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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 93741/20

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED: NO

DATE: 06/12/2024

SIGNATURE:

In matter between

SB GUARANTEE COMPANY (RF) PTY LTD

Applicant /Plaintiff

and

JASON RICHARDSON

First Respondent /Defendant

CHER RICHARDSON

Second Respondent/Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be December 2024.

JUDGMENT

LESUFI AJ

Introduction

[1] This is an opposed application for summary judgment brought in terms of Rule 32 of the Uniform Rules of Court, as amended. The application is preceded by an action proceeding instituted by the Applicants(as it was the Plaintiff in the action proceedings) against the First and Second Respondent(as they were Defendants in the action proceedings) .In the particulars of claim, the Plaintiff premised its case on the enforcement of an obligation contained in contract secured by a mortgage bond registered in favour of the Plaintiff.

[2] The Plaintiff is SB Guarantee Company (RF) Pty Ltd, a company registered in terms of the Company laws of the Republic of South Africa. The First Defendant is Jason Richardson in his capacity as an adult male. The Second Defendant is Cher Richardson in her capacity as an adult female. The First and Second Defendant will be referred to as "Defendants" throughout the judgment.

The Pertinent facts

[3] The Defendants' indebtedness to the Plaintiff is premised on their breach of two home loan agreements (the agreements) concluded with the Plaintiff during 2016 and 2017 respectfully in terms of which the Defendants failed to pay the monthly instalments in terms of the said agreements.

[4] As a result of this the Plaintiff, a registered credit provider, seeks summary judgment for the following:

- 4.1. Payment of R 3 359 977.49,
- 4.2 The interests on the amount referred to immediately above at the rate of 9,9% per annum from the 3rd of December 2019 to the date of payment both dates inclusive.
- 4.3 That the immovable property described as:
ERF 1[...] JUSKEIPARK TOWNSHIP
REGISTRATION DIUVISION I.Q PROVINCE OF GAUTENG
MEASURING 2284 SQUQRE METERS HELD BY DEED OF
TRANSFER NUMBER: T45470/1999 SUBJECT TO THE
CONDITIONS THEREIN CONTAINED:
("the immovable property") be declared executable for the aforesaid amounts.
- 4.4 An order authorising the issuing of a writ of execution in terms of Rule 46 read with Rule 46A for the attachment of the immovable property;
- 4.5 That the reserve price be set for the sale of the immovable property at a sale in execution and value to be determined by the court.
- 4.6 Should the reserve price in prayer 5 above not be reached at the auction, the property be sold for an amount not less than 70%of the reserve price, alternatively that the property be sold without reserve to the highest bidder.
- 4.7 Cost of suit on attorney and client scale.
- 4.8 Further and /or alternative relief.

Issues for determination

[5] This court has to determine whether the Respondents have set out a bona fide defence to the Applicant's claim.

The law

[6] In terms of Rule 32(1) of the Uniform Rules of Court, a plaintiff may obtain summary judgment against a defendant without the necessity of going to trial when a defendant has no defence to a claim based on a liquid document, for a liquidated amount of money, for delivery of movable property, and for ejectment. Rule 32(2) (b) sets out the Applicant's onus to identify a point in law and facts relied upon which his claim is based, to prove why the defence pleaded does not raise any issues for trial. It is not enough to merely state that the Respondents do not have a *bona fide* defence.¹

[7] It is the Applicant's contention that the Respondents' defence of reckless credit in terms of section 8(12) of the National Credit Act 34 of 2005 (NCA) is without merit, based on the facts presented before the Court. The Respondents have contradicted themselves in their concessions regarding the reckless credit defence. Therefore, their defence is not *bona fide* and does not raise a triable issue. Further, the Applicant contended on the issue of section 129 notice, and submitted that the notice was sent to the chosen *domicilium* of the Respondents. It was further submitted that non-compliance with section 129 is not a kind of defence required by Rule 32.

[8] On the contrary the Respondents have proved that they at the very least have a defence and state the material facts upon which his defence is based. This enables the Court to decide as to whether a *bona fide* defence has been established or not. The Respondents need not deal exhaustively with all the facts and evidence relied on to substantiate a defence, but the essential material facts on which the defence is based must be disclosed with sufficient completeness, particularly to enable the Court to decide whether or not the affidavit discloses a *bona fide* defence.²

¹ *Hennie Ehlers Boerdery Cc V Apl Cartons (Pty) Ltd* 2024 (1) SA 149 (ECG) at para 8. [8] Thus, in terms of the amended subrule 32(2)(b), broken down into its component parts, the affidavit supporting the application for summary judgment must contain: [8.1] A verification of the cause of action and the amount, if any, claimed; [8.2] an identification of any point of law relied upon; [8.3] an identification of the facts upon which the plaintiff's claim is based; and [8.4] a brief explanation as to why the defence as pleaded does not raise any issue for trial. According to the defendant, the plaintiff's alleged failure to comply with the brevity qualification attached to this final requirement is at the core of the dispute between the parties.

² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-E

[9] A *bona fide* defence is not scrutinised according to the strict standards of pleadings. In summary judgment it is the material and factual defence and not the Respondents who must be *bona fide*. In *Maharaj v Barclays National Bank Ltd*³ the court held that in determining whether the Respondent has established a *bona fide* defence the court has to enquire whether the Respondent has with sufficient particularity disclosed the nature and grounds of his defence and the material facts upon which his defence is based. It is expected of the Applicant on the other hand to convince the court that he has made out a case for summary judgment as stated above.

[10] The Court has an overriding discretion whether on the facts averred by the Applicant, it should grant summary judgment or on the basis of the defence raised by the Respondents, it should refuse it. Such discretion is unfettered. If the court has a doubt as to whether the Applicant's case is unanswerable at trial such doubt should be exercised in favour of the Respondent and summary judgment should be refused. The test for the granting of a summary judgment is whether the Respondent has satisfied the Court that he has a *bona fide* defence to the Applicant's claim. What this entails is whether the facts put up by the Respondent raised a triable issue and a sustainable defence in law deserving of their day in court.

The Respondents' special plea

[11] The Respondents in opposing the application and admitted that they have not made all the payments due to the Applicant. However, submitted that the Applicant acted with gross negligence in terms of section 80 of the NCA when lending the Respondents such significant amounts by not conducting a thorough assessment to ascertain that the Respondents would not be over indebted by the home loan.⁴ The Respondents concede that they have breached the home loan agreements by defaulting on the monthly instalments. They claim that the bank has extended credit to them recklessly.

³ 1976(1)SA418(A).

⁴ Section 81(2) of the National Credit Act 34 of 2005.

[12] That the Applicant failed to take reasonable steps in its assessment of the Respondent credit worthiness and therefore the Applicant's assessment was irrational. The Respondents also denies having received the letter required by section 129 of the NCA..

[13] In the first defence on the alleged reckless lending. In dispute of this defence, the Applicant relied on the case of *SA Taxi Securitisation (Pty) Ltd v Mbatha*⁵ where the court held:

"since the enactment of the NCA, there seems to be a tendency in these Courts for the Defendants to make a bald allegation 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 judgement, should not be "inherently and seriously unconvincing" 'should contain a reasonable amount of verifactory 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."⁶

[14] In their second defence, the Respondents alleged that they did not receive section 129 notice in terms of the NCA. In dispute of this defence, the Applicant relied on *Sebola v Standard bank LTD*⁷ the Constitutional Court judgement where Cameron J(as he then was) who delivered a majority judgement held:

"[75] Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. Even though registered letters may go astray, at least there is a "high degree of probability that most of them are delivered. But the mishap that afflicted the Sebolas' notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer

⁵ *SA Taxi Securitisation (Pty) Ltd v Mbatha*; *SA Taxi Securitisation (Pty) Ltd v Molete*; *SA Taxi Securitisation (Pty) Ltd v Makhoba* 2011 (1) SA 310 (GSJ).

⁶ *Id* at para 26.

⁷ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC); 2012 (8).

and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

[76] In practical terms, this means the credit provider must obtain a post-despatch "track and trace" print-out from the website of the South African Post Office. As BASA's submission explained, the "track and trace" service enables a despatcher who has sent a notice by registered mail to identify the post office at which it arrives from the Post Office website. This can be done quickly and easily. The registered item's number is entered, the location of the item appears, and it can be printed.

[86] For these reasons, adding the indications the Act offers to the signal importance the notice occupies in the statutory scheme, I conclude that the obligation section 130(1)(a) imposes on a credit provider to "deliver" a notice to the consumer is ordinarily satisfied by proof that the credit provider sent the notice by registered mail to the address stipulated by the consumer in the credit agreement, and that the notice was delivered to the post office of the intended recipient for collection there."⁸

[15] As decided in *ABSA Bank Ltd v Petersen*⁹ mere non-receipt of the section 129 letter is not by itself a defence as the respondent must explain how he would have availed himself of the rights afforded by the NCA and to put up evidence to demonstrate the prospect of a debt-review application being successful. In the present case the Respondents made no attempt to do so.

[16] Section 80(1)(a) clearly states that a credit agreement is reckless if at the time when a credit agreement is entered into, the credit provider failed to conduct an affordability assessment in terms of 81(2)(a). Section 81(3) expressly prohibits a credit provider from entering into reckless credit with a consumer.

⁸ Id at para 75-86.

⁹ 2013 (1) SA481 (WCC).

[17] In the answering affidavit the Respondent contends that they have not made any payments in terms of both agreements due to the Applicant however submit that the Applicant acted with gross negligence when lending the Respondents with such significant amounts of money without conducting thorough assessment in terms of the NCA to ascertain the Respondents would not be over- indebted by the home loan.

Analysis

[18] At the centre of the present dispute lies in whether the Applicant acted recklessly and without conducting any thorough assessment on the respondents' credit worthiness. Secondly whether the Applicant acted irrationally and contravened section 81(2) of NCA.

[19] It is not in dispute that after the two loans were granted by the Applicant, the Respondents made payment for at least almost a year.

[20] In the result, I am of the view that Respondents have not set out a bona fide defence as required by the rules.

[21] I am of the view that the Applicant has made out a case to be granted a summary judgment, and the application for the summary judgment should be granted.

[22] As regards to costs, I am of the view that attorney client scale is warranted as it is provided for in the agreement.

Order

[23] I therefore make the following order:

1. The application for summary judgement is granted.
2. That the immovable property described as:

