REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

21/8/15

DATE:

CASE NO: 13757/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

21/08/2015
DATE

SIGNATURE

In the matter between:

ARUMUGAM MURUGAN 1ST APPLICANT

VALENCIA MURUGAN 2ND APPLICANT

And

ANGELA JOY WATSON RESPONDENT

JUDGMENT

. MAKUME, J

[1] This is an application for summary judgment. The applicants claim against the respondent is for payment of the sum of R207 450.00 plus interest and costs.

[2] On 26th day June 2013 at Kempton Park the respondent acknowledge herself in writing to be indebted to the applicants in an amount of R217 450.00 being the balance of a purchase price due to the applicants.

[3] This amount is the balance of the purchase price in respect of certain property described as Portion [.....] I Township, Registration Division IR Province of Gauteng.

[4] That balance is payable to the applicants by the respondent at the rate of R5 000.00 (five thousand rand) per month the first payment payable one month after registration of the property sold in the name of the respondent.

[5] As security for the debt it was agreed that a private bond he registered in favour of the applicants over the property sold.

[6] In terms of clause 5 of the acknowledgement of debt the respondent agreed that in the event of her failing to make payment of any amount due on due date then the full amount of the capital and interest outstanding shall become due and payable.

[7] In paragraph 9 of the particulars of claim the applicants allege that the respondent breached the agreement in that she made only one payment of R1 0 000.00 (Ten Thousand Rand) on 27 November 2013 and has not made any further payments despite demand accordingly the balance of R207 410.00 is due and payable.

[8] The applicants issued summons against the respondent during February 2015 claiming payment of the sum of R207 450.00 plus costs as well as interest at the rate of 15.5% per annum from 26 June 2013 to date of final payment. On receipt of the summons the respondent entered appearance to defend the applicants served and filed this application for summary judgment on 1 April 2015 set down the hearing on 19 May 2015. The respondent served and filed her affidavit resisting summary judgment on 15th May 2015.

[9] In her affidavit resisting summary judgment the respondent raises three points *in limine* and on the merits she does not deal with the case pleaded by the applicants instead the respondent refers to a separate agreement of sale that she and the applicants concluded on 24 March 2013 in respect of the same property.

[10] The respondent points out that in terms of that agreement she bought the property from the applicants for an amount of R l 350 000.00. She does not say how that amount was payable. She then proceeds to put up what she says would be her counterclaim as a result of various breaches and damages that she suffered arising out of that sale agreement. The respondent concludes by saying that the application for summary

judgment should be dismissed alternatively that it be stayed pending determination of her claim.

[11] The courts have in a number of cases stressed the fact that summary judgment proceedings are extraordinary and drastic in nature in that it closes the door to defendants hence it is imperative that this procedure should only be resorted to where the plaintiff s case is unimpeachable and that the defence is not *bonafide* and is bad in law.

[12] In terms of rule 32(3)(b) of the Uniform Rules of Court one of the ways in which a defendant could successfully oppose summary judgment is by satisfying the court on affidavit that he has a *bona fide* defence to the claim. Where the defence is based on facts in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts constituting a defence are alleged the court will not attempt to decide the issue or to determine whether or not there was a balance of probabilities in favour of the one party or the other. All that a court enquires into is the following:

(a) Whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded.

(b) Whether on the facts so disclosed the defendant appeared to have as to either the whole or part of the claim a defence which was *bonafide* and good in law.

[13] The respondent has failed to set out what her defence is and instead raises a possible counterclaim based on a breach of an earlier agreement. Her counterclaim if valid which is denied is unliquidated hence the requests in her alternative prayer that the Applicant's claim be stayed pending determination of her claim.

[14] A defendant may raise as a defence to the plaintiff s claim a counterclaim against plaintiff whether liquidated or unliquidated however such affidavit must comply with the requirements of rule 32(3)(b). In the matter of **Soil Fumigation Services v Chemfit Technical Products 2004 (6) SA 29** Bravo JA dealing with a similar matter said the following at page 39 paragraph [24] and [25]:

> *"[24] In the light of the aforegoing, I find myself in agreement with the alternative argument raised by the plaintiff in this Court, namely that the defendant failed to 'disclose fully the nature and the grounds of [its counterclaim] and the material facts relied upon therefor' as required by rule 32(3)(b). See the classic exposition Colman J on behalf of the Full Court in* ***Breitenbach v Fiat SA Edms (Bpk) 1976*** *2 SA* ***226 (T)*** *at 228B-H.*
>
> *[25] What remains to be considered is whether in these circumstances the Court a quo should have exercised its overriding discretion to refuse summary judgment in the defendant's favour. I think not. For the reasons I have stated (in paragraph [11] above a Court should be less*

inclined to exercise its discretion in favour of a defendant in a matter such as this where the answer to the plaintiff 's claim is raised in the form of a counterclaim as opposed to a defence to the plaintiff 's claim in the form of a plea. Moreover, and in any event, a Court can only exercise its discretion in the defendant 's favour on the bases of the material placed before it and not on the basis of mere conjecture or speculation. On the material before the Court there is in my view no reason to think that the defendant 's counterclaim has any merit. For these reasons I believe that the summary judgment was rightly granted for the whole amount of the plaintiff's claim. "

[15] The respondents counterclaim is bad in law and falls to be dismissed. Firstly the agreement of sale on which the counterclaim is based has a voetstoots clause which reads as follows:

"11.5 The property is sold as is or voetstoots and the seller do not afford any guarantees or warranties in respect of the building or improvements on the property including building materials."

[16] Secondly, Clause 8 of that agreement dealing with breach required the Respondent to have called upon the Applicants to remedy any breach including warranties within seven days. There is no evidence that since March 2013 the Respondent ever called upon the Applicants to remedy any breach or to comply with any warrant. This is brought out now two

years later. In the premises it is my view that the respondent's counterclaim for damages as a result of *inter alia* the alleged breach of warranties cannot succeed and accordingly does not constitute a *bona fide* defence for purposes of resisting this application.

The Respondents Points *in limine*

[17] The first point *in limine* raised by the respondent is that the applicant failed to sent to her the notice required in terms of section 129 (1) (a) of the National Credit Act prior to instituting the action. The applicants deny that the National Credit Act applies in this matter and in any case such a letter was subsequently dispatched to the respondent on 27 May 2015 and still Respondent omitted to take any action to which she is entitled to in terms of the Act. The respondent did not ask for debt review or attempt to resolve the dispute under the agreement nor did she attempt to develop a plan to bring the payments under the agreement up to date. Accordingly, this point *in limine* is technical and falls to be dismissed.

[18] The second point *in limine* raised is that the action is based on a mortgage agreement which in terms of section 9(4) of the National Credit Act is a large agreement and therefore requires that the applicants should have registered as credit provider in terms of the National Credit Act.

[19] Once again, this argument is flawed and bad in law because nowhere does the applicants base their cause of action on the mortgage bond. The claim is based on an acknowledgment of debt and that transaction does not fall within the ambit of the National Credit Act.

[20] In the matter of *Hatting v Hatting* 2014 (3) SA 162 two brothers Johannes and Fanti respectively plaintiff and defendant had for many years conducted business together. In the year 2009 they decided to terminate their commercial relationship. In the termination agreement the defendant Fanti agreed to pay his brother Johannes an amount of R6.6 million by means of annual instalments. The defendant fell in arrears whereupon his brother Johannes instituted action for payment of the balance. In resisting the application for summary judgment the defendant argued that the termination agreement amounted to an acknowledgment of debt and that the Plaintiff should have served a notice in terms of section 129 (1) (a) of the National Credit Act before issuing summons. The plaintiff argues that the agreement was not governed by the National Credit Act.

[21] Finding in favour of the plaintiff Van Zyl R said the following at page 174 paragraphs 25:

> "[25] *Na my mening blyk die aard en substansie van die kontrak gesluit tussen die partye te wees 'n ooreenkoms wat die verhouding tussen die partye reguleer voortspruitend uit die besluit van die partye om die besigheid en sake hoat hulle vir die afgelope paar dekades in samewerking met mekaar gedoen het, te beeindig op die basis soos uiteengesit in die kontrak. Hier is nie sprake van kredietverskaffer verbruiker verhouding soosbwaarmee die Nasionale Kredietwet duidelik mee handel nie.*"

[22] On a proper construction and analysis of the National Credit Act as to its purposes and application as set out in section 2 thereof I am satisfied that in the present matter the relationship that was created in terms of the acknowledgment of debt cannot be regarded to fall within the ambit and scope of the National Credit Act.

[23] The third and last point *in limine* need not detain me further. It concerns the omission to indicate the words "true and correct" in the affidavit of the Applicants. This was a typing error which has been rectified in a supplementary affidavit. There is no prejudice to the respondent and the point *in limine* is accordingly dismissed.

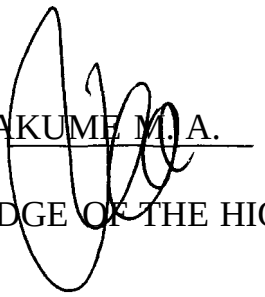
[24] In conclusion the respondent has failed to show any *bond fide* defence to the applicants claim and I accordingly grant summary judgment in favour of the applicants as follows:

1. Payment in the sum of R207 450.00;

2. Interest at the rate of 15.5% per annum from 26 June 2013 to date of payment.

3. Cost of the action.

Dated at Pretoria on 21st day of August 2015.



MAKUME M. A.

JUDGE OF THE HIGH COURT

Heard on:	07 August 2015
For the Applicants_ :	Adv A Granova
Instructed by:	Joubert Scholtz Inc 43 Charles Street Muckleneuk
For the Respondent :	Adv
Instructed by:	Steve Merchak Attorney c/o Helen Karsas Attorneys
Date of Judgment:	21 August 2015