allegations, like any other allegations made in a defendant’s affidavit opposing summary judgment, should not be “*inherently and seriously unconvincing*”, should contain a reasonable amount of verificatory detail, and should not be “*needlessly bald, vague or sketchy*”. A bald allegation that there was “*reckless credit*” or there is “*over-indebtedness*” will not suffice.”

[10] Having accepted that the defence raised by the third defendant is a defence in law, the issue that requires determination is whether the defendant is required in terms of uniform rule 32 to satisfy the court that the defence raised is made *bona fide*.

[11] It has been held in *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk*,² that, not a great deal is required of a defendant but that he or she must lay enough before the court to persuade it that he or she has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a valid defence. In order to achieve that degree of persuasiveness the defendant must do more than assert an intention to establish a defence by evidence at the trial. The defendant must place on affidavit enough of his or her evidence to convince the court that the necessary testimony is available to him or her and that, if it is accepted, it will constitute a defence.

² 1978 (1) SA 164 (W) at 171.

[12] In *Maharaj v Barclays National Bank Ltd*³ it was stated that, where the defence is based on facts the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the court enquires into is whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts so disclosed the defendant appears to have, as to either in whole or in part of the claim, a defence which is *bona fide* and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be.

[13] From my understanding of the wording of uniform rule 32, it is not a requirement for the defendant to raise a defence *bona fide*. Uniform rule 32 (3) requires the defendant to satisfy the court that he or she has a defence which is *bona fide* and good in law. When sub-rule (3) is read with sub-rule (7) of uniform rule 32 it is clear that if the defendant satisfies the court that he or she has a *bona fide* defence the court is bound to give him or her leave to defend.⁴

[14] The plaintiff's concession that the defence of "*reckless credit*" raised by the defendant in his opposing affidavit is a *bona fide* defence is, in my view,

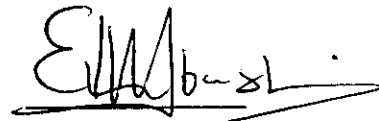
³ 1976 (1) SA 418 (A) at 426.

⁴ See Erasmus: Superior Court Practice volume 2 at D1-419.

dispositive of the issue before me. There is no need for the defendant to satisfy me that the defence he raised in his opposing affidavit has been made *bona fide*. This is not a requirement of uniform rule 32.

[15] In the circumstances I make the following order

1. The third defendant is granted leave to defend the matter.
2. Costs are costs in the main action.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE

: 16 NOVEMBER 2015

DATE OF JUDGMENT

: 03 DECEMBER 2015

PLAINTIFF'S COUNSEL

: ADV. L.A. PRETORIUS

PLAINTIFF'S ATTORNEY

: VAN ZYL LE ROUX ATTORNEYS

DEFENDANTS' COUNSEL

: ADV. C.M RIP

DEFENDANTS' ATTORNEY

: JAN ELLIS ATTORNEYS