

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5032/2021

In the matter between:

NEDBANK LIMITED

Plaintiff

and

RETYRE (PTY) LTD

1st Defendant

JENDERS INVESTMENTS (PTY) LTD

2nd Defendant

EBEN VINCENT BOTHA

3rd Defendant

HELENA DORETHIA BOTHA

4th Defendant

CORAM:

AFRICA, AJ

HEARD ON:

26 MAY 2022

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 11h00 on 14 June 2022.

JUDGMENT

INTRODUCTION

- [1] This is an application for summary judgment. The Defendants opposes the application and has filed an affidavit in support of their opposition thereto.

BACKGROUND

- [2] According to Plaintiff's particulars of claim, on or about 4 July 2016 and at Bethlehem, the plaintiff¹ and 1st defendant², concluded a written loan agreement ("Loan Agreement")

On or about 26 October 2018 at Bethlehem, the plaintiff, offered an overdraft facility ("Overdraft Facility") to the 1st defendant, which on 22 November 2018, the principal debtor, accepted with the terms and conditions as contained in annexure "POC4".

The Loan Agreement specifically provides that it would be paid from the Overdraft Facility.³

- [3] The plaintiff agreed to advance the sum of R2 900 000.00 to the 1st defendant in terms of the Loan Agreement, together with Credit Life Assurance and Insurance over the immovable property, bonded to the plaintiff to secure the debt.

The Loan Agreement was for a period of 120 months and was to be repaid in monthly instalments. In the event that plaintiff failed to pay any instalments due in terms of the loan agreement and/or overdraft facility agreements ("the agreements"), the plaintiff would *inter alia*, have the right to, without prejudice to any other rights or remedies available to it, cancel same.

¹ Represented by a duly authorised representative.

² Represented by the 3rd defendant.

³ Annexure "POC2" to the POC, page 101.

- [4] The agreements were subject to certain conditions, including that a mortgage bond be registered in favour of the plaintiff over the properties as described.⁴
- [5] Pursuant to the conclusion of the Agreements, the 1st defendant caused continuing covering mortgage bonds⁵, to be registered over the properties in favour of the plaintiff, wherein the 1st defendant declared itself to be lawfully indebted and bound to the plaintiff, its successors in title or assigns.
- [6] The 2nd, 3rd, and 4th defendants, on the 26th of April 2016 at Bethlehem, and on the 30th of May 2015 at Mossel Bay, respectively, executed unlimited deeds of suretyships in consideration of indebtedness incurred by the 1st defendant to the plaintiff.

It is common cause that the Loan Agreement would be paid from the Overdraft Facility. Plaintiff states that the 1st defendant is in breach of the terms and conditions of the Agreements, as it has failed to pay the monthly instalments due in terms of both accounts, which breach is material.⁶ Further, that 1st defendant and or defendants collectively, failed to submit financial documents in terms of the Financial Intelligence Centre Act (“FICA”).

- [7] The defendants have filed and raised a number of defences.
- [8] The first contention raised is that plaintiff, belatedly seeks to adduce evidence, embodied by Annexure “REF6”⁷, that it was entitled to suspend the Overdraft Facility because, the defendants failed to submit financial documents in terms of FICA, which were required to review the Overdraft Facility”⁸
- [9] Rule 32(1)⁹ reads:

“The Plaintiff may after the Defendant has delivered a plea, apply to the court for summary judgment on each of such claims in the summons as is only:

a) On a liquid document;

⁴ Erf 4277 Pretorius Street, Bethlehem, District Bethlehem, Province Free Sate in extent 965 square meters held by Deed of Partition T15366/1995; Erf 967 Reebok Street, in Municipality and Division Mossel Bay, Province Western Cape, in extent 634 Bethlehem, District Bethlehem, province Free State in extent 955 Square meters held by Deed of Partition T15366/1995.

⁵ Number B000003410/2016; Number B 000017166/2016 and Number B000017167/2016.

⁶ Paragraph 19 page 90 amended POC.

⁷ Notice of Breach.

⁸ Paragraph 6 of defendants’ affidavit opposing summary judgment.

⁹ Uniform Rules of Court.

- b) For a liquidated amount in money;
- c) For delivery of the specified movable property; and
- d) For ejectment.”

Rule 32 (2) reads:

(a): “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 plaintiff or by any other person who can swear positively to the facts.

(b): The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any claimed, and identify any point of law relied upon which the plaintiff’s claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial. (emphasis added)

(c): If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit...”

Rule 32 (4) reads:

“No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2) ...” (emphasis added)

[10] The plaintiff argues that in the present case Annexure “REF6” is attached to the founding affidavit, as is envisaged in subrule (4) and therefore the argument raised by the defendants that Annexure “REF6”, may be ignored¹⁰ by this court, is without merit. The plaintiff argues that it is mindful that it must set out in its founding affidavit why it is entitled to summary judgment in terms of Rule 32 and is not permitted to introduce further evidence, by way of the said affidavit.

[11] In support of that argument, the plaintiff referred this court to the case of *Rossouw v FirstRand Bank Ltd*¹¹ where the Supreme Court of Appeal, however, held:

“that a certificate of balance handed up to court in summary judgment proceedings perform a useful function and is not hit by the provisions of the subrule.”

[12] The plaintiff argues that what the bank sought to do in the *Rossouw* matter (*supra*) was to hand up documents to show compliance with the provisions of

¹⁰ Paragraph 17 of defendants Heads of Argument.

¹¹ 2010 (6) SA 439 (SCA) at 454 A-C.

section 129 of the National Credit Act 34 of 2005 and that those documents were not alluded to in either the summons or the affidavit, which is not the case in the present matter. Further, that Annexure “RET6” in *casu*, is important in respect of the defences raised in the defendant’s plea. In this respect, plaintiff is entitled to bring an application for summary judgment on the basis that a breach occurred at the instance of the defendants, as Annexure “RET6” advised the 1st defendant that it is in breach of its facilities agreement(s) with the Bank and committed one or more of the following events of default:

“You failed to submit annual financial statements, management accounts and debtors list.

You failed to remedy same within the time period previously stipulated, if any...We hereby notify you that we intend taking the following action: - Suspend the availability of your facilities for a review of the current position should you fail to submit the annual financial statements, management accounts and debtors by 5 February 2021.”

- [13] The plaintiff maintains that it is necessitated to attach Annexure “RET6” to its founding affidavit to show that the defences raised are not triable.
- [14] In opposing this argument, counsel for the defendants submits¹² that apart from the fact that it is not evident that Annexure “RET6” was received by the defendants, plaintiff is not entitled to rely on a breach of the Overdraft, that it did not plead. This is so since it is plaintiff’s pleaded case, that the defendants are called upon to meet. In this regard plaintiff carefully pleaded the terms that might trigger the defendants breach of the Overdraft in paragraph 13.8 of the particulars. Further, that significantly, the failure to submit financial documents is not among the breaches pleaded by plaintiff. That fact is especially pertinent, since the defendants formally complained that plaintiff had originally framed the defendant’s liability in unreasonably vague terms. Plaintiff capitulated in that complaint and delivered an amended set of particulars¹³ to give sufficient specificity in respect of the defendants alleged breach, and the breach in terms of Annexure “RET6” at no stage formed part of plaintiff’s pleaded case (even in its amended form).

¹² Paragraphs 8,9,10 of affidavit opposing summary judgment.

¹³ Paragraph 19 of that amended particulars purports to specify the defendants alleged breach.

- [15] To this end, even when specifically requested by this court to show where the breach as alleged in terms of Annexure “RET6” was pleaded, counsel for plaintiff could not direct this court thereto.
- [16] Counsel for the defendants maintain that the argument that Annexure “RET6” can be attached either to the summons or the founding affidavit¹⁴ is without merit because subrule (2)(a) must be read in conjunction with subrule (2)(b), in answering the question whether or not Annexure “RET6” is admissible. Subrule (2)(b) defines what permissible evidence is.¹⁵
- [17] The defendants further maintain that, the breach as pleaded by plaintiff, is defendants’ failure to pay the monthly instalments in respect of the respective accounts and not defendants failure to submit financial documents. Thus, attaching Annexure “RET6” to the founding affidavit does not verify the cause of action as set out in the particulars of claim neither does it fall within the ambit of any of the other permissible evidence, in terms of subrule (2)(b), which the affidavit must contain.
- [18] In the view of this court, the defendants’ reliance on the *Rossouw* case in this instance is correct. The certificate of balance, the court in *Rossouw* found did not amount to new evidence, which would be inadmissible under rule 32 (4). To the extent that the certificate reflects the balance due as at date of hearing, is merely an arithmetical calculation based on the facts already before court.
- The certificate of balance on its mere production is sufficient proof of the amount due and owing, thus verifying the cause of action and the amount as claimed in the summons. It is the view of this court, as argued on behalf of the defendants that Annexure “RET6” as attached to the founding affidavit, amounts to new evidence, which is inadmissible.
- [19] A further defence raised by the defendants is that the plaintiff in its founding affidavit also belatedly relies upon clause 4.1 of the Overdraft, namely that the Overdraft Facility is repayable on demand in Nedbank’s (“plaintiff’s”) discretion. That clause reads as follows:

¹⁴ In support of summary judgment.

¹⁵ “The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any claimed, and 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.”

“Oortrekkingsfasiliteite is onderworpe aan hersiening en is op aanvraag in Nedbank se diskresie in oorstemming met gewone bankpraktyk terugbetaalbaar.”

- [20] Counsel for the defendants argued that reliance on this clause is likewise misplaced, since this too, is not plaintiff’s pleaded case. However, if plaintiff is entitled to rely upon clause 4.1, such contractual discretion must be exercised *arbitrio boni viri*, namely in a fair and reasonable manner, and in good faith.
- [21] The exercise of this discretion, in suspending defendants’ facilities, were communicated to the defendants as per Annexure “RET6”, the receipt of which are denied by the defendants. It is further argued by defendants that the repayment of the Loan was inextricably linked to the Overdraft Facility and plaintiff exercised its discretion arbitrary and capricious, more so in circumstances where the defendants during April 2021, made a payment of R1.845 million into the Overdraft Facility, reducing the outstanding amount to R70 701,41.
- [22] In opposing this argument, plaintiff submits¹⁶that the Overdraft Facility is a demand facility, which in terms of the agreement, can be suspended or cancelled or called up by the plaintiff in the event of non-compliance with any of the terms contained therein. The plaintiff has a right to claim, at its discretion, the full amount outstanding, with interest, which became immediately due and payable. In the circumstances, defendants have failed to submit financial documents in terms of the Financial Intelligence Centre Act¹⁷, 38 of 2001, which documents were required to review the Overdraft Facility. Annexure “RET6” was addressed to 1st defendant notifying same of the breach. As the breach or default was not rectified, the Overdraft Facility limit, was subsequently suspended on 9 February 2021, activating the deduction of excess fees. The effect of the suspended Overdraft Facility, meant that there were insufficient funds in the account, as the overdraft was withdrawn and debit orders returned. Plaintiff submits that because there was still an amount of R70 701.00 outstanding, the default continued and excess fees and interest is still payable on the outstanding amount, until the date of settlement.

¹⁶ Paragraphs 28.5-28.13.

¹⁷ FICA.

[23] The failure by 1st defendant to submit the FICA documents, triggered the suspension of the overdraft facility, having the effect that plaintiff became entitled to charge excess fees and the full amount outstanding becoming due and payable, upon the act of default. Defendants argue that Annexure “RET6” was never received, as the address referred to on the letter is: Posbus 896, Grootbrak 6525. First defendant’s address on the face of Loan agreement (“RET4”) is President Boshofstraat 22, Bethlehem. Paragraph 16.3-16.4 of (“RET4”) reads:

“...a notice served on either party to this Agreement will have been properly served when it has been either delivered to that party or sent by registered mail to that last party’s last known address. Any notice between parties to this agreement shall *prima facie* be deemed to have been delivered on the day of hand delivery thereof or on the 4 (forth) day after posting of a pre-paid registered letter”

[24] The chosen *domicilia citandi et executandi*, in respect of the Overdraft (“RET5”) is President Boshofstraat 22, Bethlehem, whereas the address as reflected on (“RET6”) is Posbus 896, Grootbrakrivier, 6525. Counsel for the defendants argue that the address on (“RET6”) is not the chosen *domicilium* and even if one can deem delivery to have taken place after 4 days, the notice (“RET6”) is dated 3 February 2021, whereas the time period defendants is afforded to submit the FICA documents was until 5 February 2021. Therefore, in the absence of any evidence in the founding affidavit to show how (“RET6”) was delivered (received) by the defendant(s), the argument raised by defendants in this regard, is well founded.

[25] The defendants further pleaded¹⁸ that plaintiff has without any legal cause or justification unlawfully debited certain amounts¹⁹ in purported “excess fees” when the defendants had not, on the plaintiff’s own version, exceeded the Overdraft Facility. On the 8th of February 2021, the available credit “disappeared”, yet the bank continued to deduct the loan instalment of R36 3889.18 as can be gleamed from (amongst other) items 231 and 249²⁰, in addition to, excess fees, which according to the defendants were not permissible, as the facility was not overdrawn. As a result of the facility being

¹⁸ Paragraph 23 of defendant’s plea.

¹⁹ Paragraphs 23.1-23.9.

²⁰ Pages 171 and 172 of Index Bundle.

suspended, debit orders in respect of the Loan account were dishonoured as from 1 March 2021. To this extend, defendants referred this court to the cases of *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and another v Absa Ltd; Friedman v Standard Bank of SA Ltd*²¹ where it was stated that:

“discretion (to call up the overdraft facility) must be exercised in good faith and in a reasonable manner- *arbitrio boni viri*.”

- [26] The plaintiff correctly states²² that a claim cannot be regarded as one for a “liquidated amount in money” unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a ‘mere matter of calculation’. The data upon which the calculation is to be based must not contain room for uncertainty, estimation or debate.
- [27] In *casu*, this court is confronted with the submission as advanced by the defendants, that plaintiff’s calculation in arriving at the amount due and owing leaves room for uncertainty. This defence surely raises a triable issue.
- [28] The prayer²³ seeking an order to declare certain properties specially executable was not pursued by plaintiff in this application or argument and will this court not address any issues which stem from it.
- [29] The defence of “inducement” also do not warrant any further attention from this court, save to say that the court agrees with the submission made by plaintiff in this regard, that the defendants in their plea have admitted to the conclusion of the contracts and the suretyship agreements and the concomitant terms and conditions. This defence raised is without merit.
- [30] This court is mindful that the defendant(s) is not at this stage required to persuade the court of the correctness of the facts stated by it or, where the facts are disputed, that there is a preponderance of probabilities in its favour,²⁴ nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another.²⁵ The court merely considers whether the facts

²¹ 1999 (4) SA 928 (SCA) at para 25.

²² Paragraph 26 of the heads of argument.

²³ Paragraph 5 of POC.

²⁴ *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303-4.

²⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426.

alleged by the defendant(s) constitute a good defence in law and whether the defence appears to be *bona fide*.²⁶In order to enable the court to do this, the court must be appraised of the facts upon which the defendant(s) relies with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at trial to be correct, judgment should be given for the defendant(s).²⁷

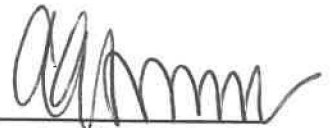
[31] It is the considered view of this court that the defences put up by the defendants, are *bona fide* and raises triable issues.

[32] In the result the following order is made:

[32.1] The application for Summary Judgment is refused.

[32.2] Leave is granted to the defendants to defend the action.

[32.3] Costs shall be costs in the cause.



A. AFRICA, AJ

APPEARANCES:

COUNSEL FOR THE PLAINTIFF:

Adv. Macakathi
Instructed by:
R Oosthuizen Attorneys

COUNSEL FOR 1st to 4th DEFENDANTS:

Adv. R Van der Merwe
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²⁶ Arend case *supra*.

²⁷ Maharaj case *supra*.