

SOUTH AFRICA / JUDGMENT

Nedbank v Richardson (2184/2021) [2022] ZAECKMKHC 108 (12 December 2022)

[2022] ZAECKMKHC 108

COURT

Eastern Cape High Court, Makhanda

BEFORE

Rugunanan

CASE / FILE NUMBER

2184/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MAKHANDA

CASE

NO. 2184/2021

In

the matter between:

NEDBANK
LIMITED
Plaintiff
and
ALMARIE
RICHARDSON
Defendant

JUDGMENT

Rugunanan J

[1] This is an application for summary

judgment.

[2] On good cause shown, condonation for the plaintiff's late delivery thereof and the defendant's late delivery of heads of argument was granted.

- [3] Simultaneously with the claim sounding in money the plaintiff claims further relief under rule 46A of the uniform rules of court ('the rules') for an order authorising the sale in execution of the residential immovable property namely, Erf 7029, East London ('the property') as more fully described in the particulars of claim.
- [4] Where a plaintiff claims both forms of relief it is competent for the court to deal with the money judgment while deferring the claim for special executability.[1]
- [5] For that reason, I directed that the latter application be adjourned sine die pending the outcome of the summary judgment proceedings for the plaintiff's monetary claim.
- [6] Under the present amended formulation of rule 32, summary judgement proceedings are competent once a defendant has delivered a plea. The plaintiff's supporting affidavit now falls to be made in the context of the deponent's knowledge of the content of the delivered plea and supersedes the previous formulaic supporting affidavit that ensued after the defendant had delivered its notice of intention to defend.
- [7] A plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely as a delaying tactic. [2]
- [8] For a plaintiff, the amended rule has raised the bar and onus for securing summary judgment[3], but some of the well-known and established requirements that have to be established by a defendant to avoid summary judgment remain intact.
- [9] A defendant must still show that it has a defence which is bona fide and good in law[4]. A bona fide defence requires full disclosure of the nature and grounds of the defence and the material facts relied upon in support thereof.[5] To satisfy these requirements a defendant will have to engage meaningfully with the additional material now required to be contained in a plaintiff's affidavit in support of summary judgment.[6]
- [10] The plaintiff's claim is liquidated and certified in the amount of R1 477 101.80. It represents the balance of the principal debt together with finance charges as at 15 June 2021. The cause of action is founded on the defendant's breach of her monthly payment obligations in instalments of R23 738.89 under a written agreement concluded between the parties on 9 September 2008 subject to the provisions of the National Credit Act 34 of 2005 for loan of the amount of R1 900 000 – the repayment of which was secured by a mortgage bond passed by the defendant in favour of the plaintiff.
- [11] A full recapitulation of the material terms of the agreement pleaded in paragraphs 4 to 6 of the particulars of claim would be gratuitous. These are satisfactorily pleaded in compliance with rule 18 and with reference to the written loan agreement attached to the particulars of claim as Annexure POC2. The said paragraphs are to be read as if incorporated herein.

- [12] I shift focus to the defendant's plea and her affidavit in opposition to the summary judgment application. Beginning with the plea. At the onset it is an unsatisfactorily drafted document flowing through with a litany of bald averments that the plaintiff's allegations are 'denied as if specifically traversed'. In every instance of its occurrence, the bald contention evades dealing with the point of substance alleged in each of the specific paragraphs in the particulars of claim to which the averment is directed. Where there is no consequential and constructive engagement with the substance of the plaintiff's allegations, this presents as a clear breach of rule 18(5) of the rules.
- [13] The evasiveness of the plea is aptly demonstrated in the plaintiff's supporting affidavit from paragraphs 11 et seq which should be read as if incorporated herein; the said paragraphs meticulously pointing out the failing in each of the instances in which the bald contention is raised.
- [14] Notably, the defendant's affidavit in opposition does not meaningfully engage with, or engage at all, with the failings illustrated by the plaintiff.
- [15] I am satisfied that the plaintiff's supporting affidavit has properly engaged with the content of the plea in order to substantiate plaintiff's averments that the defence (for reasons to follow) is not bona fide. Except for admitting her breach by averring that '... it became impossible for me to discharge the mortgage bond repayments to the plaintiff in accordance with our existing agreement', the defendant's opposing affidavit merely proffers a rendition of her plea with argumentative legal matter purportedly given under legal advice. One may reasonably conclude that the defendant is not bona fide. In such an instance her defence of compromise (dealt with below) is not bona fide in the sense that it is good in law.
- [16] A compromise is the settlement by agreement of disputed obligations, whether contractual or otherwise.[7] If there is no dispute there can be no compromise.[8] Put otherwise, it is a form of novation where the obligations novated by the compromise must previously have been disputed.[9] It is thus the essence of a compromise that the parties thereto, by mutual assent, agree to the settlement of previously disputed obligations.[10]
- [17] Reverting once again to the plea, the defendant, in denial of her alleged breach (contrary to her assertion quoted from the opposing affidavit), avers the oral conclusion of an agreement of compromise. The compromise interceded consequent to an 'SMS' invitation by the plaintiff for the defendant to contact its call centre to resolve the issue of her outstanding debt in the circumstances set out in some length in paragraph 9 of her plea.
- [18] Reproduced as pleaded, are the following terms the defendant maintains are essential to the compromise:

‘(a) The terms of repayment of the defendant’s mortgage debt under the loan agreement would be as follows, namely, that she would pay instalments of R16 100.00 per month over a period of 120 months.

(b) The plaintiff’s agent would procure that the defendant’s portfolio would be transferred to her, whereupon she would implement the aforesaid terms of repayment in the plaintiff’s records.’

[19] Paragraph (a) constitutes a variation of the loan agreement by reduction of the initial contractually agreed monthly instalment of R23 738.89 to an instalment of R16 100.00. This demonstrates the problem which the defendant faces in the present case namely that, in order for there to be a valid compromise, there must in fact have been a dispute (pleaded as a material fact) between the parties in regard to their obligations under the loan agreement which they agreed to resolve by creating a fresh set of rights and obligations. The defendant’s bald denials, (in particular of the monthly repayment of R23 738.89)

to which I have alluded to earlier do not establish a dispute in the light of the express provisions concerning repayment which is readily apparent in the loan agreement annexed to the summons.

[20] Indisputably, the defendant was obliged from inception of the loan agreement to make a monthly repayment of R23 738.89. As at 15 June 2021 the balance of the principal debt together with finance charges was certified in the amount of R1 477 101.80, the quantum of which is not disputed or varied in either of the aforementioned specific terms as pleaded.

[21] Asserting that the compromise is legally unsustainable and impermissible, the plaintiff’s supporting affidavit relies on the loan agreement encapsulating a non-variation clause. The clause specifically precludes recognition of any amendment, alteration, variation or consensual cancellation ‘unless reduced to writing and signed by the parties’ (see Annexure POC2 clauses 28.1-28.2).

[22] In summary, the plaintiff asserts, correctly in my view, that the terms of the loan agreement must be honoured – in effect seeking reliance on the principle *pacta sunt servanda* enunciated in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren*[11]; the defendant on the other hand asserting the unenforceability of the non-variation clause regard being had to considerations of good faith, fairness and reasonableness with reference to the Constitutional Court approach in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[12].

[23] The principles and their evolution in the constitutional era have been accurately dealt with in the parties’ heads of argument and do not require repetition.

[24] It merely suffices to state that the approach adopted by the defendant is unsustainable.

[25] Material facts pertaining to disputed obligations are significantly lacking.

[26] Accordingly, a bona fide defence in law has not been established.

[27] The following order will issue:

1. The plaintiff is granted summary judgment for payment by the defendant of the amount of R1 477 101.80;
2. The defendant shall pay the plaintiff's costs as between attorney and client as taxed or agreed.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

APPEARANCES:

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Date heard: 13 September 2022

Date delivered: 12 December 2022

[1] Changing Tides 17 (Pty) Ltd NO v Frasenburg

[2020] ZAWCHC 59 para 30.

[2] Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd

[2020] ZAWCHC 28 paras 21-22.

[3] Standard Bank of SA Ltd v Rahme and Another

[2019] ZAGPJHC 287 para 8.

[4] Maharaj v Barclays National Bank Ltd 1976

(1) SA 418 (A) at 426.

[5] Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd

[2020] ZAGPPHC 808 para 48.

[6] Standard Bank of SA Ltd and Another v Five Strand Media (Pty) Ltd and Others

[2020] ZAECPEHC 33 para 12.

[7] R H Christie and G B Bradfield, Christie's The Law of Contract in South Africa, LexisNexis 6th ed at 473.

[8] Ibid at 473.

[9] Ibid at 473.

[10] Karson v Minister of Public Works 1996 (1) SA 887 (ECD) at 893H.

[11] 1964 (4) SA 760 (A).

[12]

[2020] ZACC 13.

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