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**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No. 5129/2011

In the matter between:

**SUIDWES LANDBOU (EDMS) BPK**  
**h/a SUIDWESFIN**

Plaintiff

and

**LOOMAR BOERDERY (EDMS) BPK**  
**MARTHINUS ABRAHAM PRINSLOO**

1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant

**JUDGMENT:** CHESIWE, AJ

**HEARD ON:** 9 FEBRUARY 2012

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**DELIVERED ON:** 1 MARCH 2012

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[1] The plaintiff, first and second defendant entered into an agreement in which the first defendant will make purchases and make monthly payments on receipt of statements from the plaintiff. The second defendant bound himself as a co-principal debtor in *solidum* in terms of a written contract that was signed by the parties on 11Jun 2009.

The second defendant also signed as surety for the first defendant.

- [2] The plaintiff issued a combined summons against the first defendant and second defendant. The plaintiff claimed payment of R272 117, 83 and interests of 18,5% per annum calculated from 1 November 2011 to date of payment.

The plaintiff further claimed a payment of R10 030 861,19 and interest of 13,5% per annum calculated from 1 November 2011 to date of payment, and plaintiff further claimed that a court order be issued whereby the farm Theronshoop 411, district Hoopstad, Free State Province registered at the Deeds Office under T1561/2004 be made executable immediately.

- [3] The second defendant gave a notice of intention to defend the action and claimed in the Heads of Argument that the plaintiff's summons and particulars of claim do not comply with Rule 18(1) in that the particulars of claim are not originated by an advocate or an attorney who has right of appearance in the High Court.

[4] Mr De Wet, on behalf of the plaintiff, in his oral arguments submitted that the combined summons and particulars of claim comply with Rule 18(1) which provides that:-

A combine summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney, or in the case of an attorney who under section 4(2) of the Right of Appearance in Court Act, 1995, has the right of appearance in the High Court.

[5] Mr De Wet argued that there was compliance with the rules as the case of **FORTUNE v FORTUNE** 1996 (2) SA 550 (1) is an old case. He argued that the plaintiff's attorney is a known practising attorney in the Free State and do have the right of appearance in the High Court. He submitted that the rule was amended and has been effective from July 1996.

[6] Mr De Wet submitted that the first and second defendants do not have a *bona fide* defence and only gave notice of intention to defend for purpose of delaying the process. He submitted that the combined summons and particulars of claim are

compliant with Rule 18(1) of the Uniform Rules of Court.

[7] Mr De Wet argued that summary judgement proceeding terrified those who had no defence and said the time has come to discard labels such as extraordinary and drastic and rather concentrate on the proper application of the rule. In this regard, he referred to the case of **JOOB JOOB INVESTMENTS (PTY) LTD v STOCKS MAVUNDLA ZEK JOINT VENTURE** 2009 (5) SA 1 (SCA).

[8] Mr De Wet submitted that the defendants do not have a defence and that the court would consider the SCA decision in **JOOB JOOB** *supra* and gives an order in terms of the prayers in the particulars of claim.

[9] Mr Reinders, on behalf of the first and second defendants, argued in the Heads of Argument and oral submission that the plaintiff did not comply with the agreement between the parties. He submitted that the plaintiff had agreed that, he will send monthly statement to the defendant and that the defendant will within six months note any objection, if any, to the statements.

The plaintiff will then issue a certificate signed by an accountant in the employment of the plaintiff.

[10] Mr Reinders submitted that, said the defendant has a *bona fide* defence and will not enter into the merits of the case as this can be argued at trial. He submitted that the court has the discretion not to shut the door on the defendant.

[11] With regard to paragraph 9 of the particulars of claim, which deals with section 26 of the Constitution.

Mr Reinders submitted that he has not received any instruction if the farm Theronshoop is the primary residence of the second defendant.

Mr De Wet also confirmed that the plaintiff highlighted the issue of adequate housing in terms of the Constitution. He indicated that the plaintiff is unaware whether Theronshoop is the primary residence of second defendant, nor did he receive any instruction in this regard.

- [12] The summary judgement procedure is to enable a plaintiff whose claim falls within a certain judgment without going on trial unnecessary.

By means of this procedure as defence lacking in substance can be dispersed of without putting the plaintiff to the expense of a trial. The courts have previously in different decisions emphasised the fact that the remedy provided by this rule is an extra-ordinary one which is very stringent in that it closes the door to the defendant, and which will thus be accorded only to the plaintiff who has, in effect, an answerable case.

- [13] In **JOOB JOOB INVESTMENTS** *supra* the court was of the view that the time has come to discard labels such as extraordinary and drastic and rather concentrate on the proper application of the rules.

However, the amounts involved in this matter a quiet substantial, and the plaintiff also prays that the farm that the second defendant bonded as security be made executable immediately although during oral argument both counsel could

not confirm if the farm Theronshoop, district Hoopstad is the primary residence of the second defendant.

- [14] One of the ways in which a defendant may successfully oppose a claim for summary judgement is by satisfying the court by a affidavit that he has a *bona fide* defence to the claim.

Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his combined summons are disputed or new facts are alleged constituting a defence.

The court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the court enquires into is:

- whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded.
- Whether on the facts so disclosed the defendant appears to have a defence which is *bona fide* and good in law.

- [15] While the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them-, he must at least disclose his defence and the material facts, upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence. At the same time the defendant is not expected to formulate his opposition to the claim with the prescription that would be required of a plea.

The defendant in his affidavit claimed that the plaintiff did not comply with their agreement that monthly statements will be issued upon which the defendant will have six months to note an objection. The defendant also claimed that on receipt of all the statements he made payments.

- [16] In my view, the defendant has a *bona fide* defence and the court should not shut the door on the defendant on his intention to have his claim tested according to the dictates of law.



[17] Under these circumstances, the court will therefore order that:

- The defendants are granted leave to defend the plaintiff's action.
- The costs of the application for summary judgment are costs in the cause of the action.

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**S. CHESIWE, AJ**

On behalf of the applicant:

Adv. P J T de Wet  
Instructed by:  
Symington & De Kok  
BLOEMFONTEIN

On behalf of the respondents: Adv. S J Reinders

Instructed by:  
EAL Muller Prokureurs  
BLOEMFONTEIN