THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 193 / 2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

20 June 2022 .....
DATE SIGNATURE

In the matter between:

NEDBANK LIMITED **APPLICANT**

And

LATERAL SUPPORT 102 CC **FIRST RESPONDENT**

DAVIES NORMAN MCULU **SECOND RESPONDENT**

SKOMBISO JENNIFER MCULU **THIRD RESPONDENT**

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 20 June 2022.

[1] This is an application for summary judgment in terms of Rule 32. The application is opposed by all three respondents (the Respondents). The summary judgment application is brought against the Respondents jointly and severally and in *solidium*, the one paying the other to be absolved for

(a) payment of R447 008.11,

(b) interest on the aforementioned amount at the rate of 17.5% (prime plus 10.5%) per annum, compounded daily and capitalised monthly from 08 October 2021 to the date of final payment, both days inclusive,

(c) an order in terms of Rule 46 declaring Erf 36, Wild Fig Country Estate, held by Deeds of Transfer no. 2048/2012 (the property), specially executable for the above mentioned amount,

(d) an order in terms of Rule 46A determining that the property shall be sold in execution without a reserve price, alternatively, with a reserve price determined by the court and

(e) costs of suit on a scale of between attorney and client.

[2] At the hearing of this application, prayers under (c) and (d) above were abandoned for purposes of summary judgment application. The Applicant

requested that these applications should be removed from the roll or be postponed *sine die*. This according to the Applicant, was necessitated by the provisions of Rule 46A which requires various inquiries to be conducted before the order requested could be granted, which cannot be practically held and dealt with alongside this application.

[3] According to the particulars of claim, a banking facility was extended to the First Respondent (the principal debtor) with the Second and the Third Respondents binding themselves jointly and severally as surety and co-principal debtors in *solidium* for the repayment on demand of all the amounts the principal debtor may owe the Applicant. The facility was for an overdraft extended and agreed to on various dates. As of 01 July 2020, the overdraft was R550 000.00 with the initial interest rate of 5% above the prime lending rate applicable from time to time. Further clauses in the facility agreement included a penalty interest to be charged in case the overdraft was exceeded. As a security for the debt, a covering mortgage bond was also registered by the Second and the Third Respondents over the immovable property referred to above.

[4] The Applicant (the Plaintiff in the main action) issued summons against the Respondents (the Defendants in the main action) after a breach of agreement in that the First Respondent defaulted in the monthly instalment repayments. As of 07 October 2021, the certificate of balance reflected R447 008.11 as the balance owing, together with interest at 17.5% (prime plus 10.5%) per annum, compounded daily and capitalised monthly from 08 October 2021, to date of final payment. The amount owing as per certificate of balance had increased to R471 535.08 on 30 March 2022.

[5] In a plea filed by the Respondents, they dispute that they refused to pay, saying they offered R280 000.00 as a settlement, which offer was rejected by the Applicant’s attorneys. They further dispute the calculation of the interest rate

as not being in line with the agreement. In an affidavit filed in opposition to the current application, the Respondents raised concern over summary judgment in an application premised on Rule 46A suggesting that such application was bound to fail as it would not be in compliance with the requirements set out in the rule. The rest of the submissions do not take the matter any further than what is in the plea already. Arguments over Rule 46A are now academic as that application has since been abandoned for purposes of summary judgment application.

[6] Although the Respondents allege that the date and place of signature in the agreement were inserted by the Applicant's representatives and that the Second Respondent did not sign it at Hazyview as alleged; I take note of the fact that the agreement as a whole is not disputed. The contents thereof as well as the indebtedness are admitted. The Respondents also question the liquidity of the claim based on the fact that the interest had to be calculated in order to come up with the amount owing. As demonstrated below, this is a non-issue given the clauses in the agreement providing for the liquidity of the debt. The only dispute that the Respondents raise is the calculation of the interests which they allege to be excessive and not in accordance with the agreement. The court also has to consider if this dispute amounts to *bona fide* defence.

[7] Before unpacking this defence, it is apposite to look at the principles involved in the application for summary judgment. This court was referred by counsel for the Applicant to a judgment of *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd*[1] where Binns-Ward J said the following,

> "[13] However, our procedure, by contrast, even in its amended form, remains true to that in which summary judgment was originally introduced in the English civil

[1] (3670/2019) [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) (30 April 2020) at para 13 & 23.

> procedure in the mid-19th century.[2] Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a *bona fide* (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in *Maharaj (Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 765D-F) and *Breitenbach v Fiat SA (*1976 (2) SA 226 (T), at 228B-H) as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or *bona fide*, summary judgment must be refused. The defendant's prospects of success are irrelevant.
>
> [23] It seems to me, however, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial. This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case. As the current applications illustrate, the exercise is likely therefore to conduce to argumentative affidavits, setting forth as averments assertions that could more appropriately be addressed as submissions by counsel from the bar. In other words, it is likely to lead to unnecessarily lengthy supporting affidavits, dealing more with matters for argument than matters of fact.

[8] I align my reasoning with the views expressed above. The court is not concerned with whether the defence raised is good enough to be successful in a trial. The question should rather be whether it is a genuine defence, that presuming it to be

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[2] See *Edwards v Menezes* 1973 (1) SA 299 (NC); [1973] 1 All SA 515 (NC), at 304 (SALR), *Joob Joob Investments* supra, at paras. 29-31 and JA Faris, *The historical context of summary judgment in South Africa: politics, policy and procedure*, (2010) LXIII CILSA 352 for a historical overview of the history of the summary judgment procedure in this country.

true, the question is whether it raise triable issues? Is the pleaded defence genuinely advanced or it is a sham raised merely to delay the proceedings?

[9] There is no doubt that the interest charged *in casu* could be seen as exorbitant. But the question should rather be whether this is what the Respondents bound themselves to. Clause 5 of the agreement, dealing with the interest to be charged reads as follows.

> "5. INTEREST.
>
> All interests rate applicable will be linked to Nedbank's publicly quoted prime lending rate (the prime rate). The maximum penalty interest rate is equal to the ruling South African Reserve Bank repurchase rate (the repo rate) + 14%. The default interest rate applicable will be determined by Nedbank and will not exceed the maximum rate prescribed from time to time for credit facilities in the regulations promulgated in terms of the National Credit Act, 34 of 2005.
>
> 5.1 In respect of any overdraft facilities.
>
> 5.1.1 Overdraft facility interest rate.
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> The initial interest rate applicable to the overdraft facility will be equivalent to 5% above (+) the prime rate determined from time to time and charged by Nedbank (the overdraft rate)
>
> 5.1.2 Penalty Interest.
>
> If the overdraft is exceeded, Nedbank will, in addition to any other right it may have in law, be entitled to charge penalty interest on the amount with which the Borrower has exceeded the overdraft facility.
>
> 5.1.3 Default interest…" [My emphasis].

[10] Under standard terms and conditions, the following appears under clause 8.

> "Certification of Debt.
>
> The nature and amount of the Borrower's obligations and the applicable interest rate will be determined and proved by a certificate or any other written evidence (Certificate) purporting to have been signed by a Nedbank Manager whose capacity or authority does not have to be proved. Unless the contrary is proved, the Certificate

> will on the production thereof be binding and be prima facie proof of the content thereof and the fact that the amount is due and payable. The Certificate will be valid as a liquid document (alternatively proof of a liquidated amount) in any competent court or for any other purpose. [My emphasis].

[11] Counsel for the Applicant demonstrated it well that the interest charged is in line with the agreement even though it could be high. Moreover, the Applicant did not even have to prove the calculations in the first place, but merely produce a certificate of balance, which shall be sufficient proof for the debt and proof for liquid claim. The Respondents failed to establish how applying the agreed interest rate would bring the amount owing lower nor why the Certificate of balance should be rejected. Instead, the Respondents suggested that the Applicant negotiated in bad faith when they rejected the offer they made. I do not see how negotiation in bad faith, even if it was proved, would constitute a defence, let alone a *bona fide* one. I however reject the notion suggesting that refusing a lower amount in settlement of a debt can be interpreted as negotiation in bad faith.

[12] It is therefore clear from the above that the Respondents have dismally failed to demonstrate that they have a *bona fide* defence to the claim by the Applicant. This is a case that stands or falls on the four corners of an agreement. Any defence raised will only serve to delay the outcome in this matter which is inevitable.

[13] For the reasons stipulated above, I make the following order.

[13.1] Summary judgment is granted against the Respondents, jointly and severally, the one paying the other to be absolved for payment of R447 008.11 plus interest at the rate of 17.5% per annum, calculated from 08 October 2021 to the date of final payment.

[13.2] The Applicant is awarded costs on attorney and client scale.

[13.3] Applications in terms of Rule 46 and 46A (see para (c) and (d) in paragraph 1 of this judgment) are postponed *sine die*.

TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

FOR THE APPLICANT	**: ADV. J VAN DEN BERGH**
INSTRUCTED BY	**: STEGMANNS INC ATTORNEYS**
	NELSPRUIT
FOR THE RESPONDENT	**: ADV. V MABUZA**
INSTRUCTED BY	**: CULU INC ATTORNEYS**
	: MBOMBELA
DATE HEARD	**: 23 MAY 2022**
JUDGMENT DELIVERED	**: 20 JUNE 2022**