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THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41403/2019

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**
REVISED: N
28 July 2022

In the matter between:

ABSA HOME LOANS GUARANTEE COMPANY (RF)
PROPRIETARY LIMITED (Reg No. 2003/029628/07) First Applicant / Plaintiff

ABSA BANK LIMITED (Reg No. 1986/004794/06) Second Applicant / Plaintiff

And

ERF 1404 DAINFERN CC (Reg No. 1998/57004/23) First Respondent / Defendant

JUST PRICE CC (Reg No. 2005/026528/23) Second Respondent / Defendant

JACQUES RENE FOBIAN Third Respondent / Defendant

Coram: Nichols AJ

Delivered: 28 July 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to the

CaseLines system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 28 July 2022.

JUDGMENT

NICHOLS AJ,

Introduction

[1] This is an opposed application for summary judgment in which the plaintiffs, Absa Home Loans Guarantee Company (RF) (Pty) Ltd and Absa Bank Limited (the plaintiffs), seek summary judgment against the defendants for payment of the full outstanding amount due under a written mortgage loan agreement (the loan agreement), together with interest and costs and an order declaring certain immovable property specially executable.

[2] The first defendant, ERF 1404 Dainfern CC (Dainfern CC), is the principal debtor, which concluded the loan agreement with the second plaintiff (the bank) on 30 June 2017. The second and third defendants, Just Price CC and Jacques Rene Fobian (Fobian), are cited in their capacities as sureties and co-principal debtors for a limited amount pursuant to written deed of suretyships executed on 30 June 2017.

[3] As further security for the loan agreement, Dainfern CC concluded a written indemnity agreement in which it indemnified the first plaintiff against any claim by the bank under a Guarantee given by the first plaintiff to the bank in respect of all amounts then and subsequently due by Dainfern CC to the bank in terms of the loan agreement.

[4] The money advanced pursuant to the loan agreement was used to purchase an immovable property situated in Dainfern Residential Estate. A mortgage bond and indemnity bond were registered over the immovable property in favour of the first plaintiff.

[5] The plaintiffs seek payment of the sum of R7 599 016.25, from Dainfern CC and the limited sum of R7.1 million from the second defendant and Fobian respectively.

[6] The second defendant has not opposed the application for the summary judgment. Dainfern CC and Fobian (the defendants) set out their defences in the plea and amended plea delivered on 20 February 2020 and 22 February 2021 respectively. These defences are encapsulated in the defendants' affidavit opposing summary judgment that was delivered on 18 May 2020.

[7] The plaintiffs' in turn delivered a supplementary affidavit in support of the summary judgment application on 4 March 2021, to ensure that the summary judgment proceedings were in harmony with the pleadings and to address the defences raised in the amended plea which was delivered subsequent to the launch of the summary judgment application.

Issues for determination

[8] The issues for determination are:

(a) Whether the plaintiffs are entitled to submit a supplementary affidavit consequent upon the amendment of the defendants' plea and whether an adverse finding in this regard is fatal to the summary judgment application.

(b) The constitutionality of the National Credit Act¹ (NCA) for its failure to differentiate between trading and non-trading juristic persons with a single member / shareholder such as Dainfern CC; and its constitutionality insofar as the NCA distinguishes between natural persons and non-trading property holding CCs, with a sole member, when granting protection against reckless credit.

(c) The further ancillary issues that arise upon a finding that the NCA is applicable. These are whether the bank granted credit to the defendants

¹ The National Credit Act 34 of 2005.

recklessly by valuing the immovable property for more than its actual value; and whether Fobian was misled and induced to conclude the loan agreement on behalf of Dainfern CC by this incorrect inflated valuation.

(d) Whether the immovable property may be declared specially executable.

Admission of the plaintiffs' supplementary affidavit

[9] The application for summary judgment is pursuant to rule 32, which entitles a plaintiff to seek summary judgment once the defendants have delivered a plea. The affidavit filed by the plaintiffs in support of the summary judgment must, *inter alia*, explain briefly, why the defence as pleaded does not raise any issue for trial.²

[10] By the time the matter was argued, the defendants delivered an amended plea and counterclaim to align with the defences raised for the first time in their affidavit opposing summary judgment. The plaintiffs delivered a supplementary affidavit in support of the summary judgment to harmonise the pleadings with the summary judgment application and to address the additional defences raised in the amended plea in accordance with rule 32(2)(b).

[11] Mr De Beer, who appeared on behalf of the defendants, argued that the plaintiffs are precluded from delivering a supplementary founding affidavit to adduce further evidence to address the additional defences raised by the defendants' amended plea. This, he contended, was an unfortunate consequence of the lacuna in rule 32, which did not provide for the situation where a defendant would amend its plea subsequent to the institution of the summary judgment proceedings.

[12] As authority for this proposition, Mr De Beer relied on the decision of *Belrex 95 CC v Barday*³, in which the court found that a plaintiff was obliged to institute a fresh summary judgment application to address the amended plea. He submitted

² Uniform Rule 32(2)(b).

³ *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC).

that the plaintiffs should not, however be afforded an opportunity to institute a fresh summary judgment application and the matter should instead be referred to trial.

[13] Mr Scholtz, who appeared on behalf of the plaintiffs, pointed out that the defendants' erstwhile counsel did not oppose the delivery of the plaintiffs supplementary founding affidavit or the condonation sought for the late filing of this affidavit. This was recorded in the defendants' practice note delivered on 15 April 2021.

[14] Mr Scholtz's complaint is supported by the fact the defendants' opposition to the plaintiffs' supplementary affidavit was not raised in the procedurally correct manner. It is not raised under rule 30 but was argued as part of the opposition to the summary judgment application. In view of my finding on this issue, I do not intend to make a finding on the procedural manner in which the defendants raised this issue but shall comment on it later in this judgment.

[15] Fisher J had occasion to consider this issue recently in the matter of *City Square Trading 522 (Pty) Limited v Gunzenhauser Attorneys (Pty) Ltd and Another*⁴. The court confirmed that rule 32 did not make provision for the situation that arose when a defendant amended its plea after summary judgment proceedings had been instituted. However, the court found that this was not necessary as rule 28(8), which is a rule of general application, makes adequate provision for a plaintiff to adjust the founding affidavit in the application for summary judgment, without leave, provided the adjustment is consequential upon the amendment of the plea.⁵

[16] Fisher J held that:

'rule 32(4) should not be read to deprive the plaintiff of its rights under rule 28(8) but rather as a prohibition against introducing factual matter which is of

⁴ *City Square Trading 522 (Pty) Limited v Gunzenhauser Attorneys (Pty) Ltd and Another* [2022] ZAGPJHC 71 (18 February 2022).

⁵ *City Square Trading* *ibid* at paras 16 to 18.

*the nature of a reply or rejoinder to the defendant's case and which is not consequential on the amendment of the plea.*⁶

[17] In the circumstances, it is common cause that the plaintiffs' supplementary affidavit in support of summary judgment seeks only to address the additional defence raised by the amended plea and counterclaim. It is consequential on the amended plea and counterclaim and explains why the additional defence and cause of action pleaded does not raise any triable issues. It cannot be construed as a reply or rejoinder to the defendants' opposition.

[18] I accordingly align myself with the dictum of Fisher J in *City Square Trading* and find that the plaintiffs are entitled to rely on the supplementary affidavit that was delivered in support of summary judgment.

The constitutionality of the NCA

[19] The crux of the defendants entire defence is that the amount of the loan agreement granted to Dainfern CC was far in excess of the actual value of the immovable property. Fobian contends that this amounted to reckless credit by the bank and coupled with the factual circumstances of this matter the NCA should apply and the defendants should be afforded its protections.

[20] It is common cause that the purpose of the loan agreement was to purchase the immovable property. The principal business of Dainfern CC is listed as owning immovable property. Fobian contends that Dainfern CC is non-trading and it was only used as a vehicle to purchase and hold the immovable property. It was always intended that the immovable property would be leased out and income derived from such rental should have been sufficient to cover all expenses associated with the immovable property including the instalment payments due to the plaintiffs. Fobian further contends that the plaintiffs were aware that Dainfern CC is non-trading and is simply a vehicle for holding the immovable property.

⁶ *City Square Trading* fn 4 above at para 29.

[21] Mr Chetty has taken occupation of the immovable property since April 2019 following on from an auction where Mr Chetty offered to purchase the immovable property for R5million in November 2018. Fobian contends that this auction was conducted after it had been widely and properly marketed and advertised for a reasonable period. Notwithstanding, the maximum amount offered at the auction for the immovable property was the R5 million by Mr Chetty, which was conditionally accepted by Fobian on behalf of Dainfern CC.

[22] Fobian would like to finalise the conditional sale concluded with Mr Chetty and submits that the plaintiffs are only entitled to payment of R5 million as the total amount outstanding under the loan agreement because this amount is reflective of the fair market value of the property at the time of the auction.

[23] Accordingly, the plaintiffs should be estopped from denying him the protection and relief afforded by the NCA. He argues that the factual position of Dainfern CC with him as its sole member is no different to that of a natural person granted a loan to purchase an immovable property and his exclusion from the protections afforded by the NCA is irrational. To deny him the protections afforded by the NCA, simply because he elected to use a non-trading CC to hold immovable property purchased is unfair, irrational and unconstitutional in the factual circumstances of this matter.

[24] He contends that the failure of the NCA to distinguish a non-trading CC with one member is unconstitutional and irrational and it is unconstitutional to exclude these juristic persons from the ambit of the NCA. Further, the factual circumstances of this matter render the distinction between a natural person and the sole member of a CC, used solely as a vehicle for holding immovable property, irrational.

[25] He further contends that even if the NCA is not found to be applicable, the misrepresentations by the bank's representatives regarding the inflated value of the immovable property is sufficient ground for the loan agreement to be cancelled and restoration tendered.

[26] The provisions of the NCA, which address reckless credit, do not apply to juristic persons, regardless of turnover or asset value.⁷ The provisions of the NCA do not apply to:

(a) Large credit agreements concluded with juristic persons whose asset value or annual turnover is below R1 million at the time the agreement is concluded.⁸

(b) Large credit agreements include mortgage agreements,⁹ which are defined in the NCA as credit agreements that are secured by the registration of a mortgage bond by the registrar of deeds over immovable property.

[27] The defendants concede that the NCA does not apply to Dainfern CC as a juristic person, which concluded a mortgage agreement. However, in order to situate and advance the defence regarding reckless credit, Fobian seeks to declare the NCA unconstitutional in so far as it fails to declare that a juristic entity with a single member must be regarded as a natural person.

[28] As a starting point, it is apposite to repeat the caution of the Constitutional Court in *Fraser v ABSA Bank Limited*¹⁰ that an issue does not become a constitutional matter merely because an applicant calls it one. This is particularly so when the issue has already been addressed by our courts and is uncontroversial.

[29] The constitutionality of the NCA in so far that it states that the NCA is not applicable to juristic persons (ss4(1)(a) and 4(1)(b)), has already been determined by our courts in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No1)*.¹¹ Similarly, to this matter, the defendants in *Hunkydory Investments (No1)* contended that the company was simply a non-trading property holding company that held the immovable property in question as an estate planning measure. The sole shareholder of the company argued that it was unfair that he and

⁷ Section 6 of the NCA.

⁸ Section 4(1)(b) of the NCA.

⁹ Section 9(4) of the NCA.

¹⁰ *Fraser v ABSA Bank Limited* 2007 (3) SA 484 CC para 40.

¹¹ *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C).

the company were not afforded the same protection under the NCA as a natural person, simply because the credit agreement was concluded with a juristic person.

[30] In dismissing the argument that the defendants' right to equality was violated by the NCA, the court held that:

*'There can be no doubt that there is a rational connection between the differentiation created by the relevant provisions of section 4 of the National Credit Act and the legitimate governmental purpose behind its enactment. I have not been persuaded, on a balance of probabilities, by the Defendants, who bear the onus in this regard, that any differentiation on discrimination, even if it exists, is unfair. I have not been persuaded that the First Defendant's exclusion from the protection of the relevant sections of the Act, have any negative effect on it.'*¹²

[31] In support of the argument that the defendants are entitled to the protections afforded by the NCA, Mr De Beer contended that the facts of this matter were distinguishable from *Hunkydory Investments (No1)*. He contended that insufficient emphasis was placed on the fact that the number of 'controlling minds' is a factor that should be considered under the NCA. This was especially so when viewed in the context of the definition of Trusts as only constituting a juristic person if it had three or more trustees.

[32] He further argued that the distinction between a Trust with two or less trustees, which enjoys the protection of the NCA, and a non-trading CC which does not enjoy the protection of the NCA, is irrational and unfair. He further contended that the unique circumstances of this matter, relating to the alleged overvaluation of the property would subvert the purpose of the NCA if the defendants were excluded from its protection.

[33] He argued that the defendants' right to equal protection before the law would be infringed if the distinction between them and a Trust with less than three trustees was maintained in the particular circumstances of this case. It was clear, so he

¹² *Hunkydory Investments (No1)* fn 11 above para 25.

argued that such discrimination had a negative impact on the defendants because they lost the difference between the actual value of the immovable property and value imputed to the immovable property by the bank.

[34] It is settled authority that a party may not rely on a constitutional complaint that is not pleaded.¹³ Constitutional challenges to and attacks on statutes must be explicit, with due notice to all affected.¹⁴ This is achieved through rule 16A. The purpose of rule 16A is to draw the attention of persons who may have a legitimate interest in the matter or who may be affected by the matter, of the particularity of the constitutional challenge so they may take steps to protect their interests.¹⁵

[35] The defendants did not raise their constitutional challenge in accordance with the relevant provisions of the rules, nor did they seek to identify any constitutional rights, save for the alleged infringement of the right to equality, which have been infringed and/or violated.

[36] Notwithstanding the procedural irregularities with the manner in which this constitutional challenge was raised, I am unpersuaded by the arguments advanced to distinguish the facts of this matter from those of *Hunkydory Investments (No1)*. In addition to the fact that Mr De Beer's contentions were largely raised for the first time in the defendants' heads of argument and do not appear in the affidavit opposing summary judgment or the amended plea and counterclaim, they ignore the glaring similarity of the factual matrix.

[37] In *Hunkydory Investments (No1)*, the company had one shareholder who argued that the company was non-trading and intended to only hold the immovable property. Therefore, there was only one controlling mind. The right to equality was argued and found lacking and the defendants likewise failed to comply with the relevant provisions for raising a constitutional challenge.

[38] When, likewise called upon to determine the constitutionality of the exclusions of juristic persons from the protection afforded by the NCA in *Standard Bank of*

¹³ *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 39.

¹⁴ *Phillips* ibid at para 43.

¹⁵ *Phillips* fn 13 above at para 40.

South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No2),¹⁶ Rogers J held that the finding of the court in *Hunkydory Investments (No1)* was definitive of this constitutional challenge and was unaffected by the factual distinctions that were raised.

[39] It is trite that the constitutional validity of legislation is an objective matter unaffected by a particular litigant's circumstances.¹⁷ Given that, this particular challenge to the NCA has already been determined and further that the defendants' entire argument is premised on the particular factual circumstances of this matter, I have no hesitation in finding that the constitutional challenge to the NCA, as presented is bad in law.

[40] Accordingly, the NCA does not apply to the loan agreement and is not applicable to the second defendant and Fobian's suretyship agreements either, since these are pursuant to a credit agreement to which the NCA does not apply.¹⁸

Reckless credit

[41] Although my finding that the NCA is not applicable is dispositive of the ancillary issues regarding reckless credit, I agree with Mr Scholtz that the provisions of the loan agreement and in particular clause 11.1 preclude a defence on this basis. It provides that any valuation of the immovable property by the bank is for it to determine the value of the security of the loan agreement and is not intended to represent a present or future value of the property.

[42] This issue was settled in *Absa Bank Limited v Kganakga*¹⁹ where the court held that the NCA is intended to regulate credit agreements but not other interactions such as offers to purchase or sale agreements because it is not concerned with other commercial engagements between persons or entities. Satchwell J found that:

¹⁶ *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No2)* (15427/08) [2009] ZAWCHC 81; 2010 (1) SA 634 (WCC); [2009] 4 ALL SA 488 (WCC) (1 June 2009).

¹⁷ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Other* 2004 (1) SA 406 (CC) para 85.

¹⁸ Section 4(2)(c) and S 8(5) of the NCA.

¹⁹ *Absa Bank Limited v Kganakga* [2016] ZAGPJHC 59 (18 March 2016).

‘The difference between the value of that which [the defendant] bought at the time that she bought it and the value which it had to and for her versus the value of that same merx to other persons is not a risk for purposes of the granting of credit. If she had bought shares in Anglo American in 2007 with monies loaned from the bank could she now complain that the bank did not ascertain that those shares would decline in value out of all recognition? The answer is, of course, no...

If the credit provider was to examine and assess every hope of profit in every acquisition of property (immovable or otherwise), funding of studies (fine arts versus medicine) and so on, the credit providers would be intruding into areas which the Legislature can never have envisaged.²⁰

[43] Fobian similarly complains that the immovable property has depreciated in value and contends that such decline in value should be borne by the plaintiffs. Therefore, even if the NCA were applicable, a defence based on reckless credit would not succeed. It is misplaced and unsustainable.

Rule 46A

[44] I turn now to consider the defendants’ submission that the immovable property may not be declared specially executable because it is currently occupied by Mr Chetty and his family. The defendants concede that none of the defendants occupy the immovable property but contend that Mr Chetty and his family should not be unfairly displaced.

[45] Our courts are required to interpret rule 46A purposively against the backdrop of the right to access to housing.²¹ However, it has also been acknowledged by our courts that s26(1) of the Constitution is not engaged or compromised in every case where execution is levied against immovable property.²² The SCA has reiterated that

²⁰ *Kganakga* ibid at paras 71 and 75.

²¹ *Petrus Johannes Bestbier and Others v Nedbank Limited* (150/2021) [2022] ZASCA 88 (13 June 2022) para 8.

²² *Mkhize v Umvoti Municipality and Others* [2011] ZASCA 184; 2012 (1) SA (SCA); [2011] 4 ALL SA 460 (SCA) para 10.

rule 46A is intended to protect indigent debtors who are in danger of losing their homes and to give effect to s26 of the Constitution.²³

[46] The defendants have expressly conceded that the immovable property is not occupied by any of the defendants. The current occupier has ostensibly paid a conditional purchase price of R5million to the defendants for the immovable property, which may be described as situate in an affluent residential estate.

[47] The rights of occupiers of property are regulated and protected by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (the PIE Act).²⁴ The defendants have not traversed the considerations that the Constitutional Court regarded as significant to an assessment whether execution against immovable property would constitute an unjustified violation of an occupier's right to access to housing.²⁵

[48] In the circumstances, I am of the view that Mr Chetty, as the occupier of the immovable property, has sufficient legislative protection under the PIE Act and the circumstances of this application do not engage the provisions of rule 46A.

Authority of plaintiff

[49] In so far as it may be necessary to address the argument raised by the defendants that the application is a nullity because the authority of the deponent to the affidavits has expired, such argument is rejected. The defendants expressly admit the deponent's authority in the affidavit opposing summary judgment. Leave has not been sought to withdraw this admission and this argument was raised for the first time at the hearing of this application.

Non-compliance with the rules

²³ *Petrus Johannes Bestbier* fn 21 above at para 17.

²⁴ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

²⁵ *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC) paras 56 to 60.

[50] The purpose of procedural rules of court has always been, and remains the efficient administration of justice.²⁶ It is trite that the court does not exist for the rules but the rules for court. However, inasmuch as a court is afforded a discretion to condone non-compliance with the procedural rules of court, such condonation is not merely for the asking and must at a minimum be sought by the litigant who has failed to comply with the rule/s in question.

[51] The nature and extent of the defendants' egregious disregard for compliance with the procedural rules of court has compelled me to note the nature of these transgressions and my opprobrium of such conduct. These relate to the procedure, or lack thereof, used to challenge the plaintiffs' supplementary affidavit; the assertion of a constitutional challenge; the withdrawal (or failure to) of admissions that have been set out in pleadings and practice notes; and the submission of arguments in heads of argument and during oral argument when these are not foreshadowed in the pleadings.

[52] Save for my ultimate findings in this matter, the combined effect of these multiple transgressions would have been prejudicial to the plaintiffs and would have interfered with the expeditious and inexpensive finalization of this matter. That is a purpose rule 32 is intended to achieve in circumstances where defendants do not have a bona fide defence and have not disclosed any triable issues.

Costs and order

[53] For the reasons provided, I am satisfied that the defences raised by the defendants are without merit and disclose no bone fide defence or triable issues. The plaintiffs are entitled to judgment as claimed and punitive costs on the scale provided for in the loan agreement.

[54] In the result, I make the following order:

²⁶ *Motloung and Another v The Sheriff, Pretoria East and Others* [2020] ZASCA 25 (26 MARCH 2020) Para 27.

(a) Summary judgment is granted against the first, second and third defendants, jointly and severally, the one paying the others to be absolved for:

(i) Payment of the sum of R7,599,016.25 (seven million, five hundred and ninety-nine thousand and sixteen rand, and twenty five cents), together with interest at the rate of 10.40% per annum from 22 January 2019 to date of final payment, both dates inclusive;

(ii) the liability of the second and third defendants shall be respectively limited to the amount of R7.1 million (seven million, one hundred thousand rand) in respect of the capital sum referred to in paragraph 54(a)(i) above;

(b) The immovable property, namely:

Erf [...] Dainfern, Extension [...] Township; Registration Division J.R. Province of Gauteng, Measuring 913 square metres, Held by Deed of Transfer Number T [...], Subject to the Conditions therein contained and more especially subject to the conditions in favour of the Dainfern Residential Estate Homeowners Association NPC
is declared specially executable for the said sums.

(c) The first, second and third defendants are ordered to pay the plaintiffs' costs of suit on the scale as between attorney and client, jointly and severally, the one paying the others to be absolved.

T NICHOLS

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

Date Heard:	13 August 2021
Counsel for plaintiffs /applicants:	Adv R Scholtz
Attorney for plaintiffs /applicants:	Lowndes Dlamini Attorneys Sandton

Ref: A Wright/MAT25660

Email: alex@lowndes.co.za

Counsel for defendants / respondents:

Adv J De Beer

Attorney for defendants / respondents:

Dawie De Beer Attorneys

Pretoria

Ref: Mr De Beer/CM/DM040

Email: dawie@ddebbeer.co.za