

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

CASE NO: **2019/25638**

REPORTABLE: NO / ~~YES~~
OF INTEREST TO OTHER JUDGES: NO / ~~YES~~
REVISED.
7/2/2022

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Applicant**
(Registration Number: 1962/000738/06)

and

PAUL PHALANE **First Respondent**
(Identity Number: [...])

RHULANI PHALANE **Second Respondent**
(Identity Number: [...])

JUDGMENT

ABRAHAMS AJ

Introduction

[1] This is an opposed application for summary judgment as well as an application in terms of Rule 46A of the Uniform Rules of Court to declare the immovable property of the defendants to be specially executable.

[2] The summary judgment proceedings have been described as drastic and robust proceedings. In *Joob Joob Investments v Stocks Mavundla Zek JV* **[2009] All SA 407(SCA)** it was held that summary judgment proceedings are no longer extraordinary and the Rule must be applied properly. The summary judgment procedure exists for the applicant to obtain a speedy judgment against the defendant in cases where the defendant has no valid defence to the claim. By short-circuiting an otherwise potentially protracted trial, the applicant avoids incurring unnecessary costs associated therewith.

[3] Summary judgment cannot be granted where it is clear that some ventilation of evidence is required in order for the Court to come to a decision. Adopting this approach, the successful defendant who demonstrates a triable defence is not excised from further anticipated litigation. Thus the defendant retains (all) his Constitutional Rights to access justice, as enshrined in section 34 of the Constitution.

[4] The Plaintiff is The Standard Bank of South Africa Limited.

[5] The First Defendant is Paul Phelane and the Second Defendant is Rhulane Phelane.

Background and common cause facts

[6] On 11th September 2007 the Plaintiff duly represented concluded a Loan Agreement with the Defendants. In terms of the Loan Agreement the Plaintiff agreed to advance the sum of R490,000 to the Defendants as a Home Loan.

[7] Pursuant to the Loan Agreement, the Defendants caused a continuing covering mortgage bond to be registered over immovable property in favour of the Plaintiff.

[8] The immovable property is the primary residence of the Defendants.

[9] The Defendants agreed to repay the Plaintiff in monthly installments for a period of 360 months.

[10] The Defendants have defaulted on their monthly payments and entered into a repayment arrangement with the Plaintiff.

[11] On 22 July 2019 the Plaintiff caused the combined summons to be issued. The Defendants Plea was served on 30 January 2020.

[12] The Application for Summary Judgment was served on 21 February 2020.

Points *in Limine* raised by the Defendants

First Point *in Limine*

[13] The Application for Summary Judgment was served out of time.

[14] **Rule 32 (2) (a)** of the Uniform Rules states

“Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.”

[15] The use of the word “*shall*” make compliance with subrule (2)(a) prescriptive and peremptory.

[16] The Defendants Plea was served on 30 January 2020.

The Application was served on 21 February 2020 and should have been served on 20 February 2020.

[17] The Application was one day out of time. The Plaintiff contends in his Heads of Argument that he will bring an application of Condonation in terms of Rule 27 of the Uniform Rules. This Application was never brought.

Second Point *in Limine*

[18] The Defendant argues that the relief sought in the Application for Summary Judgment which is a claim for R62 603, 04 is inconsistent with that claimed in the Plaintiff's particulars of Claim which is a claim for R628 203,04. The Plaintiff contends that the difference is due to a typographical error and purely of a technical nature.

[19] In *Standard Bank of South Africa v Roestof* **2004 (2) SA 492** (W) at 496 F-H it was held as follows:

“A reading of Rule 32 as a whole makes it plain that, once there is an affidavit by the plaintiff, or someone acting on its behalf, who can swear positively to the facts verifying the cause of action and the amount, if any, claimed, stating that in his opinion there is no bona fide defence to the action and that intention to defend was delivered solely for the purposes of delay, the plaintiff is entitled to summary judgment unless the defendant has complied in some way or other with the requirements of Rule 32(3). If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him.”

[20] Relying on *Roestoff*, I find that no prejudice has been caused to the Defendants by the technical flaw. The difference in the amount is clearly a typographical error as the correct amount is reflected in paragraphs 22.2, 23.1 and 33.2.4 of the Plaintiff's Particulars of Claim the technical flaw is cured.

Issues in Dispute

[21] The main issue that are disputed between the parties is that the Plaintiff did not comply with its obligations in the terms of the Loan Agreement.

Analysis of the evidence

[22] The Plaintiff avers that it has complied with requirements of a Summary Judgment in terms of Rule 32.

[23] The Defendants submit that the Plaintiff did not comply with its obligations in terms of the Home Loan Agreement.

[24] It was held *Absa Bank Limited v Pocklingberg* (4116/2016) [2017] ZAFSHC 27 (9 February 2017) that:

“[17] Summary judgment must be refused if the defendant discloses facts which, accepting the truth thereof, or only if proved at a trial in due course, will constitute a defence (see Raphael and Co v Standard Produce Co (Pty) Ltd 1951 (4) SA 244 (C) 245 E - G) While the defendant must fully present the facts upon which his defence is based, he need not deal in detail with either that defence or the evidence in support thereof (see: Absa Bank Ltd v Coventry 1998 (4) SA 351 (N) 353 C - H). Defects in the opposing affidavits are not necessarily fatal for the defendant as the court is entitled to adopt a lenient approach to the allegations contained therein and it is entitled to draw reasonable inferences from those allegations (see Koornklip Befeggings (Edms) Bpk v Allied Minerals Ltd 1970 (1) SA 674 (C) 678 E)”

[25] There is a discrepancy in the amount of R490 000 that Plaintiff claims was advanced the Defendants in terms of the Loan Agreement and the amount stated on the transaction history attached to the application for summary judgment marked “A03” that shows that the Plaintiff only advanced R380 000 to Defendants.

[26] The Plaintiff’s counsel argued that even if the amount advanced to the Defendants is less than the amount on the Loan Agreement that the Defendant’s signature appears on the Home Loan Agreement, and they are liable for that amount. This is an issue for the trial court to decide.

[27] The Plaintiff has debited certain fees to the Defendants' account which fees appears not be agreed on. The transaction history shows that the Plaintiff has debited "collection costs" and "*garden fees*". Counsel for the Plaintiff could not shed light on what these fees are and argued that the amounts can be deducted from the amount claimed.

[28] The interest rate in terms of the Home Loan Agreement is a variable interest rate of 0,7% below the prime interest rate. The Plaintiff claims interest against the Defendants at a rate of 10% per annum (being the prime lending rate at the time) from 2 October 2018. It is clear that this interest rate does not constitute a rate of prime minus 0,7%.

[29] I find that the above discrepancies are triable issues that need to be properly ventilated at a trial, and that accordingly the application for summary judgment is refused.

Costs

[30] As a general rule the award of the costs remains in the discretion of the Court. The general rule is that such costs should follow the result, being the successful litigant. being that costs are awarded to a successful litigant. The usual costs orders in summary judgment applications is to reserve costs for determination by the trial Court.

[31] **Rule 32 (9)** of the **Uniform Rules** provides that:

"(9) The court may at the hearing of such application make such order as to costs as to it seems just: Provided that if -

(a) The plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle him to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs, and may further order that such costs be taxed as between attorney and client; and

(b)"

[32] The purpose of the above subrule is, on the one hand, to discourage unnecessary or unjustified applications for summary judgment and, on the other hand, to discourage defendants from setting up unreasonable defences.

[33] In my view the Plaintiff knew or ought reasonably to have known that the Defendants contentions as contained in their plea would entitle them to leave to defend.

[34] The Plaintiff has advanced no plausible ground why it proceeded to bring the present application in the light of the Defendants contention nor why it persisted with the application up to this point. The Plaintiff knew that he was out of time with the Application for Summary Judgment and undertook in his Heads of Argument that he would bring an Application for condonation in terms of Rule 27 of the Uniform Rules. This was not done.

[35] These costs could have been avoided by the Plaintiff. The Defendants are ordinary citizens as opposed to Plaintiff which is one of the largest banking institutions in South Africa. I see no reason why the Defendant should be out of pocket in this application. This is the proper case for showing displeasure at the conduct of the Plaintiff by mulcting it with costs of this application.

ORDER

In a result, I make the following order:

1. The application for summary judgment is dismissed with costs.
2. The application to declare the immovable property executable is dismissed with costs.
3. Costs are to be taxed on a scale as between an attorney and client scale.

L C ABRAHAMS

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

COUNSEL FOR THE PLAINTIFF:	ADV M AMOJEE
PLAINTIFF'S ATTORNEY:	STRAUSS DALY INC
COUNSEL FOR THE DEFENDANT:	ADV L ACKER
DEFENDANT'S ATTORNEYS:	A DU PLESSIS ATTORNEYS
DATE OF HEARING:	9/11/2021
DATE OF JUDGMENT:	7/2/2022