

SOUTH AFRICA / JUDGMENT

**ABSA Bank Limited v Sable Hills Waterfront
Estates CC and Others; ABSA Bank Limited v On
Air Investment Holdings (Pty) Ltd and Others
(2020/15210;2020/41768) [2022] ZAGPJHC 205;
[2022] 2 All SA 767 (GJ) (15 March 2022)
[2022] ZAGPJHC 205**

COURT

South Gauteng High Court, Johannesburg

BEFORE

N.J. Graves

CASE / FILE NUMBER

2020/15210;2020/41768

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION,

JOHANNESBURG

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

REVISED:

YES

15/03/2022

In

the matters between:

ABSA
BANK LIMITED
vs
SABLE
HILLS WATERFRONT ESTATES CC, ANDRIES
VENTER
TRUST N.O., LETITIA VENTER N.O., GRAHAM
BRUCE
PECK
(Case
number 2020/15210)
and
ON
AIR INVESTMENT HOLDINGS (PTY) LTD,
CHARGE UP
TRADE AND INVEST, FIRST NATIONAL
CORE
(PTY) LTD, SAPPLING TRADE AND INVEST 39
(PTY)
LIMITED
(Case
number 2020/41768)
Practice-
Summary judgment- aim and effect of amendments to rule 32- properly
interpreted no disconnect existing between averments
made by
plaintiff in affidavit supporting summary judgment and averments by
defendant opposing summary judgment
Required
knowledge on behalf of deponent to plaintiff's affidavit
Delivery
of defendant's plea before summary judgment application brought
– advantages considered

JUDGMENT

GRAVES AJ:

- [1] This judgment concerns two summary judgment applications brought by Absa Bank Limited, as plaintiff. That under case number 2020/15210 is brought against Sable Hills Waterfront Estate CC (“Sable Hills”) as principal debtor and against the Andries Venter Trust (“the Trust”), represented by its trustees, Mr Andries Jacobus Venter and Ms Letitia Venter, and against Mr Graham Bruce. The Trust and Mr Bruce are sued as sureties for Sable Hills.
- [2] The application under case number 2020/41768 is brought against On air Investment Holdings (Pty) Ltd (“On Air”) as principal debtor and against the second to fourth defendants as sureties, being Charge Up Trade and Invest (Pty) Ltd , First National Call (Pty) Ltd and Sapling Trade and Invest 39 (Pty) Ltd.

[3] Before turning to the merits of the respective summary judgment applications I wish to say something about the changes introduced to the summary judgment procedure in Uniform Rule 32 by GN R842 of 31 May 2019. The new procedure was subjected to a detailed and thoughtful analysis by Binns-Ward J in *Tumileng Trading CC v National Security and Fire (Pty) Ltd.* [1] Despite having some reservations about the utility and practicality of the new procedure the learned judge recognised that the

requirement that the summary judgment application should be brought only after a plea had been delivered. As was noted this is directed at achieving, and should succeed in doing, the avoidance of speculative summary judgment applications. [2] That this was one of the animating goals of the Task Team constituted by the Rules Board to consider amendments to the summary

judgment

procedure, is unmistakable. One reason articulated by the Task Team for the present summary judgment procedure being regarded as unsatisfactory is that deserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences. This is primarily because of the inability of the plaintiff under the previous rule to discern the defence that the defendant may advance, coupled with the prohibition against any further affidavits by the plaintiff. [3] Many of the criticisms and observations regarding the new procedure noted in *Tumileng* may in time prove to be prescient and may result in further changes to the rule concerning important procedural remedy. The analysis by the learned judge will undoubtedly serve as the cornerstone for further judicial analysis.

[4] I do not intend traversing each of the observations and findings in the *Tumileng* judgment, but I wish to make a few of my own observations. First, the prefatory remark in the judgment that the summary judgment procedure has long worked successfully is not a view universally held. [4] Criticism of the summary judgment process was voiced by the late Appeal Justice O. Galgut in his Report of the Commission of Enquiry into Civil Proceedings in the Supreme Court of South Africa (1980), which in dealing with summary judgment said:

“It is generally agreed that the present procedure has little value. A defendant can put up a fictitious defence and the plaintiff cannot answer it.” [5]

[5] The Report considered two possible solutions: the first was that the plaintiff should be given the right to reply on affidavit. The second was that the plaintiff should file a declaration and be given the right to apply for summary judgment by filing a verifying affidavit, that the defendant file its plea and support the allegations on oath and that the plaintiff be given the opportunity to replicate on oath. Justice Galgut favoured the latter procedure. What was ultimately recommended by the Task Team regarding the amended procedure is set out in paragraph 8 of the Memorandum reproduced in the *Tumileng* judgment. The first significant change was the recommendation that the defendant should deliver its plea before summary judgment could be applied for. Further, it was recommended that the plaintiff should deliver an affidavit that went beyond the mere formalism which was required under the previous

rule.

[6] The pitfalls of the previous procedural requirements concerning the plaintiff's affidavit are illuminated by an earlier, unreported

judgment of Binns-Ward J in *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd*. [6] Here the serious deficits in the affidavit deposited by a manager of the plaintiff bank who plainly did not demonstrate any personal

knowledge of the relevant facts, are illustrated. This made it impossible for the presiding judge to place any reliance on the

affidavit. I suggest that the legitimate criticisms levelled at the plaintiff's affidavit supporting summary judgment in *Future Indefinite Investments* were not only a result of sloppy and slapdash drafting but also a consequence, albeit unintended, of the formulation of the previous

subrule 32(2). The previous subrule required the plaintiff's affidavit to be by a person who could swear positively to the facts and which affidavit was required to verify the cause of action and the amount, if any claimed. Despite extensive judicial pronouncements giving guidance on pitfalls to be avoided [7] plaintiffs (particularly corporate litigants) continued to submit deficient affidavits. This was one of the areas identified by the Task Team as requiring an amendment to the rule. The elucidation of the requirements of the plaintiff's affidavit as set out in paragraphs [20] and [21] of the Tumileng

judgment

provides valuable guidance to plaintiffs wishing to invoke this procedure and I respectfully agree with what is there stated.

[7] Second, I agree that the amended rule now requires a plaintiff to consider very carefully whether it is justified in applying for summary judgment, because it is now required to engage more closely the contents of the plea. [8] But I am not convinced that this will be futile in most cases. A procedural oddity under the previous rule was that the summary

judgment application accompanied by the affidavit by the plaintiff, was delivered after appearance to defend was delivered but before any vestige of a defence was disclosed. This notwithstanding the plaintiff was required to allege in its affidavit that "in his opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay." The constitutionality of placing this burden on the defendant before it had an opportunity to advance a defence must now be regarded as questionable and would probably have attracted a challenge at some stage. [9] The new rule which requires the plaintiff inter alia to explain briefly why the defences pleaded does not raise any issue for trial arguably seeks to avoid the above fallacy in the old rule as well as avoiding the potential disconnect between subrules 32(2)(b) and 32(3)(b) referred to in Tumileng at para [40]. [10] The English courts take into account whether the plaintiff has a 'realistic' as opposed to a 'fanciful'

prospect of success. A realistic prospect is one that carries some degree of conviction and means a claim that is more than merely

arguable. [11] I believe that this approach commends itself to the South African procedure.

[8] The further comments on the opposing affidavit in paragraphs [24] and [25] of Tumileng provide useful insight into the new procedure; the method of evaluating the defence raised on the same basis as before remains the same. Whether this will indeed result in (an increased) proliferation of argumentative matter in the opposing affidavit remains to be seen; argumentative matter was not notably absent under the previous procedure.

[9] Ultimately, whilst the amendments to Uniform Rule 32 seek to ameliorate some of the shortcomings in the summary judgment process this is likely to be achieved only in part. Procedural rules can seldom prevent all misuses or abuses; all that can be hoped for is that a procedural structure is provided which clearly articulates the requirements for the remedy and that compliance is enforced by our Courts. Courts will inevitably continue to be troubled with affidavits that are non-compliant with the Rules

or poorly drafted, or both:

“The best lack all conviction, while the worst

Are full of passionate intensity.” [12]

[10] Finally, the caution expressed in paragraphs [12] and [13] of the Tumileng

judgment

about excessive reliance on jurisdictions such as England and Australia is merited. The procedures in these jurisdictions contain features which do not fit comfortably within our own summary judgment procedure as historically developed. [13] But I suggest that there is value to be found in these jurisdictions provided the differences are recognised. The overall object of summary judgment to “winnow out cases that are not fit for trial” [14] is unmistakably applicable in the South African context.

Case No 2020/15210

[11] By summons issued on 1 July 2020 Absa instituted action against the named defendants in their respective capacities. The claims against the defendants arose out of diverse loan agreements and other instruments, which are summarised below:

[11.1] A term loan agreement (claim A, account no. [...]) concluded between the plaintiff and Sable Hills on 28 April 2020 for a loan to the first defendant in the sum of R7 million. The terms of payment provided for interest linked to the prime lending rate and the requirement that repayment be made in 119 equal monthly instalments of R89 981,65 commencing on 1 May 2010 and a final instalment of R89 981,99 on 1 April 2020.

[11.2] An access term loan facility agreement (claim B, account no. [...]) concluded on 15 January 2013 between the plaintiff and Sable Hills for a term loan facility in the aggregate minimum amount of R8 million. Interest accrued at the plaintiff's prime rate, compounded monthly with unpaid amounts attracting interest at the prime rate plus 6% per annum. The first defendant was required to repay the facility in equal monthly instalments with the final payment on the 5th anniversary of the date of signature, being 17 January 2018.

[11.3] An overdraft facility (claim C, account no. [...]), in terms of which the plaintiff provided an overdraft banking facility to Sable Hills in the sum of R7 600 000,00, attracting interest at the plaintiff's prime overdraft rate from time to time. The overdraft facility was repayable on demand by the plaintiff.

[12] The Trust and the fifth defendant ("Mr Peck") executed deeds of suretyship binding themselves in solidum as sureties and co-principal debtors in favour of the plaintiff for due payment by Sable Hills of all moneys due which they executed respectively on 17 January 2003 and 24 January

2006. The suretyships contained the standard clauses including those renouncing benefits.

[13] On 27 November 2007 Sable Hills caused a covering mortgage bond B19201/2007 to be registered in favour of the plaintiff for the sum of R32 300 000,00 (plus an additional R6 460 000,00) over two immovable properties being Erven 292 and 293 Sable Hills, Waterfront Estate Township, Registration Division JR, Gauteng. The properties were mortgaged as security for

the due and prompt payment of the capital amount, interest and the additional amount (or portion thereof) arising from any cause which may be owing or payable at any time to the plaintiff.

[14] On 24 August 2018 the Trust caused mortgage bond B32542/2018 to be registered over Portion 112 of the Farm Tweefontein 413, Registration Division JR, Gauteng for the sum of R25 million, or any lesser amount that may become owing by the Trust to the plaintiff under the Mortgage Loan Agreement concluded. The bond was to remain as continuing covering security for each and every sum in respect of which the Trust may become indebted. This security features prominently in the defendants' opposition to summary judgment.

[15] The plaintiff alleged in its Particulars of claim that Sable Hills had defaulted on each of the loans set out in claims A and B and that it had failed to make regular and sufficient deposits in respect of the overdraft facility in claim C. In all respects, the plaintiff claimed a breach of the respective conditions by the first defendant. The plaintiff further alleged that Sable Hills had failed to honour the terms of the loan agreements in claims A and B and the overdraft facility in claim C. Consequently the plaintiff claimed payment of the outstanding amounts of R4 823 761,55 (claim A), R3 954 065,67 (claim B) and R11 575 176,53 (claim C). It further claimed an order declaring executable (with regard to Sable Hills) Erven 292 and 293, Sable Hills, Waterfront Estate Township and (with regard to the Trust) such an order in respect of

the remaining extent of Portion 112 of the Farm Tweefontein 413. In addition, the plaintiff claimed interest and costs in accordance with the various instruments.

[16] In their plea the defendants admitted failure to pay in respect of claims A, B and C and admitted the outstanding balances as set out in the certificates of balance attached to the particulars. But they pleaded diverse reasons for maintaining that

judgment

as prayed should not be granted which are dealt with fully below. The defendants additionally raised two in limine defences: first, that the summary judgment application was jurisdictionally defective; and second, that the plaintiff already had sufficient security as contemplated in Uniform Rule 32(3)(a) which warranted the defendants being afforded the opportunity to enter into the merits of the matter at trial. I deal first with these in limine points.

[17] The defendants' argument on jurisdiction is that the amendment to Subrules 32(2) and (3) with effect from 31 May 2019 [15] does not permit the plaintiff to embark on "the trial of a cause on paper", or to use the procedure to gain a tactical advantage in the trial or to abuse the procedure by forcing the defendants to provide a preview of its evidence and to limit its defences in any way. Developing this argument the defendants maintained that the plaintiff was restricted to the facts pleaded in its Particulars of claim and was not permitted through its affidavit to provide a narrative of further *facta probanda* or *facta probantia*.

[18] I do not find it necessary in the present circumstances to delineate the precise ambit of what is permissible in this portion of Rule 32(2)(b) which requires the plaintiff in its affidavit to identify "the facts upon which the plaintiff's claim is based and to explain briefly why the defence, as pleaded, does not raise any issue for trial". I accept that the plaintiff should, by and large be restricted to the facts as set out in its particulars of claim. But there may well be circumstances in which a factual matter raised in the particulars of claim and pleaded to in the plea may permissibly be clarified or elucidated without advancing a new factual premise for the claim or seeking to introduce substantial, supplementary facts. The test in this regard will depend on the particular facts and will no doubt be developed over time. I am satisfied that in the instant plaintiff's affidavit did not exceed the permissible bounds.

[19] The contentions regarding the prohibition against a plaintiff gaining a tactical advantage are formulaic when stated in such general terms and lack factual foundation. The new summary judgment procedure is implicitly aimed at exposing a defendant's pleaded defence to the scrutiny of the plaintiff and the court; no procedural unfairness arises from this. The dictum of the Supreme Court of Appeal in *Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [16] concerning the pre-2019 procedure remains apposite:

"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court." [17]

As I have canvassed above the requirements regarding the affidavits by the plaintiff and the defendant/s respectively have been reformulated in the amended rule. There is no indication that the Rules Board intended to convert the process into an opposed motion. This point in limine cannot be upheld.

[20] The second point in limine suggests that security is already in place sufficient for the purposes of Subrule 32(3)(a). For this contention the defendants say in their opposing affidavit that the plaintiff holds sufficient security under the two mortgage bonds executed in its favour of the sums of R32 300 000,00 (mortgage bond 192017/2007) and for the further sum of R25 000 000,00 (mortgage bond 32542/2018). The amounts outstanding as at the date of issue of summons under claims A, B and C appear in aggregate to be less than the aggregate amounts of the sums secured by the two mortgage bonds. Nevertheless I do not accept that such security as

may notionally be afforded by these properties constitutes the giving of security to the plaintiff to the satisfaction of the Court for any judgment including costs as contemplated in subrule 3(a). To accept this contention would require that a court enter an assessment or evaluation of the amount of free equity that may be available to a creditor in an immovable property or properties. This would require the deployment of skills in property evaluation which few judges would possess, or would be inclined to deploy. What is contemplated by subrule 3(a) is plainly security which is easily quantifiable, liquid and which permits prompt satisfaction of any judgment. Neither of these features are apparent from what is proposed as security. This point in limine is unsustainable.

[21] I now turn to the merits of the summary judgment application. Following the institution of action by the plaintiff the defendants delivered their plea as contemplated by rule 32(1)[18] making the admissions referred to above. However, they pleaded that it would be contrary to public policy to enforce the recovery of the loans under claims A, B and C prior to the expiry of a period of twelve months, and further disputed that entitlement of the plaintiff to orders declaring the properties executable.

[22] The essential features of the plea are these: [19]

[22.1] Mr Venter is a longstanding property developer who has over some years (through various legal entities) embarked upon successful property developments. The plaintiff has habitually been his banker and has provided loan or other financing, which obligations have been honoured to the mutual benefit of both parties.

[22.2] Prior to 2007 the opportunity to develop the Sable Hills Waterfront Estate development ("the development") presented itself. Mr Venter says that he partnered with the plaintiff who would provide finance for the development. To secure the loan funding business plans were submitted and vetted (which I take to mean approved) by the plaintiff.

[22.3] The initial development indebtedness incurred by Mr Venter was for R3,2 million together with an additional sum required for the costs of building houses and installing services for the development. [20] A corresponding bond was registered over Erven 292 and 293, Sable Hills Waterfront Estate Township. This is the mortgage bond

B192017/2007 which was registered on 27 November 2007 and is referenced in the particulars of claim.

[22.4] Clause 15.2 of the mortgage bond contains the following condition:

“Subject to the conditions therein contained and further subject to conditions imposed in favour of sable hills homeowners association (registration nr: 2003/015759/08) (Association incorporated under Section 21 of Act 61 of 1973) and more especially subject to the conditions imposed by the sable hills waterfront estate homeowners association.”

The defendants allege in their plea that the conditions included the right to have a usufruct registered in favour of the Association for an indefinite period over Erven 283, 285, 286, 291, 292, 293 and 295 of Sable Hills Waterfront Estate Township. [21]

[22.5] To secure the registration of the usufruct the consent of the plaintiff as bondholder was required in terms of Section 65(3) of the Deeds Registry’s Act, 47 of

1937. [22]

[22.6] By 2010 the indebtedness for the development had been reduced through the sale of properties and this indebtedness together with further funding requirements were restructured through the loan set out in claim A.

[22.7] However, from 2010 and on an on-going basis the Association engaged Sable Hills in what was termed by the defendants as “a legal war of attrition” to secure rights for members which the defendants say they are not entitled to. This included various legal objections to rezoning

applications and the attempt to have the usufruct registered. [23] The plaintiff, however, declined to furnish its consent to registration of the personal servitude in the form of the usufruct. [24]

[22.8] During 2013 the access facility and overdraft facility were concluded (claims B and C respectively). As security for these further loans Sable Hills registered first covering mortgage bonds over units 52, 61, 62 and 77 of Erf 741, Sable Hills Waterfront Estate together with a limited suretyship of R8 million. [25]

[22.9] After a long period of refusal the plaintiff eventually on 23 February 2018 agreed to permit cancellation of the bonds over Erven 292 and 293 (this apparently necessary to permit the registration of the usufruct) on the condition that a replacement bond would be registered by the Trust in favour of the plaintiff in the sum of R25 million over the remaining extent of Portion 112 of the Farm Tweefontein. The terms of the consent were contained in a letter from the plaintiff dated 22 February 2018 addressed to the members of Sable Hills and marked for the attention of Mr Venter. The letter was signed by Neville van Vuuren, whose designation is rendered as

“Wealth Banker, ABSA Wealth, Sandton”. I quote the body of the letter below:

“Release of security: Erven 292 and 293 Sable Hills Waterfront Estate Township mortgage bond B192017/2017

We hereby confirm that we have received credit approval to release erven 292 and 293 Sable Hills Waterfront Estate Township and replace this with registering a first continuous covering mortgage bond for R25 million ifo Absa Wealth over the remaining Extent of Portion 112 of the Farm Tweefontein 413 JR.

The above release of security will only take place once all our securities have been perfected in accordance with our credit approval as well as all our internal terms and conditions associated with this transaction.

Please do not hesitate to contact me if you have any questions regarding this letter.” [26]
[emphasis added]

I will refer to this as “the substitution letter”.

[22.10] On 15 March 2018 a written instruction was given by the plaintiff to its attorneys Boshoff Inc to attend to registration of a bond on the standard conditions for the amount of R25 million over the Farm Twee-fontein 413.

[22.11] On 15 March 2018 attorneys Carol Coetzee & Associates Inc. wrote to Boshoff Attorneys with the heading “Our bond cancellation: Sable Hills Waterfront Estates CC / Absa Property: Erven 292 and 293 Sable Hills”. The letter confirms the instructions received from the plaintiff to attend to the cancellation of the bonds and goes on to deal with necessary documents and various matters pertaining to the cancellation, which are not relevant.

[22.12] The next document annexed to the opposing affidavit is an email from ABSA dated 31 July 2018 to Boshoff Inc (and copied to attorneys Carol Coetzee) the body of which reads as follows:

“Dear Hester

I have spoken to Dries and we agreed that we will cancel our bonds at a later stage but we need to lodge the Farm bond documentation immediately. Please proceed.” [emphasis added]

The email is in the name of Mr Neville van Vuuren, Wealth Banker and it appears that the reference to “Dries” is to Mr Andries Venter. [27]

[22.13] The plea explicitly references the plaintiff’s consent to the release of Erven 292 and 293 and replacement with the bond over the Twee-fontein property. It goes on to allege that the replacement bond over the Tweefontein property was registered on 24 August 2018, but that despite numerous requests the plaintiff failed to procure the cancellation of the bond over Erven 292 and 293. It is said that on 1 April 2020 the plaintiff advised that it did not consent to the cancellation. The details of this appear from an email bearing this date from the plaintiff’s attorneys of record in this litigation to Carol Coetzee Attorneys. The material portion says this:

“Our client does not consent to the cancellation of the mortgage bonds registered in its favour over Erven 292 and 293, Sable Hills

Waterfront Estate for as long as there is any indebtedness owing to our client by Sable Hills Waterfront Estate CC.

Any previous consents to cancellation were revoked, alternatively is hereby repealed.

Kindly urgently arrange for delivery of the original title deeds and mortgage bonds to our offices. ...”

[22.14] The plea goes on to set out a rambling narrative of events concerning the development including references to the deleterious effect of Covid-19 which had arrested the progress of the development and prevented the repayment of the loans. The defendants plead that the repayment in full will be made within a period of 12 months after the date of the plea and maintains that the plaintiff has sufficient security in immovable property, being the bond for R32 300 000,00 over Erven 292 and 293 and for R25 000 000,00 over the Tweefontein property. [28]

[23] The plaintiff’s affidavit in support of summary judgment was signed by a manageress in the business banking and wealth recoveries division of the plaintiff who claims to have personal knowledge by virtue of her position as manageress, having familiarised herself with the file, documents and records relating to the indebtedness and to security. This is followed by a paragraph in these terms:

“4. To the extent necessary and in respect of that which I have not been personally involved within this matter, I submit that I have nonetheless familiarised myself with all facts and I can therefore solemnly state that I am undoubtably the appropriate person to give evidence in these proceedings.”

[24] The unreported judgment in Future Indefinite Investments that I have referred to above was justifiably critical of the affidavit of the plaintiff’s deponent in that matter. This judgment was given in 2016 and appears prominently in Erasmus: Superior Court Practice which is one of the leading texts on the High Court Rules. While the deponent to the plaintiff’s affidavit may not be expected to study judgments or legal texts her affidavit would have been greatly improved by receiving guidance from the plaintiff’s attorneys on a number of features, including these:

[24.1] the introductory qualifying words, “[t]o the extent necessary and in respect of that which I have not been personally involved ...” are practically meaningless. It is clear from the affidavit that the deponent has no personal knowledge of the facts other than as gleaned from the file of documents and records. It is therefore wholly inaccurate to suggest any personal involvement in the “matter” when the sole involvement has been through perusal of the file documents and records;

[24.2] the statement by the deponent that she is the appropriate person to give evidence is similarly inaccurate and in my view, misleading. The appropriate person would have been Mr Neville van Vuuren who appears to have had the benefit of at least some individual engagements with Mr Venter. Whether Mr van Vuuren was available to provide affidavit evidence is not disclosed;

[24.3] the sole reason that can be discerned for the selection of the deponent lies in the reference to her employment in the wealth recoveries division of the plaintiff. In common parlance she deals with bad debts. But this position cannot serve as a universal qualification to depose to an affidavit in support of summary judgment.

[25] The situation is not improved when the plaintiff's deponent deals with the main point in contention in the summary

judgment

application relating to the release of the security over Erven 292 and 293. The deponent concedes that the plaintiff had agreed to this release but says that this was contingent upon the fulfilment of "various preconditions which the defendants failed to fulfil", including the registration of a replacement bond over the Tweefontein property for R44,5 million and the reduction of the overdraft account from R8 million to R6,05 million. I deal with this further below.

[26] I accept that a bank such as the plaintiff seeks to introduce some efficiency into its recovery process, including that part of the process involving court processes to enforce debts. Our courts have recognised that financial institutions, including banks, face practical challenges in deposing to affidavits in support of summary judgment which demonstrate the ability to swear positively to the facts as required by subrule 2(a). [29] What has long been required is personal knowledge, which may not equate to knowledge necessarily based on actual personal involvement

or first-hand experience in the underlying transactions. What may be sufficient, depending on the circumstances would be knowledge derived from reference to records which are reliable and accurate. [30] More on this below.

[27] The defendants' opposing affidavit is brief by comparison to its lengthy plea and its main purpose seems to be to attach the various documents referred to in the plea that were not annexed to that pleading. It adds nothing material to the defence.

[28] As noted above the indebtedness of Sable Hills and the defaults on the loan agreements and overdraft facility is not disputed by the defendants. Although not unsympathetic I am unpersuaded that a proper case has been made out by the defendants that the lockdowns occasioned by the Covid-19 pandemic serve as a legal justification for a delay in payment. Nor am I persuaded that the plaintiff was for this reason precluded from instituting action for recovery of the indebtedness. An indulgence of the nature sought by the defendants lacks legal foundation.

- [29] This means that the fate of the summary judgment application depends upon whether the contentions regarding the release and substitution of immovable properties are sufficient to constitute a bona fide defence to the action. [31] I deal with this together with the contention that the enforcement by the plaintiff of the terms of the various loan instruments and the execution against Erven 292 and 293 would be contrary to public policy. I should point out that the plea filed on behalf of the defendants restricted this argument on public policy to a prohibition against enforcement and recovery of the loans under claims B and C, said to be contrary to public policy if it occurred prior to the expiry of 12 months. It was said that as the prayer seeking orders for the various immovable properties to be declared executable were contingent upon the valid enforceability of claims A, B and C, this should similarly not be permitted. I accept the second proposition as logically correct if it can be shown that there is a bona fide defence to the monetary claims.
- [30] In the affidavit resisting summary judgment the defendants in confirming the allegations in the plea appear to broaden the basis of their contention to something more general, to the effect that the plaintiff should not be permitted to profit from its own wrong and that it would be contrary to public policy to permit the plaintiff to take judgment. Despite a suspicion that the defendants were trimming their sails to the wind I accept that the affidavit should in the instant case stand as the basis for the

determination

of whether a bona fide defence as required has been established. The purpose of the delivery of the plea before the application for summary judgment is to alert the plaintiff as to the substantive nature of the defence that will be proffered by the defendant/s with the aim of encouraging the plaintiff to make an informed decision as to whether to apply for summary judgment, rather than to do this ritually. Save in extreme circumstances I do not believe that a forensic comparison between the plea and the opposing

affidavit is required. During argument on the import and effect of the substitution letter the debate segued into whether the substitution letter constituted a parallel agreement with some independent contractual force. At my invitation, both counsel filed

brief supplementary submissions for which I am grateful.

- [31] The plaintiff made two supplementary submissions. First, reference was made to clause 11.3 of the mortgage loan agreement, in the following terms:

“11.3 Variation of terms

11.3.1 No contract varying, adding to, deleting from or cancelling of (sic) the facility document will be effective unless reduced to writing and signed by or on behalf of the bank and the borrower.

11.3.2 The expiry or termination of a facility document will not prejudice

the rights of the bank in respect of any antecedent breach by the borrower of, or non-performance under, that facility document.”

[Emphasis provided by the plaintiff.]

I do not believe that the substitution letter varied, added to or deleted from the mortgage loan agreement. But did it cancel that document or constitute the termination thereof? To my mind the answer must be “No”. The letter does not purport to alter or vary the indebtedness of the defendants; what it states is that the plaintiff agrees to the release of the security enjoyed over Erven 292 and 293 and to substitution therefor by the Tweefontein Property. I do not find any express reference in the mortgage bond agreement to Erven 292 or 293 or to any other immovable property. Consequently, clause 11.3 does not in terms preclude substitution of security.

[32] The second contention by the plaintiff, essentially repeating what was stated in the main submissions was that if the substitution letter is to be construed as a separate agreement then the defendants had not demonstrated prima facie that they had fulfilled the suspensive conditions contained in that letter. This contention should be read with what is said by the plaintiff in its affidavit in support of summary judgment:

“19. Whilst it is true that the Plaintiff agreed to release bonds over Erven 292 and 293, such was contingent upon the fulfilment of various preconditions which the Defendants failed to fulfil, such as:

19.1 the registration of a replacement bond over Portion 112 of the Farm Tweefontein for R44,5 million;

19.2 the reduction of the overdraft account mentioned above from R8 million to R6,05 million.”

The difficulty with this proposition is that there is no evidence before me that there were preconditions imposed by the plaintiff relating to the bond over Tweefontein being for R44,5 million, or to a reduction in the overdraft amount; these are certainly not to be found in the substitution letter. During argument I asked counsel for the plaintiff where I would find the internal terms and conditions referred to in the substitution letter but he was unable to direct me to any document containing these. I further regard the reference in the letter to the need for all securities to have been perfected to be insufficiently certain for me to find that the specific preconditions relied on by the plaintiff were indeed in force. On my reading this reference to securities being perfected is compatible with the replacement of the existing securities (Erven 292 and

293) with the Tweefontein Farm property. Of course, I cannot determine this with a sufficient degree of certainty to make conclusive determination on these issues nor need I determine whether or not there is a balance of probabilities in favour of the plaintiff or the defendants. [32] For present purposes I do not find it necessary to decide the exact legal nature of the substitution letter. If it is to constitute an agreement then would the absence of the defendants signature (as contemplated by clause 11.3.1 of the mortgage bond agreement)

preclude reliance on this? And if not, would enforcement of the terms of this agreement, separate from or together with the other loan agreements, be unfair, unreasonable or unduly harsh and consequently contrary to public policy? [33] These are matters that can only be determined in a trial.

[33] I also have considerable difficulty with the email of 1 April 2020 from the plaintiff's present attorneys of record to the conveyancing attorneys dealing with the cancellation of the bonds over Erven 292 and 293. It will be recalled that the

bond over the Tweefontein property was registered on 24 August

2018. Prima facie this bond was intended to replace the previous security. Why then some 18 months later in April 2020 did the attorneys advise that the plaintiff declined to consent to the cancellation for as long as there was any indebtedness owed by Sable Hills? If this was a condition of the substitution then it is not so recorded. Similarly puzzling is the suggestion that previous consents to cancellation are revoked or repealed. If so what then about the performance rendered by the defendants in causing the bond over the Tweefontein property to be registered; are they not entitled to counter-performance? If not, are they entitled to demand cancellation of this bond? These are also matters that cannot be answered in the present summary judgment proceedings.

[34] The defendants themselves are uncertain about the exact nature of their legal right underpinning their opposition to the application for summary judgment. Their rendition of the nature and grounds of their defence and the material facts relied upon is not a picture of clarity, but I am not satisfied that the plaintiff's case is unimpeachable and that the defendants' defence is bogus or bad in law. [34] I believe that the monetary claim is sufficient intertwined with the prayer for execution against immovable property to find that all disputed issues should be resolved at a trial. I cannot accept the plaintiff's contention that the pleaded defence does not raise any issue for trial.

[35] The nature of the defence raised in the plea concerning the substitution letter in my view required the plaintiff's deponent to engage issuably with the defence through a representative of the plaintiff with personal knowledge of the facts relating to the substitution. The email from Mr van Vuuren to the bond attorneys on 31 July 2018 which refers to a conversation with "Dries" probably refers to a conversation with Mr Andries Venter, which could conceivably bear upon the bona fides of the defence. The email directly engages the question of release of security recorded in the security letter written by Mr van Vuuren. I fail to see how the plaintiff's deponent who suggests no knowledge of this interaction or of the substitution beyond the correspondence, is able to state on oath that this defence is not bona fide. I am of the view that the defendants have disclosed a bona fide defence to the action and the plaintiff is not entitled to summary judgment.

Case no. 2020/41768

[36] The plaintiff's action against the defendants is for payment of R6 273 714.24, interest and costs. The claim is based upon the following:

[36.1] a written loan agreement between the plaintiff and On Air concluded on 21 September 2011 for a cash loan facility up to R40 625 000,00. The loan was to be prepaid in 120 equal monthly instalments commencing on the first month following the month on which the first drawdown was made, and would bear interest at a fixed rate for an initial period of 24 months and thereafter equal to the plaintiff's prime rate of interest. It was a condition of the loan that further security as set out below would be provided.

[36.2] On Air was required to register a continuing covering mortgage bond over an office block situated in Woodmead Ext. 22 ("the property") for the total loan amount plus an additional amount. The mortgage bond was registered on 30 September 2011 with number B44291/2011.

[36.3] the second to fourth defendants, being limited liability companies were required to bind themselves as securities for and co-principal debtors with On Air for the maximum amount of R13 540 000,00 together with interest and costs. All three deeds of suretyship are in identical terms and contain terms of the nature usually found in such documents. The suretyships were executed by the second, third and fourth defendants on 26 August, 17 August and 12 August 2011, respectively.

[37] On 6 August 2019 On Air sold the property for an amount of R31 004 000,00. After registration of the transfer on 13 July 2020 an amount of R25 952 370,00 was paid to the plaintiff. The plaintiff alleges that on 22 October 2020 On Air was indebted to it in the amount of R6 273 714,24, plus interest on this sum at the prime rate of interest, 7% per annum, calculated and capitalised monthly from 23 October 2020 to date of payment. A certificate of balance, signed by a manager of the plaintiff was attached to the particulars of claim confirming the indebtedness and amounts payable, which were unpaid. The plaintiff pleads that the loan agreement is not subject to the provisions of the National Credit Act, 34 of 2005 and that, consequently the suretyships are similarly excluded. Judgment is prayed for against the first, second, third and fourth defendants, jointly and severally, for the amount of R6 273 714,24, interest and attorney-client cost, as provided for in the various instruments.

[38] The plea delivered on behalf of the defendants does not dispute the conclusion or validity of the various debt and security instruments concluded or that of the mortgage bond, nor do they take issue with the terms thereof. Their pleaded defence is that on 31 July 2020 the plaintiff (represented by various individuals, including a Mr Wikus de Jager) and the defendants (represented by Mr Henning du Plessis) settled the dispute, being the outstanding amount claimed. In support of this settlement they attach an email from Mr du Plessis to Mr de Jager on 31 July 2020 which they contend confirms the settlement reached. I deal with this further below.

[39] The plaintiff duly applied for summary judgment and delivered an affidavit by a manageress of the plaintiff whose authority is illustrated through a certificate of authority. The affidavit contains the same wording as that referred to above under case no. 15210/2020. The curious lack of particularity in this affidavit regarding what division or area of the plaintiff the deponent is employed in is, however, not fatal. The deponent says in her affidavit that she has spoken to Mr Lodewikus Tobias de Jager who informed her that he did not at any stage agree to write off any portion of the debt and that the sale of the property was permitted so as to reduce the indebtedness. A confirmatory affidavit by the said Mr de Jager confirming what is said in the main affidavit is attached. I am satisfied that the deponent to the confirmatory affidavit is the individual referred to in the above email correspondence.

[40] The main deponent to the affidavit supporting summary judgment refers to paragraph 24 of the Loan Agreement which is in these terms:

“24. Variation and waiver

No agreement varying or deleting any provision of the loan agreement or adding any provision, and no waiver of any rights, will be effective unless in writing and signed by the borrower and the bank.”

Also of relevance is clause 27:

“27. No indulgence allowed by the bank will operate as a waiver or abandonment by the bank of its rights, or preclude the bank from exercising any of its rights, whether under the mortgage bond or the borrower’s indebtedness to the bank.”

[41] The defendants delivered an extremely brief opposing affidavit in which they first asked for condonation for the late filing of their opposing affidavit. This was not opposed and was granted. The affidavit was along the same lines as set out in the plea, alleging that on 31 July 2020 the plaintiff and the defendants settled the balance outstanding through a compromise by which the plaintiff agreed to write off the outstanding balance of R6 273 714,24 being the balance owing after sale of the immovable property and part payment to the plaintiff. The legal principles of compromise were extensively considered and analysed in the Full Bench judgment in *Be Bop A Lula Manufacturing and Printing CC v Kingtex Marketing (Pty) Ltd.*

[35] A compromise (*transactio*) is an agreement in terms of which the parties to an obligation settle a dispute arising from such obligation. Once consensus has been reached on the settlement of the dispute the original obligation is discharged and a new obligation, based on the terms of the settlement comes into existence. The effect of a compromise is to put an end to the prior claim which may be disputed and uncertain, in the same way as if the matter were finally adjudicated on. Compromises are to be strictly interpreted because they exclude everything which was probably not contemplated by the parties at the time they reached the compromise. The party alleging a compromise bears the onus of proving it. In determining whether or not a compromise has been effected, the Court will have regard to the substance rather than the form in which it is couched or the description given to it by the parties. [36]

[42] Have the defendants established the compromise on a sufficient basis to avoid summary judgment? I believe not. My view is based largely on further emails annexed to the opposing affidavit which assist in an evaluation of the compromise:

[42.1] on the morning of 9 March 2020 Mr du Plessis (representing the defendants) sent an email to Mr Wikus de Jager

in which he asked for definitive direction regarding a potential transaction with a purchaser. [37] Mr Henning records that the deal had been discussed between “all parties on several occasions” and further advises that the deal requires the plaintiff to pay agent’s commission because the purchaser has paid all other costs;

[42.2] later on the morning of that same day Mr de Jager responded by email asking to be informed what the net amount would be available to the plaintiff should agent’s commission be deducted from the proceeds of the sale, before the proposed transaction could be recommended;

[42.3] on 13 March 2020 Mr de Jager addressed a further email to the defendants, which said the following:

“We considered the request and it was agreed that we will fund the commission from the proceeds of the sale. We will, however, require a binding contractual commitment from the shareholders / sureties / shareholders of the sureties as to how the shortfall of approximately R5 m will be settled before we consent to cancellation. This can be either in the form of a onceoff payment or monthly payments over a period. We are open to proposals / settlement negotiations.

Please advise. You are welcome to contact me should you wish to discuss. If in agreement, we can instruct Cristine to proceed with the payment.” [emphasis added]

[42.4] later on the same day Mr de Jager sent a further email to Mr du Plessis, the body of which reads:

“With reference to our telephonic discussion, according to my records the following companies signed surety for On Air Investment Holdings (Pty) Ltd to the amount of R13,540,000 each:

1. First National Core (Pty) Ltd;
2. Charge Up Trade and Invest (Pty) Ltd;
3. Sapling Trade and Invest 39 (Pty) Ltd.

I will advise Christine that we will consent to the transfer of the properties against payment / guarantees to the amount of R25 952 370.00.”

[42.5] on 31 July 2020, Mr du Plessis wrote to Mr de Jager in the following terms:

“I needed to most sincerely thank you guys at Absa for the different roles you have played in the culmination of this sale. We at OAI are most appreciative of the substantial writeoffs that Absa eventually made and wish to reiterate that the deal would not have happened without your help.

Your assistance was instrumental in making this happen and we are so grateful for your perseverance, understanding and decisive action.”

[43] The opposing affidavit does not provide any further context or background information to the string of emails. No attempt is made to provide detail of the telephonic discussion referred to in the second email from Mr de Jager on 13 March 2020, nor concerning the write-offs. What was the discussion about the sureties which appears from Mr de Jager’s email to have been important to the plaintiff? Reading this email without any background or context it appears to suggest some level of comfort on the part of the plaintiff to agree to the sale of the property because of the suretyships in place by the second, third and fourth defendants. Did the discussion possibly concern the release of On Air from liability, but not the sureties? I am unable to consider this because neither the plaintiff nor the defendants offered any assistance. The comfort of the plaintiff to permit the transaction to proceed because of the suretyships is certainly suggested in Mr de Jager’s first email to Mr du Plessis

on 13 March 2020. The suggestion in this email that the plaintiff was open to proposals or settlement negotiations is left

hanging and there is no objective evidence that the outstanding balance was written off or compromised. These are matters on which

the defendants would at trial bear the onus.

[44] The email from Mr du Plessis on 31 July 2020 referring to substantial right-offs made by the plaintiff is discordant with the preceding emails dealt with above. It is commercially unlikely that the plaintiff, holding security in the form of suretyships from the second to fourth defendants would have regarded a write-off of the full outstanding balance as being an acceptable proposal or settlement. Counsel for the defendants urged me not to shut the door on the defendants who it was said have shown a triable issue. The door has been shut by the defendants themselves through their failure to demonstrate that they do indeed have a bona fide defence to the action. I should make it clear that my decision is not solely based on the affidavit evidence of Mr de Jager which disputes the compromise. But this affidavit aligns sufficiently with the emails to conclude that the defence of compromise has not been established as bona fide.

[45] The defendants have not advanced a case that is bona fide and which has disclosed fully the nature and grounds of their defence and the material facts relied on. In the result the plaintiff is entitled to summary judgment.

[46] I make the following orders:

In case number 15210/2020:

1. Summary judgment is refused.
2. The costs of the application are reserved for determination by the trial court.

In case number 41768/2020:

1. Summary judgment is granted against the defendants jointly and severally for:
 - (a) payment of the amount of R6 273 714,24;
 - (b) interest on this amount at the rate of 7% per annum, calculated and capitalised monthly from 23 October 2020 to date of payment;
2. Costs of suit on the scale as between attorney and client.

N.J. GRAVES

Acting Judge of the High Court of

South Africa

Gauteng Local Division

Johannesburg

APPEARANCES:

Date of hearing: Case no: 2020/15210: 11 October 2021

Case no: 2020/41768: 12 October 2021

Date of judgment: 15 March 2022

Counsel for the plaintiff (Case no: 2020/15210):

ADV. N Alli

Instructed by:

Jay Mothibi Inc

Counsel for the defendants (Case no (2020/15210): ADV. D VETTEN

Instructed by:

BDK Attorneys

Counsel for the plaintiff (Case no: 2020/41768):

ADV. N ALLI

Counsel for the defendants (Case no (2020/41768): ADV. S SWARTZ

Instructed by:

Stan Fanaroff & Associates

[1] 2020 (6) SA 624 (WCC).

[2] At para [15].

[3] Para 8.1.1 of the Task Team Memorandum referred to in para [8] of the Tumileng judgment, read with para 3.1 of that Memorandum. I disclose that I was privileged to be a member of the Task Team which considered this topic and made recommendations to the Rules Board, substantially captured in the Memorandum referred to in the Tumileng

judgment

at para [8].

[3] Para 8.1.1 of the Task Team Memorandum referred to in para [8] of the Tumileng judgment, read with para 3.1 of that Memorandum.

I disclose that I was privileged to be a member of the Task Team which considered this topic and made recommendations to the Rules Board, substantially captured in the Memorandum referred to in the Tumileng

judgment

at para [8].

[4] Tumileng, para [2].

[5] sv “Rule 32 – Summary Judgment”, pp. 78 and onwards.

[6] WCC case number 20266/2015, dated 12 September 2016.

[7] Most notably that of Corbett JA in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423 D-H.

[8] Tumileng at para [22]. Binns-Ward J makes this point by continuing to use the phrase ‘bona fide defence’ from the old rule.

[9] Compare the protections introduced for a defendant by the Constitutional Court in *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011

(1) SA 1 (CC). The procedural advantages enjoyed by a plaintiff under Rule 8 arise from the status of the liquid document- se at para [15].

[10] The concern expressed here was that if the phrase ‘an issue for trial’ in subrule 32(2)(b) merely means the bones of a triable defence then it would be impossible to marry this with the requirement in subrule 32(3)(b) that a bona fide defence must be shown.

[11] See: *Easyair Limited (Trading as Openair) v Opal Telecom Limited* [2009] EWHC 399 (Ch) at para [15]. Despite the differences between our Rule 32 and C.P.R 24 in England and Wales.

[12] *The Second Coming* by W.B. Yeats.

- [13] As carefully traced by Prof. J.A. Faris in his article *The Historical Context of Summary Judgment in South Africa: Politics, Policy and Procedure* (2010) LXIII CILSA 352.
- [14] *Aquila WSA Aviation Opportunities II Ltd v Onur Air Tasimacilik AS* [2018] EWHC 519 (Comm), at para [27].
- [15] Both Subrules having been substituted by GN R842 of 31 May 2019.
- [16] 2009
- (5) SA 1 (SCA).
- [17] At para [32].
- [18] The plea is an admixture of a standard pleading and an affidavit in narrative form. Whether this was occasioned by the amended summary judgment procedure is notionally possible, but practically unimportant.
- [19] For narrative purposes I refer to documents mentioned in the plea, but not attached. These were subsequently attached to the affidavit
- opposing summary judgment.
- [20] It is unclear what commercial instruments were involved concerning this loan funding.
- [21] Erven 292 and 293 are significant because of the covering bond in favour of the Plaintiff.
- [22] Section 68(3) of this statute provides: “(3) If the land to be encumbered by a personal servitude is mortgaged or subject to any other real right with which the said personal servitude may conflict, the bond or other registered deed by which such right is held shall be produced to the registrar together with a consent in writing of the legal holder of such bond or other right to the registration of the said personal servitude and, in the case of a bond, free from the bond.”
- [22] Section 68(3) of this statute provides:
- “(3) If the land to be encumbered by a personal servitude is mortgaged or subject to any other real right with which the said personal servitude may conflict, the bond or other registered deed by which such right is held shall be produced to the registrar together with a consent in writing of the legal holder of such bond or other right to the registration of the said personal servitude and, in the case of a bond, free from the bond.”*
- [23] The latter right must be accepted as being legitimately claimed.
- [24] On my reading of section 68(3) of Act 47 of 1937 I understand this to require that the servitude be registered without any encumbrance of the bond, which was in place over Erven 292 and 293.
- [25] This bond does not feature in the action.

- [26] The letter was ultimately annexed to the affidavit opposing summary judgment. This also occurred in respect of further documents which were referred to in the plea, but not annexed thereto.
- [27] The header on this email refers to a transfer from Sable Hills Waterfront Estate CC and references Erven 292 and 293, Sable Hills Waterfront Estate Township. The meaning of this is unclear and as no suggestion of transfer appears in the papers it is likely that this was intended to refer to cancellation of the bond.
- [28] The reliance on security over Erven 292 and 293 is contradictory of the defendants' stance that this security should have been released in exchange for the bond over the Farm Tweefontein.
- [29] See: *Stamford Sales & Distribution (Pty) Ltd v Metraclark (Pty) Ltd* [2014] ZASCA 79 (29 May 2014).
- [30] The analysis of the *Stamford Sales* judgment by Binns-Ward J in *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd* above explains how this judgment should be read and I respectfully agree with the analysis.
- [31] I leave aside for present purposes the justifiable observations in paragraph [40] of Tumileng concerning the possible tension between subrule 32(2)(b) and that in subrule (3)(b).
- [32] Compare *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A), at 426 A-E; *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA), para [22].
- [33] Compare *Beadica v Trustees, Oregon Trust* 2020 (5) SA 247 (CC), at paras [80] and [87].
- [34] *Maharaj*, at 423 F.
- [35] 2006 (6) SA 379 (C).
- [36] At paras [18] to [25].
- [37] This email refers to a trailing email which is curiously not attached.

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