

SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Laduma Foods and Others (3083/2024) [2025] ZALMPPHC 35 (11 February 2025) [2025] ZALMPPHC 35

COURT

Limpopo High Court, Polokwane

BEFORE

Bresler

CASE / FILE NUMBER

3083/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NUMBER: 3083/2024

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

11 FEBRUARY 2025

SIGNATURE:

In

the matter between:

ABSA
BANK LIMITED
APPLICANT/PLAINTIFF
-and-
LADUMA
FOODS
FIRST
RESPONDENT/DEFENDANT
LADUMA
BISCUITS (PTY) LTD
Registration
number: 2004/013025/07
SECOND
RESPONDENT/DEFENDANT
EQUISTOCK
PROPERTIES 8 (PTY) LTD
Registration
number: 1999/023534/07
THIRD
RESPONDENT/DEFENDANT
WILLEM
NICOLAAS SAAYMAN OOSTHUIZEN
Identity
number: 6[...]
FOURTH
RESPONDENT/DEFENDANT
KAREN
OOSTHUIZEN
Identity
number: 7[...]
FIFTH
RESPONDENT/DEFENDANT

JUDGMENT

BRESLER AJ:

Introduction:

[1] The matter came before court as an opposed Summary Judgment.

[2] The Applicant / Plaintiff's case is briefly the following:

2.1 On or about the 7th of June 2022, the Plaintiff and the First Defendant entered into a written agreement in terms whereof the Plaintiff made available to the First Defendant an overdraft facility and a credit card facility.

2.2 It was pertinently agreed between the parties that all amounts payable under the agreement would be repayable upon written demand by the Plaintiff and any undrawn portion of the facility would be cancelled by the Plaintiff at any time.

2.3 Should the First Defendant default under the terms of the agreement, the Plaintiff will notify the First Defendant in writing (a 'Default Notice') and allow the First Defendant an opportunity to bring the First Defendant's financial obligations up to date.

2.4 The First Defendant will be in default should the First Defendant fail to comply with any provision of the First Defendant's agreement with the Plaintiff.

2.5 The Plaintiff complied with all its obligations under the agreement. The First Defendant breached the agreement in that it failed to make regular and / or sufficient payments into the transactional account, alternatively failed to reduce the account with the amount of R750,000.00 as agreed between the parties.

2.6 The balance owing to the Plaintiff on the overdraft facility is repayable on demand in terms of the agreement.

2.7 The Second, Third, Fourth and Fifth Defendants bound themselves jointly and severally, as sureties and co-principal debtors for the indebtedness of the First Defendant. As a result of the First Defendant's breach of the agreement, the full amount became due, owing and payable by the Second, Third, Fourth and Fifth Defendants.

2.8 On 8 March 2023, the Plaintiff's attorney caused a written demand to be served on the First Defendant.

2.9 Letters of demand were also sent to the Second, Third, Fourth and Fifth Defendants in their capacities as sureties and co-principal debtors.

2.10 The provisions of the National Credit Act, Act 24 of 2005, do not apply to the agreement concluded between the parties.

2.11 The First, Second, Third, Fourth and Fifth Defendants have failed to make payment and the Plaintiff is therefore entitled to judgment as prayed for.

[3] The Respondents / Defendants submit in their Plea:

3.1 The terms of the agreement are not disputed.

3.2 The breach by the First Defendant is denied – no particulars are provided as to this bare denial.

3.3 The outstanding balance is denied – no particulars or counter version is presented pertaining to the outstanding balance.

3.4 The Defendants consequently denies liability in toto.

[4] The Defendants elected not to deliver an Opposing affidavit. A notice of security was delivered as contemplated in Uniform Rule 32(3)(a), inter alia stating the following:

‘The Defendants / Respondents herewith give security to the Plaintiff / Applicant as follows:

6.1 Further pledging of the bond already registered over the property known as Erf 1[...], Groblersdal Extension 22, Registration Division J.S., Limpopo Province, in favour of the Plaintiff.

6.2 Consent to register a further bond over the property known as Erf 1[...], Groblersdal Extension 22, Registration Division J.S., Limpopo Province, in favour of the Plaintiff for any further amount that might be owed.

6.3 I further undertake and confirm that no further withdrawals will be made from the bond accounts and hereby consent that a relevant hold to that effect may be put on the bond account.’

[5] This Court is therefore called upon to determine if the defence, raised by the Defendants, constitutes a bona fide triable issue and if the security should be accepted as an alternative.

Applicable law:

[6] Uniform Rule 32(3)(a) provides that a Defendant may give security to the satisfaction of the court for any judgment including costs which may be given.

[7] Erasmus, Superior Court Practice, Volume 2 states the following on page 32-70:

‘In this regard the plea should comply with the provisions of rule 18(4) and 22(2) i.e. it should clearly and concisely state all the material facts relied upon in order for the plaintiff, in the context of summary judgment proceedings, to consider whether or not the defense as pleaded raises any issues for trial. Otherwise, the purpose of rule 32 in its amended form would be defeated. If the plea is, for example, one of bare denial which does not raise any issue for trial, the defendant should not be allowed, in the absence of a notice to amend the plea in order to properly set out its defence to the action, to rely on the affidavit resisting summary judgment in which the nature and grounds of a bona fide defence and the material facts relied upon therefore, which are unrelated to the bare denial in the plea, are set out. A defendant who intends to disclose a bona fide defence in its affidavit which is not raised in its plea should first, deliver a notice of intention to amend the plea in terms of rule 28(1).’

[8] In analysing the Plea, this Court holds the view that same constitutes a bare denial. More specifically, the Court cannot see how an admission of the terms of the agreement is compatible with a bare denial of the breach of the terms thereof or the outstanding balance without, at the very least, setting out how the terms were complied with. The Court cannot go on a venture to speculate what the bare denial may possibly entail.

[9] The Plea, as it stands, therefore does not disclose a defence to the claim of the Plaintiff and definitely does not raise any triable issue.

[10] In the case of *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd*[1] the learned Justice Miller JA stated the following:

'Rule 32 (7) provides that, if the defendant finds security or satisfies the Court as provided in sub-rule (3), the Court shall give leave to defend. Counsel for the defendant contended before us that, notwithstanding that defendant admitted that it had no defence to that part of the claim in respect of which liability was admitted and notwithstanding the provisions of Rule 32 (6) (b) (ii), the Court a quo was obliged in terms of Rule 32 (7) to give it leave to defend because of the provision by defendant of security 'as provided in sub-rule (3)'. It is true that Rule 32 (3) (a) provides that in proceedings for summary judgment the defendant may give security to the plaintiff to the satisfaction of the Registrar 'for any judgment including costs which may be given...' and that such provision, read with Rule 32 (7), enables a defendant to avoid summary judgment by the provision of the requisite security, even if he may not have satisfied the Court, in terms of Rule 32 (3) (b), that he has a bona fide defence. (See *Spring and Van den Berg Construction (Pty) Ltd v Banfrevan Properties (Pty) Ltd* 1968 (1) SA 326 (D) at 328A.) I am unable to accept, however, the defendant's contention that Rule 32 (3) (a), when read with Rule 32 (7), enables a defendant, who admits liability and concedes that he has no defence to the claim, to escape summary judgment by giving security for the amount which he admits to be due and owing. So, to hold would be to reduce the remedy of summary judgment to absurdity. It has frequently been said that the procedure of summary judgment provides an extraordinary and drastic remedy and it may be accepted that the Courts will not lightly deprive a defendant, who might have an answer to the claim, of his ordinary right to defend. But, as CORBETT JA pointed out in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423G, the grant of the remedy of summary judgment

'is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law'.

A plaintiff seeking summary judgment is required to support his application by a sworn statement, to be made by himself or any person able to swear positively to the facts, that in his opinion there is no bona fide defence and that notice of intention to defend has been delivered solely for the purpose of delay. (Rule 32 (2).) It would be more than passing strange if a defendant who in reply to such a statement conceded that he had no defence and had entered appearance to defend in order to gain time were able, by giving the requisite security, to secure the delay which it is the very object of the summary judgment remedy to prevent. Moreover, Rule 32 (7) requires that a defendant who has provided the requisite security shall be given leave to defend. It is inconceivable that it was intended that the Court would be obliged to give leave to defend to a defendant who frankly avowed that he had no defence to advance.'

(own underlining)

- [11] It must be borne in mind that Rule 32 has since been amended to provide that security must satisfy the Court. Over and above for the fact that the Plea is evidently a bare denial of the Plaintiff's case, and does not raise a triable issue, this Court is not satisfied with the security presented by the Defendant.
- [12] It is not evident if the security will be sufficient as the Court is not privy to the outstanding balance on the bond account or a market related valuation on the immovable property. It would also force the Court to make an agreement between the Plaintiff and the First Defendant pertaining to the registration of the further covering bond. I therefore tend to agree with the Plaintiff that the bond does not satisfy the requirement of 'security' as envisioned by the legislature in the new Uniform Rule 32.
- [13] A court has a discretion to either grant or refuse summary judgment. This discretion is not premised on mere conjecture or speculation but must be exercised on the basis of the material before court. Van Niekerk, Summary Judgment – A Practical Guide, Lexis Nexis states[2]:
- 'In the absence of allegations on which any defence can be based it would be wrong to exercise a discretion against the plaintiff purely on the basis of speculation or assumption – this may result in an injustice being done to the plaintiff.'
- [14] No bona fide defence is before court and no triable issue is raised. The terms of the suretyship are likewise not in dispute. The Application for Summary Judgment must succeed against all the Defendants.
- [15] The agreement concluded between the parties contains a consent to costs being paid by the Defendants on a higher scale as between attorney and client. There is no reason to deviate from the agreement in this respect in so far as the terms of the agreement are not in dispute between the parties.

Order:

- [16] In the result the following order is made:

16.1 Summary Judgment is granted against the First, Second, Third, Fourth and Fifth Defendants, jointly and severally, the one paying the other to be absolved for:

- (a) Payment in the amount of R1,662,639.30.
- (b) Interest on the aforesaid amount at 13.62% (prime [currently 11.75%] plus 1.87%) linked, per annum, capitalised monthly from 27 January 2024 to date of payment, both days included.
- (c) Costs as between attorney and client.

M BRESLER AJ

ACTING JUDGE OF THE HIGH COURT,

APPEARANCES:

FOR THE APPLICANT: Adv. J Eastes INSTRUCTED BY: Delberg Attorneys Pretoria
liana@delberg.co.za FOR THE FIRST TO FIFTHRESPONDENT: Mr. J Moolman INSTRUCTED BY:
Pratt, Luyt & de Lange Attorneys Polokwane dolla@prattluyt.co.za DATE OF HEARING: 4
November 2024 DATE OF JUDGMENT: 11 February 2025

[1] 1980 (1) SA 816 A at 826

[2] At page 11-37

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Prepared on 12 October 2026 · Esheria