

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case No.: 745/2020

Date Heard: 18 August 2020

Made available: 7 September 2020

In the matter between:

**STANDARD BANK OF SOUTH AFRICA LIMITED**

**First Plaintiff**

**SG GUARANTEE COMPANY (RF) (PTY) LTD**

**Second Plaintiff**

and

**FIVE STRAND MEDIA (PTY) LTD**

**First Defendant**

**MOEGAMMAT SHAAF ANDREWS**

**Second Defendant**

**RAFIEK POTGIETER**

**Third Defendant**

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**REASONS**

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**RONAASEN AJ:**

**Introduction**

[1] The particulars of claim in terms of which the plaintiffs instituted action against the defendants consist of 19 claims.

[2] The first plaintiff claimed in terms of claims 1 to 17 (claims 1 to 9 being against the first defendant, claims 10 to 13 being against the second defendant and claims 14 to 17 being against the third defendant) and the second plaintiff in respect of claims 18 and 19 (claim 18 being against the second defendant and claim 19 being against the third defendant).

[3] The action was defended by the defendants and subsequent to the delivery of their plea the plaintiffs applied for summary judgment against the defendants in respect of all claims save for claim 1. The application for summary judgment, in turn, was opposed by the defendants.

[4] On Tuesday, 18 August 2020, after hearing argument from the parties, whose contentions were supported by written heads of argument, I gave an order for summary judgment against the defendants in the following terms:

"PART A: IN FAVOUR OF FIRST PLAINTIFF AGAINST THE FIRST DEFENDANT:

1. **CLAIM 2: THE INSTALMENT SALE AGREEMENT ACCOUNT  
NO 6120906660002**

- 1.1. An order for the delivery of one 2011 HYUNDAI H-1 GLS 2.4 CVVT WAGON (engine number G4KGAA594857 and vehicle identification number KMHWH81RLBU314293);
- 1.2. An order that the First Plaintiff be granted leave to prove damages (if any) by way of subsequent action;

- 1.3. Costs of the suit as between attorney and client.

2. **CLAIM 3: THE INSTALMENT SALE AGREEMENT ACCOUNT NO 6120906660003**

- 2.1. An order for the delivery of one 2015 BMW M4 COUPE A/T (engine number 006629195 and vehicle identification number WBS3R92040K342374);
- 2.2. An order that the First Plaintiff be granted leave to prove damages (if any) by way of subsequent action;
- 2.3. Costs of the suit as between attorney and client;

3. **CLAIM 4 : THE INSTALMENT SALE AGREEMENT ACCOUNT NO 6120906660004**

- 3.1. An order for the delivery of 2015 BMW M4 COUPE M-DCT (engine number 0659092 and vehicle identification number WBS3R92040K341502);
- 3.2. An order that the First Plaintiff be granted leave to prove damages (if any) by way of subsequent action;
- 3.3. Costs of the suit as between attorney and client;

4. **CLAIM 5: THE INSTALMENT SALE AGREEMENT ACCOUNT NO 6120906660005**

- 4.1. An order for the delivery of 2015 BMW M4 COUPE M-DCT 2015 BMW M4 COUPE (engine number 07639266 and vehicle identification number WBS3R92070K342823);
- 4.2. An order that the First Plaintiff be granted leave to prove damages (if any) by way of subsequent action;

4.3. Costs of the suit as between attorney and client

5. **CLAIM 6: THE INSTALMENT SALE AGREEMENT ACCOUNT NO 6120906660006**

5.1. An order for the delivery of one 2016 MERCEDES BENZ B200D AMG A/T (engine number 65193033164370 and vehicle identification number WDD2462082J378249);

5.2. An order that the First Plaintiff be granted leave to prove damages (if any) by way of subsequent action;

5.3. Costs of the suit as between attorney and client

6. **CLAIM 7: THE INSTALMENT SALE AGREEMENT ACCOUNT NO 6120906660007**

6.1. An order for the delivery of one 2015 BMW 320 I SEDAN A/T (engine number A4981018 and vehicle identification number WBA3B16020NS61277);

6.2. An order that the First Plaintiff be granted leave to prove damages (if any) by way of subsequent action;

6.3. Costs of the suit as between attorney and client.

7. **CLAIM 8: THE BUSINESS REVOLVING CREDIT PLAN ACCOUNT WITH REFERENCE NO 302968075**

7.1. Payment of the sum R 212 199.75;

7.2. Payment of interest on the aforesaid sum at the variable rate of 16.35 per cent per annum (prime plus 6.6 per cent) calculated daily and compounded monthly in arrears from 25 January 2020 to date of

payment, both days inclusive;

7.3. Costs of the suit as between attorney and client.

8. **CLAIM 9: THE BUSINESS OVERDRAFT WITH ACCOUNT NO 032743106**

8.1. Payment of the sum of R 3 433 480.04, jointly and severally with the Second and Third Defendant, the one paying the other to be absolved;

8.2. Payment of interest on the aforesaid sum at a rate of interest 5.5% above prime per annum calculated daily and compounded monthly in arrears from 25 January 2020 to date of payment, both days inclusive;

8.3. Costs of the suit as between attorney and client.

**PART B: IN FAVOUR OF THE FIRST PLAINTIFF AGAINST THE SECOND DEFENDANT:**

9. **CLAIM 10: THE INSTALMENT SALE AGREEMENT ACCOUNT NO 61209678 0001**

9.1. An order for the delivery of one 2015 BMW 320 I SEDAN A/2012 LAND ROVER EVOQUE 2.2 SD4 DYNAMIC (engine number DZ78040228790224DT and vehicle identification number SALVA2AD7CH686651);

9.2. An order that the First Plaintiff be granted leave to prove damages (if any) by way of subsequent action;

9.3. Costs of the suit as between attorney and client.

10. **CLAIM 11: MASTER CARD ACCOUNT REFERENCE NO 5520578034036165**

- 10.1. Payment of the sum R 20 380.99 ;
- 10.2. Payment of interest on the aforesaid sum at the variable rate of 18.15 % per annum calculated daily and compounded monthly in arrears from 25 January 2020 to date of payment, both days inclusive;
- 10.3. Costs of the suit as between attorney and client.

11. **CLAIM 12: THE GUARANTEE EXECUTED BY THE SECOND DEFENDANT FOR THE INDEBTEDNESS OF THE FIRST DEFENDANT**

- 11.1. Payment of the sum of R 3 433 480.04, jointly and severally with the First and Third Defendant, the one paying the other to be absolved (in terms of prayer 9 above);
- 11.2. Payment of interest on the aforesaid sum at a rate of interest 5.5% above prime per annum calculated daily and compounded monthly in arrears from 25 January 2020 to date of payment, both days inclusive;
- 11.3. Costs of the suit as between attorney and client.

12. **CLAIM 13: THE CURRENT ACCOUNT NO 372962572**

- 12.1. Payment of the sum of R 7 290.16 ;
- 12.2. Payment of interest on the aforesaid sum at the variable rate of 20.25 % per annum calculated daily and compounded monthly in arrears from 25 January 2020 to date of payment, both days inclusive;
- 12.3. Costs of the suit as between attorney and client.

**PART C: IN FAVOUR OF THE FIRST PLAINTIFF AGAINST THE SECOND DEFENDANT:**

13. **CLAIM 14: THE INSTALMENT SALE AGREEMENT ACCOUNT NO 61209694 0001**

- 13.1. An order for the delivery of one 2011 LAND ROVER EVOQUE 2.0 SI4 DYNAMIC (engine number 230811211243204PT and vehicle identification number SALVA2AG1CH617156);
- 13.2. An order that the First Plaintiff be granted leave to prove damages (if any) by way of subsequent action;
- 13.3. Costs of the suit as between attorney and client.

14. **CLAIM 15: MASTER CARD ACCOUNT REFERENCE NO 5520578032020336**

- 14.1. Payment of the sum of R 20 380.99;
- 14.2. Payment of interest on the aforesaid sum at the variable rate of at the variable rate of 7.25 % per annum calculated daily and compounded monthly in arrears from 25 January 2020 to date of payment;
- 14.3. Costs of the suit as between attorney and client.

15. **CLAIM 16: THE GUARANTEE EXECUTED BY THE THIRD DEFENDANT FOR THE INDEBTEDNESS OF THE FIRST DEFENDANT**

- 15.1. Payment of the sum of R 3 433 480.04, jointly and severally with the First and Third Defendant, the one paying the other to be absolved (in terms of prayer 9 above);
- 15.2. Payment of interest on the aforesaid sum at a rate of interest 5.5 % above prime per annum calculated daily and compounded monthly in arrears from 25 January 2020 to date of payment, both days inclusive;
- 15.3. Costs of the suit as between attorney and client.

16. **CLAIM 17: THE CURRENT ACCOUNT NO 080365620**

- 16.1. Payment of the sum of R 1 802.29;
- 16.2. An order for payment of interest on the aforesaid sum at the variable rate of 20.25 % per annum calculated daily and compounded monthly in arrears from 25 January 2020 to date of payment, both days inclusive;
- 16.3. Costs of the suit as between attorney and client.

**PART D: IN FAVOUR OF THE SECOND PLAINTIFF AGAINST THE FIRST DEFENDANT:**

17. **CLAIM 18:THE LOAN AGREEMENT: 531383156**

- 17.1. Payment of the sum of R 2 341 201.17;
- 17.2. Payment of interest on the aforesaid sum at the rate of 11.22 % per annum from 31 JANUARY 2020 to date of payment, both dates inclusive;
- 17.3. Costs of the suit as between attorney and client.

**PART E: IN FAVOUR OF THE SECOND PLAINTIFF AGAINST THE SECOND DEFENDANT:**



18. **CLAIM 19: THE LOAN AGREEMENT: 531383156**

- 18.1. Payment of the sum of R 2 369 187.58;
- 18.2. Payment of interest on the aforesaid sum at the rate of 10.35 % per annum from 31 JANUARY 2020 to date of payment;
- 18.3. Costs of the suit as between attorney and client.”

[5] The reasons for my order follow, below.

**Legal principles**

[6] On 1 July 2019 material amendments to Uniform Rule 32 came into operation, to which I shall refer in more detail later. Some of the well-known and established requirements which have to be satisfied by a plaintiff to succeed in obtaining summary judgment or by a defendant to avoid summary judgment remain unaltered. Those requirements have been dealt with exhaustively by our courts. They have been accurately dealt with by the parties in their heads of argument and do not require further discussion.

[7] In *Raumix Aggregates (Pty) Ltd v Richter Sand CC* 2020 (1) SA 623 (GJ) at [16] the purpose of rule 32 was described in the following terms:

“The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application

for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution.”

[8] In terms of rule 32 in its amended form:

- 8.1. the plaintiff may only apply for summary judgment after the defendant has delivered a plea - sub-rule (1);
- 8.2. the plaintiff must, in the affidavit in support of the application for summary judgment, verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial - sub-rule (2)(b);
- 8.3. the defendant may, in order to avoid summary judgment, give security to the satisfaction of the court, and no longer to the satisfaction of the registrar, for any judgment including costs which may be given - sub-rule (3)(a);
- 8.4. alternatively, the defendant may satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or, with the leave of the court, by the oral evidence of such defendant, or of any other person who can swear positively to the facts that the defendant has a *bona fide* defence to the action, which affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon for such defence - sub-rule (3)(b).

[9] The new requirement in rule 32(2)(b) in terms of which a plaintiff in an application for summary judgment must identify any point of law relied upon, refers to a point of law in relation to the plaintiff's claim on which summary judgment is sought and does not relate to the defence as pleaded by the defendant. In *Absa Bank Ltd v Mpahlele and Others* [2020] ZAGPPHC 257 (26 March 2020) at [18] it was held that the identification requirement does not include the identification of evidence in support of the point of law concerned.

[10] The third requirement in rule 32(2)(b) is that the plaintiff in the application for summary judgment must identify the facts upon which its claim is based. This seems to require a repetition in the affidavit supporting the application for summary judgment of the facts upon which the claim is based as identified in the particulars of claim or, at least, a cross-reference to these facts. It is not, however, required of a plaintiff to amplify the cause of action as set out in the particulars of claim, given that the particulars of claim must comply with the rules and in particular with rules such as rule 18(3) and 18(6).

[11] With regard to the requirement in rule 32(2)(b) obliging the applicant for summary judgment to furnish a brief explanation as to why the defence as pleaded does not raise any issue for trial the following was appositely stated in *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 (30 April 2020):

“[21]... I consider that the amended rule 32(2)(b) makes sense only if the word ‘genuinely’ is read in before the word ‘raise’ so that the pertinent

phrase reads ‘explain briefly why the defence as pleaded does not genuinely raise any issue for trial’. In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham.

[22] What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a *bona fide* defence. This is because the plaintiff’s supporting affidavit now falls to be made in the context of the deponent’s knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a ‘formulaic’ supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments in the defence is not *bona fide* and has been raised merely for the purposes of delay.”

[12] Rule 32(3)(b) has been left substantively unchanged and a defendant’s affidavit filed in opposition to an application for summary judgment must still show that the defendant has a *bona fide* defence to the action and must disclose fully the nature and grounds of the defence and the material facts relied upon for such defence. Obviously, 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 supporting summary judgment.

[13] In *Tumileng* at [40] it was emphasised that the brief explanation required from a plaintiff in its affidavit supporting its application for summary judgment as to why the defence as pleaded does not raise any issue for trial, relates directly to the requirement in rule 32(3)(b) that a defendant must disclose a *bona fide* defence to

the action in the affidavit opposing summary judgment. The plaintiff now has the opportunity to amplify the previously formulaic averment that the defendant does not have a *bona fide* defence to the action.

[14] The essential requirement in summary judgment proceedings, thus, remains the same namely whether or not a defendant, be it in the plea or the affidavit opposing summary judgment has demonstrated the existence of a *bona fide* defence to the action by disclosing fully the nature and grounds of the defence and the material facts relied upon for the defence.

### **Application of principles**

#### **The plaintiffs' affidavit in support of summary judgment**

[15] The plaintiffs' affidavit in support of their application for summary judgment complies with the provisions of rule 32 in its current form. In the affidavit the plaintiffs have cogently dealt with the various claims and in respect of all the claims have identified why the "defence" as pleaded by the defendants does not raise any issue for trial. That much will be apparent from my analysis of the plea and the affidavit opposing summary judgment.

#### **The plea**

[16] In respect of each of the claims which are the subject matter of the application for summary judgment the defendants have admitted:

- 16.1. their breaches of the underlying contracts;

- 16.2. having been notified of the plaintiffs' election to cancel the instalment sale contracts;
- 16.3. alternatively, the election to enforce payment under the contracts; and
- 16.4. in respect of claims where this would be applicable, the right to claim the delivery of specified movable property by reason of the cancellation of the contracts concerned.

[17] The plea in respect of the sum of R400 000.00 paid as a "deposit" for the payment of arrear vehicle instalments is irrelevant given the defendants' admission of the breaches, arrears and entitlement to cancel in respect of the instalment sale agreements.

[18] The defendants' "defence" in respect of claims 2, 3, 4, 5, 6, 7, 10 and 14 namely that they had made settlement proposals to the first plaintiff respect of the indebtedness in each instance is not a defence at all given their admitted breaches of the underlying contracts. A settlement proposal to compromise an admitted indebtedness is not a defence to the claim underlying such indebtedness. It is rather an admission of such indebtedness. Furthermore, the defendants confirm that their proposals in respect of claims 3, 4, 5, 6, 10 and 14 were rejected.

[19] The defendants, in any event, have failed to set out what the proposed terms of the settlement would be, whether the proposals were made conditionally or unconditionally and have not alleged that the first plaintiff accepted any of the settlement proposals.

[20] The apparent “alternative” defence to claims 3, 4, 5, 6, 7, 10 and 14 that they had notified the first plaintiff that they would be in a position to remedy the breach of the underlying contracts by 1 August 2020 is, again, an admission of liability and cannot constitute a defence to the underlying claims.

[21] By parity of reasoning the only “defence” raised to claims 8, 9, 11, 12, 13, 15, 16, 18 and 19 that, sometime in the future, the defendants would be in a position to remedy their admitted breaches of the underlying contracts cannot constitute a defence on the merits of the respective claims.

[22] The third defendant’s reliance on the benefit of excussion to escape liability under claim 16 is spurious. First, he expressly renounced any reliance on such benefit and, second, in any event, at law the guarantee to which he bound himself is a principal obligation and not an accessory one and therefore does not carry with it the benefit of excussion in favour of the guarantor. *List v Jungers* 1979 (3) SA 106 (A) at 119D-G.

[23] Claim 17 received no mention in the plea and accordingly no defence is raised in respect of this claim.

**The defendants’ affidavit resisting summary judgment**

[24] The significant general feature of the defendants’ poorly drafted and almost incoherent affidavit resisting summary judgment is that it makes no particular

reference to the plea or any attempt to incorporate the terms of the plea, other than a throwaway paragraph referring to the alleged payment of the sum of R400 000.00. It makes no effort to come to grips with the admissions of liability in the plea and why, despite these admissions there are defences to the claims.

[25] The affidavit alludes to the vague possibility of a claim in reconvention which would be available to the first defendant due to the alleged untimely withdrawal of the defendants' banking facilities by the first plaintiff in December 2019. No particularity is furnished as to the possible claim in reconvention or the legal basis on which such claim would exist given that the majority of the breaches relied upon by the plaintiffs occurred prior to December 2019. The claim would be one for damages and is not quantified at all.

[26] No explanation is offered why this new "defence" did not feature in the plea or why it was not ventilated in a claim in reconvention, filed contemporaneously with the plea.

**Further new "defence" raised in argument**

[27] In argument before me the defendants attempted to raise a new defence which had hitherto not featured in the plea or affidavit resisting summary judgment, namely that credit had been advanced to them recklessly by the plaintiffs, as envisaged in the National Credit Act, 34 of 2005. Counsel for the defendants was thus constrained to concede that no basis existed for him to advance this as a ground for defence.



[28] Counsel for the defendants also, quite correctly, conceded that neither the plea nor the affidavit resisting summary judgment had disclosed a *bona fide* defence to the action.

### **Conclusion**

[29] In the light of my analysis of the plea and the affidavit resisting summary judgment I am satisfied that the defendants have not disclosed in those documents a *bona fide* defence to the action. They have not in those documents disclosed the nature and grounds of their alleged defence or any material facts from which a *bona fide* defence to the action can be discerned. No basis therefore exists for me to exercise my discretion to refuse summary judgment.

[30] For these reasons I granted summary judgment in favour of the plaintiffs in the terms set out in paragraph [4] above.

**O H RONAASEN**

**ACTING JUDGE OF THE HIGH COURT**

Appearances:

For Plaintiffs: Adv J Nepgen instructed by Pagdens Attorneys, Port Elizabeth

For Defendants: Adv J Thyse instructed by Meldrum Attorneys, Port Elizabeth