**IN THE HIGH COURT OF SOUTH AFRICA**

**(BOPHUTHATSWANA PROVINCIAL DIVISION)**

CASE NO 268/2001

In the matter between:

**FBC FIDELITY BANK LIMITED** **PLAINTIFF**

AND

**MOLEKOANE GIDEON MORULE** **FIRST DEFENDANT**

**DINCO SALOME MORULE** **SECOND DEFENDANT**

**JUDGEMENT**

FOR THE PLAINTIFF: ADV J S STANDER
FOR THE DEFENDANTS : MR S E MONARE

DATE OF HEARING: 18 OCTOBER 2001
DATE OF JUDGMENT : 09 NOVEMBER 2001

**NKABINDE J**

[1] The plaintiff is FBC Fidelity Bank Limited, the successor in title to the Bophuthatswana Building Society ("BBS"). The plaintiff's title was occasioned by the following:

) The assets and liabilities of the BBS were transferred during 1997 to Citizen Bank in terms of s 71 (1)(a) of the

Mutual Banks Act 124 of 1993;

b) On 27 March 1997 the Citizen Bank changed its name to Future Bank Limited;

c) The assets and liabilities of Future Bank Limited were transferred to Fidelity Bank Limited in terms of s 54 (4)(b) of the Banks Act 94 1990;

d) On 02 September 1998 the name of Fidelity Bank Limited changed in terms of s 44 of the Companies Act 61 of 1973.

[2] During May 2001 the plaintiff issued and served summons upon the first and second defendants in terms whereof it claimed, as against the defendants jointly and severally, payment of monies lent and advanced which had been secured by a mortgage bond, interest thereon, costs on an attorney and client scale as well as an order declaring the encumbered property to be executable.

[3] The first defendant is the mortgagor and the second defendant is his wife. She is cited by virtue of the fact that she is the co-owner with the first defendant of the mortgaged property. I shall refer to them as "defendants".

[4] Upon receipt of the summons the defendants gave due and proper notice of their intention to defend the action instituted by the plaintiff, whereupon the latter applied for summary judgment against them.

[5] Summary judgment procedure is designed to enable the plaintiff to obtain judgment under certain circumstances without the necessity of going to trial. By means of this procedure a defence by the defendant lacking in substance can be disposed of without putting the plaintiff to the expense of a trial. It provides therefore an extraordinary remedy which offends the basic right of a defendant to be given a hearing. The Courts have constantly been mindful of this harsh consequences and have resorted to

granting summary judgment only where, in effect, a plaintiff has an unanswerable case. A defendant confronted with an application for summary judgment may, in terms Rule 32 (3) of the Uniform Rules of Court ("the Rules"), elect to give security to the registrar of any judgment including costs that are given or satisfy the Court by affidavit that he has a *bona fide* defence to the action. In such affidavit the defendant must disclose fully the nature and grounds of the defence and the material facts relied upon therefor (Rule 32 (3) (a) and (b)). In this matter the defendants have elected to resist the application by filing an affidavit resisting summary judgment in terms of sub-rule (3)(b) and raised certain points. I shall deal with the points raised hereunder not in the order in which they were raised and argued.

[6] The first point was that the plaintiff's title is tainted because in seeking to show how it became a successor in title as aforementioned it did not mention Future Bank Corporation Limited as one of the companies to which the assets of BBS devolved despite the fact that Future Bank Corporation Limited had sued the defendants at the Magistrate Court on the same cause of action albeit for a different amount. The plaintiff, in consequence hereof, filed a notice in terms of Rule 28 (1) of the Rules, to amend the Particulars of Claim, by inserting the word "Corporation" immediately after the words "Future Bank" wherever they appeared in paragraphs 11.2 and 11.3, respectively. The defendants did not object to the proposed amendment and accordingly the plaintiff amended its Particulars of Claim as aforementioned.

[7] The second part was that Mr J.F. Haskings, who deposed to the

affidavit in support of the application, could not swear positively to the facts on which the plaintiff's cause of action arose because, as I understood the argument, he did not tell the Court (a) where he is heading the plaintiff's Collection Unit; (b) what documents he had in his possession and under his control because the plaintiff is not the original lender. Mr Stander, for the plaintiff, in his comprehensive Heads of Argument, referred to a number of authorities to support his contention that Mr Haskings' deposition complied with the provision of Rule 32 (2) of the Rules. It is not necessary to discuss the said authorities. It suffices to state that there is no substance in the point raised because on the averments made, Mr Haskings was definitely in a position to rely on the documents in his possession and under his control to claim knowledge of the cause of action and the amount claimed (See BARCLAYS NATIONAL BANK LIMITED v SMITH 1975 (4) SA 675 (D); MAHARAJ v BARCLAYS NATIONAL BANK 1976 (1) SA 418 (A); BARCLAYS WESTERN BANK LTD v BILL JONKER FACTORY SERVICES (PTY) LTD& ANOTHER 1980 (1) SA 929 (SECLD)).

[8] The third point was that an amount of R30 000.00 was paid in advance on 25 August 1997 and the plaintiff failed to give the defendants a rebate on the finance charges for the said payment. Instead, the plaintiff debited the defendants' account with interest in excess of what it was supposed to recover from them thereby necessitating a recalculation of the whole amount; The fourth point was that the defendants paid R70 000.00 as at the time of issue of the summons in the

Magistrate's Court and that the amount herein claimed could not be the correct amount.

[9] Mr Stander contended that the defence raised does not advance a defence as required in terms of the Rule 32 (3)(b). This sub-rule provides as follows:

> "(3) Upon the hearing of an application for summary judgment the defendant may -
>
> a) . . .
>
> b) satisfy the court by affidavit . . . that he has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[10] The question now turns on (a) whether the defendants have fully disclosed the nature and grounds of their defence and the material facts upon which such defence is founded; and (b) whether on the facts so disclosed the defendants appear to have a defence which is *bona fide* and good in law. In interpreting the word "fully" as used in the context of the Rule, Corbett JA in Maharaj, *supra,* at 426 C - E,

> " It connotes, in my view, that 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 particularly 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 precision that would be required of a plea; nor does the Court examine it by the standards of pleading.".

[11] In *casu* the defendants made some allegations that they were not given a rebate on the finance charges for the alleged advance payments of R30 000.00 and also that the plaintiff debited their accounts with an excessive interest. Surely, these averments, assuming that they are correct, must have been based on documentary information. In my view, a dispute relating to the creditor's method of calculating its interest due on an amount seem to be material as to render it imperative that a trial court should attend to its resolution. The problem, however, is that the affidavit does not canvass particularity as to the alleged interest rebate to which the defendants were allegedly entitled and the alleged excess interest amount charged. Furthermore, the defendants, while admitting that they owe the plaintiff, do not give a clue of the extent of their indebtedness to the plaintiff according to their own calculation. Needless to say, the defendants have not been candid to this Court in disclosing the material facts upon which their defences are founded to enable this court to assess the *bona fide* of such defence(s). The averments made are bald allegations which leave this court with nothing but conjectural propositions. In JACOBSEN V.D BERG S.A. LTD v TRITON YACHTING SUPPLIES 1974 (2) SA 584 (O.P.D) the defendant had raised the following in his affidavit as disclosing a *bona fide* defence:

> "(2) I deny that the defendant is indebted to the plaintiff in the amount claimed in the plaintiff's summons and allege briefly that the plaintiff has failed to credit the defendant's account with certain payments

made and has, in addition, claimed payment for goods which have not been delivered.

(3) I deny that the defendant does not have a bona fide defence to the action or that notice of intention to defend has been delivered for the purposes of delay and that in fact there is a good and proper defence to the plaintiff's action.".

[12] In assessing whether or not a *bona fide* defence was disclosed Erasmus J said the following at 587 D-H:

> "Sub-rule (3)(b) requires the opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor so that the Court is satisfied that the defendant has a bona fide defence. The defence with respect must not merely "appear" to be bona fide. Se CORBETT J., in Arend and Another v. Astra Furnishers (Pty) Ltd., 1974 (1) SA 298 (C) at pp 303, 304. Apart from the allegations that the plaintiff has failed to credit the defendant's account with certain payments made and that he has claimed payment for goods which have not been delivered, the rest of the affidavit seems merely to deny the correctness of the amount. Such form of denial has been held not sufficient to comply with the requirements of sub-rule (3)(b). See Nichas & Sons (Pty) Ltd v. Papenfus, 1969 (2) S.A. 494 (O) at p.496. Enquiry must be directed to the question whether the allegations I have excluded above make any difference to the defendant's case. In Traut v. du Toit 1966 (1) S.A. 69 (O), it was held that the defendant's allegations, in an opposing affidavit to a summons for an amount outstanding for goods sold and delivered, that he did not know how much he owed the plaintiff because he had not yet received "volle besonderhede" of his account and that certain items in respect of the claim were not received by him, were not sufficient compliance with the sub-rule either. At p.71 of the judgment EKSTEEN, A.J. as he then was said:

"Geen inligting van wat hierdie items sou wees nie word verstrek, of in hoeverre hulle die eis sou verminder nie."

. . .

Raas has not stated that he is unable to reply fully to the plaintiff's claim. On the contrary his affidavit implies that he is fully aware of the manner in which the plaintiff's claim is made up as well as the items allegedly wrongly claimed by the plaintiff. He should, therefore, have given instances where goods bought from the plaintiff were not delivered or where payments made were not credited to his account.".

[13] The defendants state the following in the opposing affidavit:

> " 11
> I have been unable to obtain a printout of my statement from the plaintiff to show how I have been overcharged because I was told in May 2001 after case no: 3012/98 had been withdrawn that I could not obtain the printout because the matter has been referred to the attorneys for collection.
>
> 12
> I had paid the plaintiff about R70 000,00 when the summons under case no: 3012/98 was issued and it is not possible that my account with them could be R 136 302,68 as at the time the summons in this case was issued.
>
> 13
> I did not pay the plaintiff the balance after case no: 3012/98 was withdrawn because the plaintiff did not furnish me with a statement upon request so that we could debate it and pay what was rightfully owed."

[14] The defence raised in the instant case is not entirely distinguishable from the one raised in Traut. It should be noted that the defendants (in *casu*) have, by implication, admitted that they owe the plaintiff some money but their affidavit does not

disclose what this amount is, neither does it reveal any intention on their part to pay what they believe to be owing. The advance payment was allegedly made during August 1997. No explanation is advanced why a printout was not sought before May 2001 or immediately after the defendants became aware of the excess interest allegedly charged. *Ex facie* their affidavit it seems to me that the defendants have made the calculation of what they consider to be the correct amount and, by implication, do know the extent of their indebtedness to the plaintiff: they paid R70 000,00; from what is averred in the affidavit they seem to know the correct interest to be debited to their account. What is puzzling however, is the fact that they withheld the information and elected to request information from the plaintiff. Had the defendants given particularity, this would have enable this Court to assess the extent of their indebtedness to the plaintiff and their defence. The Court would then be in a position to give judgment for the amount admitted and leave to defend in respect of the balance. In the words of Erasmus J in Jacobsen, *supra*, at 588 E, such a course would have been proper for a defendant with a *bona fide* defence.

[15] In NEDPERM BANK LTD v VERBRI PROJECTS CC 1993 (3) SA 214 (W), a case where the plaintiff's cause of action was almost similar to the one in the instant case, the defendant having raised a defence, *inter alia*, that he lacked knowledge of the correctness of the plaintiff's interest calculation, alleging that he did not have the requisite documentation and for that

reason, did not know whether the amounts were correct, the court held as follows at 222 H - 223 C:

> "It is a strange defence for a debtor to say: 'I do now know what I owe; I borrowed money but I cannot tell you what I owe you because you took my documents away.' There was no legal obligation in the first place upon the plaintiff to furnish a statement of account. This is a simple debtor and creditor relationship between the parties. They do not stand in any fiduciary relationship to one another, there is no contract averred obliging the plaintiff to give the defendant statements, nor is there any statute which requires a bank to give statements of indebtedness . . .
>
> Be that as it may, and what is more important from a practical point of view, and in testing the *bona fides* of the defendant, is that the defendant indicates no reason for not making any effort to obtain these documents. The alleged confiscation took place many months ago. When faced with the claim of R12m-odd, one would have thought that some attempt would have been made, even by writing a letter to the plaintiff or the plaintiff's attorneys, to see these documents. A defendant in summary judgment proceedings cannot sit back supinely and justifiably say:
>
> 'Well you took my documents. I don't know whether I owe you any money. I might, I might not, but don't give summary judgment against me because when it comes to a trial I might be able to find in the documents that you provide some basis for saying that I don't owe you any money anyway.'
>
> That is not good enough if one has to demonstrate *bona fides* bona fides as the Rule requires, nor is it good enough if one has to set out one's defence fully by way of facts as opposed to speculative propositions."

In my view, and in the light of the aforegoing, the defendants have failed to set out factual basis on the strength of which this Court could consider the existence of a reasonable probability that something might come up at the trial which would give to them a defence which, owing to the alleged lack of information, he had difficulty formulating.

[16] I now turn to consider the last point raised by the defendants. The contention was that the certificate by John Ford Haskings and Frans Stephanus van Rooyen did not comply with clause 24 of the mortgage bond in that it does not state the capital, interest, all advances and payments made together with interest as well as any money claimable in terms of the bond. Mr Stander argued that the certificate refers to the "amount" which is made up of capital, interest et cetera.

[17] The abovementioned clause 24 provides as follows:

> " A STATEMENT signed by any Head Office Director or Manager or Secretary or a Local Director, Manager or Secretary for the time being or any Branch of the Society reflecting the amount from whatsoever cause arising owing to the Society in respect of capital and interest, and for all advances and payment made (in addition to the capital) to or for the account of the Mortgagor(s) or otherwise authorised to be made under this and/or any other Mortgage Bond/s passed by the Mortgagor(s) in favour of the Society, together with interest as well as any moneys claimable in terms of this Bond and the Rules of the Society shall be sufficient and satisfactory proof for the purpose of obtaining provisional sentence under this or any other Mortgage Bond/s passed in favour of the Society, and it shall rest with the Mortgagor(s) to prove

that such amount is not owing to the Society."
(My underlining for emphasis)

[18] Clause 24 clearly refers, as correctly submitted by Mr Stander, to a statement reflecting the amount. I am fortified in my view also by the wording of the last sentence in clause 24 that "it shall rest with the Mortgagor(s) to prove that such amount is not owing to the Society". I find therefore that there is also no substance in the point raised. In any event, the onus is upon the defendants to prove that it does not owe the amount reflected in the certificate. As I have already indicated, the defendants merely challenged the correctness of the amount without laying a proper and sufficient basis for what they allege. On the evidence before me it does not appear to me that this is a case where one can say, with any degree of certainty, that this Court should exercise a discretion in favour of the defendants.

[19] It therefore follows that the plaintiff is entitled to summary judgment as claimed in terms of the whole of paragraph 1 of the notice of application for summary judgment in terms of Rule 32.

**B.E. NKABINDE**
JUDGE OF THE HIGH COURT

**Plaintiff'sattorneys : Minchin& KellyInc**
**Defendantsattorneys : S E Monare& Partners**