IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NUMBER: 2395/2022

HEARD ON: 6 May 2024

DELIVERED ON: 13 December 2024

In the application of:

JAN HENDRIK GERHARDUS SAUNDERSON **APPLICANT**

(Identity number: 7[...])

and

ABSA BANK LIMITED **RESPONDENT**

(Registration number: 1986/003934/06)

Coram: **Olivier AJ**

JUDGMENT

OLIVIER AJ

INTRODUCTION/BACKGROUND:

1. This is an application for leave to appeal against the whole of a judgment and order handed down by myself on 19 January 2024[1] in terms whereof I granted summary judgment in favour of ABSA Bank Limited (as Plaintiff/Applicant at the time) against Jan Hendrik Gerhardus Saunderson (as Defendant/Respondent at the time) as follows:

1.1 Payment in the amount of R 1 589 187,81;

1.2 Payment of interest on the amount of R 1 589 187,81 at a rate of 9,75% linked, per *annum*, capitalized monthly from 21 September 2022 to date of payment;

1.3 Payment in the amount of R 3 339 659,28;

1.4 Payment of interest on the amount of R 3 339 659,28 at a rate of 9,75% linked, per *annum*, capitalized monthly from 21 September 2022 to date of payment;

1.5 Payment in the amount of R 831 974,24; and

1.6 Payment of interest on the amount of R 831 974,24 at a rate of 9,75% linked, per *annum*, capitalized monthly from 21 September 2022 to date of payment.

2. I further ordered the above Applicant to pay the costs of suit on a scale as between Attorney and Client.

I will henceforth for purposes hereof and in an attempt to avoid confusion refer to the parties hereto as "*Saunderson*" and "*ABSA Bank*" respectively.

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[1] The judgment is reported as **ABSA Bank Limited v Saunderson** [2024] 2 All SA 364 (NCK) and also at 2024 (2) SA 552 (NCK).

3. Saunderson desires to appeal the judgement referred to in paragraphs 1 and 2 above (herein after referred to as "*the Judgment*") and specifically the grounds upon which the Judgment is based and applied for leave to this Court to do so by way of an Application for Leave to Appeal that was filed on or about 12 February 2024 and wherein it was in essence alleged that I erred in <u>not</u> dismissing the application for summary judgment with costs.

4. Saunderson based his above assertion on a myriad of grounds which were mostly repetitive and after wading through all of these grounds upon which leave to appeal the Judgment is sought, it became clear that the application for leave to appeal raises exactly the same issues that were raised on behalf of Saunderson during the hearing of the summary judgment proceedings in November 2023.

5. These issues which now form the basis for Saunderson's application for leave to appeal, may be summarized as follows:

   5.1 That the supporting affidavit relied upon by ABSA Bank during the summary judgment application (herein after referred to as "*the Founding Affidavit*") goes beyond the boundaries as prescribed by ***Rule 32(2)*** of the Uniform Rules of Court (herein after referred to only as "*the Rules*"), in that ABSA Bank attached various documents to the affidavit[2] which effectively resulted in the summary judgment application proceedings becoming a "*mini trial*";

   5.2 That by allowing ABSA Bank to rely on these attached documents, I disallowed Saunderson the right to properly answer thereto;

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[2] The application for leave to appeal referred to these attached documents as "*additional evidence*".

5.3 That by allowing ABSA Bank to rely on these attached documents, I disallowed Saunderson the right to have his case in this regard properly adjudicated during trial;

5.4 That by allowing ABSA Bank to rely on these attached documents, I effectively allowed ABSA Bank the opportunity to amend its Particulars of Claim whilst simultaneously disallowing Saunderson the right to make consequential amendments to his Plea;

5.5 That I erred in finding that these attached documents put paid to the argument on behalf of Mr. Saunderson that he was in fact extended reckless credit;

5.6 That I erred in not finding that ABSA Bank failed to adhere to the provisions of ***Section 129*** of the National Credit Act[3] (herein after referred to as "*the NCA*") in that ABSA Bank failed to show that proper service of the required notice in terms of the said ***Section 129*** was effected on Saunderson; and

5.7 That I erred in not giving due consideration to the so-called payment holiday defence raised on behalf of Saunderson and that in doing so, I disallowed Saunderson the opportunity to supplement the said payment holiday defence by way of presenting documentary and *viva voce* evidence during a trial of the matter.

6. The case for ABSA Bank as set out in its Initial Summons was in essence based on Saunderson's breach of three separate credit agreements[4] and specifically on the allegation that Saunderson had failed to make timeous payments of the installments due in terms of credit these agreements.

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3 Act 34 of 2005.

4 The relevant details of these credit agreements appear in paragraphs 45.1 to 45.3 of the Judgment.

7. The defences as set out in paragraphs 5.5 to 5.7 above were effectively raised on behalf of Saunderson by way of his Plea.

It should be mentioned that the conclusion of the credit agreements and Saunderson's failure to make payments in terms of these agreements, were never in dispute.

LEAVE TO APPEAL: THE REQUIREMENTS

8. The requirements that an Applicant in an application for leave to appeal needs to satisfy in order to be successful with such an application are well-known and need very little explanation.

9. ***Section 17*** of the Superior Courts Act[5] (herein after referred to as "*the S/C Act*") determines that leave to appeal may only be given if the Judge hearing the application for leave to appeal is of the opinion:

9.1 That the appeal would have reasonable prospects of success[6]; or

9.2 That there is some other compelling reason why the appeal should be heard[7];

9.3 That the decision sought on appeal does not fall within the ambit of ***Section 16(2)(a)*** of the S/C Act; and

9.4 That where the decision sought to be appealed does not dispose of all of the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

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5 Act 10 of 2013.
6 Section 17(1)(a)(i) of the S/C Act.
7 Section 17(1)(a)(ii) of the S/C Act.

10. During the proceedings in this application for leave to appeal, the arguments on behalf of Saunderson (and for that matter also ABSA Bank) revolved solely around the requirements set out in paragraphs 9.1 and 9.2 above.

I was not referred to or addressed on the requirements set out in paragraphs 9.3 and 9.4 above and I therefore do not deem it necessary to deal with these requirements herein.

I hold the view that these last-mentioned requirements do not find application in this instance in any event and I will consequently focus solely on the questions whether Saunderson has reasonable prospects for success on appeal or whether there is some other compelling reason why the matter should proceed to appeal.

11. An interesting fact, as was pointed out by Mr. van Tonder on behalf of ABSA Bank, is that the Application for Leave to Appeal does not make mention of the above requirements of the S/C Act in the sense that the allegations are not made anywhere in the said document that Saunderson has reasonable prospects of success on appeal or that there might be some or other compelling reasons why the matter should proceed to appeal.

12. During argument however, Mr. Jankowitz who appeared for Saunderson, submitted that leave to appeal should be granted based thereon:

12.1 That another Court would have most likely reached a different conclusion on the question of whether summary judgment should have been granted;

12.2 That Saunderson has reasonable prospects of success on appeal; and

12.3 That a compelling reason exists as to why the matter should proceed to appeal, based on the lack of available case law on the issue of

whether an Applicant in an application for summary judgment may be allowed to supplement his supporting affidavit by attaching documentation to such affidavit.

13. I hold the view that it is trite by now that the S/C Act has raised the bar in so far as the granting of leave to appeal is concerned in the sense that by virtue of the use of the words "*only*" and "*would*" in ***Section 17*** of the S/C Act, a measure of certainty that another Court would differ from the Court whose judgment is sought to be appealed against is now required as opposed to a reasonable prospect that another Court might come to a different conclusion.[8]

14. The Supreme Court of Appeal *inter alia* held as follows on this subject:

"*In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.*"[9]

15. This application for leave to appeal the Judgment therefore needs to be determined against the above requirements considering that the conclusion of the credit agreements upon which ABSA Bank's claim is based as well as Saunderson's failure to make payment in terms of these agreements, were never in dispute.

FINDINGS AND REASONING:

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[8] See *inter alia* **Mont Chevaux Trust v Goosen and Others** [2014] ZALCC 20 (SAFLII reference) at paragraph [6] and **South African Breweries (Pty) Ltd v The Commissioner of the South African Revenue Services** [2017] ZAGPPHC 340 (SAFLII reference) at paragraph [5].

[9] **Smith v S** [2011] ZASCA 15 (SAFLII reference) at paragraph [7]. Also see the matter of **Pretoria Society of Advocates v Nthai** [2020] JOL 46546 (LP) at paragraph [5].

16. I deem it necessary to reiterate that that since its amendment in July 2019, ***Rule 32*** of the Rules now requires that an application for summary judgment should be accompanied by an affidavit deposed to by someone who can swear positively to the facts[10] and that said affidavit should:

16.1 Verify the cause of action and the amount, if any, claimed;

16.2 Identify any point of law relied upon as well as the facts upon which the plaintiff's claim is based; and

16.3 Explain briefly why the defence as pleaded does not raise any issue for trial.

17. The above, as was already mentioned in the Judgment, is a significant departure from the provisions of ***Rule 32*** pre-amendment which required little more of a deponent to an affidavit in support of an application for summary judgment to swear positively to the facts, verify the cause of action and amount that was claimed, if any and state that in his/her opinion a *bona fide* defence to the claims did not exist and that notice of intention to defend was given solely for the purpose of delaying the proceedings in the action.

18. I still hold the view that what ***Rule 32(2)(b)*** of the Rules (post-amendment) requires from the Deponent to the affidavit in support of an application for summary judgment is something more than what was expected of a deponent in such an affidavit prior to the amendment to the rule in the sense that the Deponent is now obligated to also *"…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.*"

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10 See **Rule 32(2)(a)** of the Rules

19. I hold the further view that by using the word "*shall*" earlier in ***Rule 32(2)(b)***, a Plaintiff is not only afforded an opportunity to deal with the merits of a Defendant's defences to a certain extent, but that a Plaintiff is in fact obligated to do so.

A Plaintiff in an application for summary judgment is therefore not only permitted but obligated to "*… explain briefly why the defence as pleaded does not raise any issue for trial*" and in order to comply with this obligation, the Plaintiff is required to do more than what was previously required.

20. To once again quote the learned Binns-Ward J[11]:

"*It is required to explain why it is contended that the pleaded defence is a sham … 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 that the defence is not bona fide and has been raised merely for purposes of delay.*" (My omissions and underlining)

21. In the Judgment I consequently found that, despite the provisions of ***Rule 32(4)*** and in view of the fact that more is expected of a Plaintiff in summary judgment proceedings post-amendment, a more liberal approach is necessary in as far as the allowance of additional evidence is concerned as long as the evidence that is provided by the plaintiff serves only to support the contentions by the Plaintiff as to why the defences raised by the Defendant, do not raise issues for trial and in the event of this evidence being documentary in nature, same is

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11 **Tumileng Trading CC v National Security and Fire (Pty) Ltd** [2020] ZAWCHC 28 (SAFLII reference) at paragraph [22] (Also reported at [2020] JOL 47144 and at 2020 (6) SA 624 (WCC)).

attached to the supporting affidavit so that the Defendant in the matter is in a position to answer thereto.[12]

I still hold this view.

22. The allowance by me of the afore-said additional evidence is what Saunderson now takes umbrage with.

23. The problem however is that Mr. Jankowitz could not refer me to any other authorities since the decision in ***Tumileng Trading***, which persuaded me that I was incorrect in my previous finding namely to accept the additional evidence attached to ABSA Bank's Founding Affidavit.

24. Mr. van Tonder on behalf of ABSA Bank on the other hand referred me to the matter of ***ABSA Bank Limited v Mashinini N.O and Another***[13] where the learned Davis J also held that the attachment of documents to an affidavit in summary judgment proceedings (albeit in this instance a supplementary affidavit) should be allowed if the purpose of these attached documents is to refute a defence pleaded by a Defendant.[14]

25. I could also find no authority (nor was I referred to such authority) to the effect that a Plaintiff may not be allowed to attach documentation to the supporting affidavit in order to show that a Defendant does not have a *bona fide* defence to the Plaintiff's claim as long as the additional evidence that is provided by the Plaintiff serves to support the contentions by the Plaintiff as to why the defences as pleaded by the Defendant, do not raise issues for trial.

Rule 32 is certainly not helpful in this regard.

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12 See paragraphs 34 to 37 of the Summary Judgment. Also see the matter of **Meredith v Moodley** [2023] ZAGPJHC 176 (SAFLII Reference) at paragraph [24].

13 [2019] ZAGPPHC 978 (SAFLII reference).

14 **ABSA Bank Limited v Mashinini**, *supra* at paragraph 3.11.

26. It is also in my view not correct for Saunderson to contend that by allowing the additional evidence complained of, I disallowed him (Saunderson) the opportunity to deal with this additional evidence.

27. The Court has held in the matter of ***Tumileng Trading*** that, despite the amendment to ***Rule 32*** of the Rules, what is required from a Defendant in the answering affidavit in summary judgment proceedings has remained essentially the same and that the question remains "*… 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.*"[15]

28. A Defendant is therefore still required to fully disclose the nature and grounds of his defence and the material facts upon which it is founded in his answering affidavit in summary judgment proceedings and this defence should still be *bona fide* and good in law[16] and not inherently and seriously unconvincing.[17]

29. It was held recently in the matter of ***Standard Bank of South Africa Limited and Another v Five Strand Media (Pty) Ltd and Others***[18] as follows:

"*Rule 32(3)(b) has been left substantially 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.*"[19]

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15 See **Tumileng Trading**, *supra* at paragraph [13].
16 See **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at page 426.
17 **Breitenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T) page 228.
18 [2020] ZAECPEHC 33 (SAFLII reference).
19 **Five Strand Media**, *supra* at paragraph [12].

30. The above was also considered in the matter of ***Tumileng Trading*** and the learned Binns-Ward expressed even stronger views on the subject where he held as follows:

"*The effect of the amended requirements for a supporting affidavit is, however, to require the defendant to deal with the argumentative material in its opposing affidavit. A defendant that fails to do that, does so at its own peril.*"[20]

and further:

"*If a defendant fails to put up the facts that it obviously should have been able to do were it advancing a genuine defence, it cannot complain if the court is left in a position in which it is unable to find a reasonable basis to doubt that it does not have a bona fide defence.*"

31. I therefore hold the view that Saunderson, subsequent to receiving ABSA Bank's Founding Affidavit in the summary judgment proceedings, had sufficient opportunity to address the "*additional evidence*" in his Answering Affidavit and he can hardly now complain if he chose not to do so properly or if he chose not to do so at all.

Further to the above I hold the view that there was nothing that precluded Saunderson from attaching documentary evidence of his own to his Answering Affidavit in an attempt to refute the averments made by ABSA Bank in its Founding Affidavit.

The averment that ABSA Bank was effectively allowed to amend or supplement its Particulars of Claim by the fact that it was allowed to rely on the documents attached to its Founding Affidavit is simply opportunistic and was, to his credit, not seriously pursued by Mr. Jankowitz during argument.

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[20] **Tumileng Trading**, *supra* at paragraph [41].

32. In view of the above I am still of the view that Saunderson's averments in this regard does not constitute a *bona fide* defence to the claim by ABSA Bank and that it does not raise a genuinely triable issue.

33. I am also not convinced that another Court would have most likely reached a different conclusion or that Saunderson has reasonable prospects of success on appeal on this subject and the lack of available case law on this particular subject does not, in my view, create a compelling reason why the matter should proceed to appeal before another Court.

34. As to the arguments on behalf of Saunderson that the application for summary judgment should have been dismissed based thereon that ABSA Bank did not adhere to the provisions of ***Section 129*** of the NCA, I find that nothing was placed before me to persuade me that this defence is *bona fide* and that it creates a triable issue.

35. Neither in the pleadings in the action, nor in the papers in the summary judgment application did Saunderson deny receipt of the required notice in terms of ***Section 129*** and I am still of the view that this defence put forward by Mr. Saunderson is only an attempt to delay the inevitable and it should be stated that Saunderson's persistence with this so-called defence, borders on the vexatious.

36. The same goes, in my view, for the arguments that Saunderson was not indebted towards ABSA Bank in the amount(s) claimed based on a verbal payment holiday agreement between Saunderson and a (still unidentified) official of ABSA Bank.

37. Saunderson persisted with this defence in spite of the fact that all of the above credit agreements contained non-variation clauses and also in spite of the so-called shifren principle which still finds application in the South African law.[21]

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[21] See the matter of **Brisley v Drotsky** [2002] JOL 9693 (A) where the

38. It was held that the purpose of non-variation clauses in contracts is to protect the creditor as such clauses enables the creditor to determine its rights with reference to existing documentation and/or documentation in its possession and also in the sense that the creditor does not need to rely on the memories of people and is protected against spurious defences and unnecessary litigation.[22]

39. I have dealt with this defence of Saunderson as well as with the authorities that I was referred to comprehensively in paragraphs 66 to 84 of the Default Judgment and I do not intend to do it herein again.

40. Suffice it to say that I also find this defence raised by Saunderson as opportunistic and that same is in my view not a *bona fide* defence and that it also does not raise a triable issue.

41. In conclusion it should be stated that it was held that the primary purpose of summary judgment proceedings, 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*"[23] and that this is exactly why the application for summary judgment was granted.

42. I am therefore convinced of the following:

    42.1 That Saunderson has no realistic prospects of success on appeal, alternatively that he has not provided a sound rational basis for the conclusion that he has prospects of success on appeal;

Supreme Court of Appeal held in paragraphs [8] and [9] that to negate the shifren principle would create legal uncertainty and where the Court also found that the shifren principle does not create an unreasonable straight jacket.

22 See ***Tsaperas & Others v Boland Bank*** [1996] 4 All SA 312 (SCA) at page 315.

23 **Raumix Aggregates (Pty) Ltd v Richter Sand CC and another and related matters** [2019] JOL 45983 (GJ) at paragraph [16].

42.2 That another Court would not come to a different conclusion in this instance; and

42.3 That there is no other compelling reason why this matter should proceed on appeal.

ORDER:

43. In view of all of the above, the following order is made:

The application for leave to appeal is dismissed with costs.

ACTING JUDGE A.D. OLIVIER
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

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