SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20063/2014

In the matter between:

SOUTH AFRICAN LAND ARRANGEMENTS CC **First Appellant**

GUIDO LOUIS MARC MARIEN **Second Appellant**

ANNE JOSEPHA LOUIS DELAET **Third Appellant**

and

NEDBANK LIMITED **Respondent**

Neutral citation: *South African Land Arrangements CC & Others* v *Nedbank LTD* (20063/2014) [2015] ZASCA 88 (29 May 2015).

Coram: **Mhlantla, Majiedt, Pillay and Mbha JJA and Van der Merwe AJA**
Heard: **05 May 2015**
Delivered: **29 May 2015**

Summary: Civil procedure–summary judgment–defence–counterclaim–reliance on agreement which never came into operation–not bona fide defence–summary judgment correctly granted.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Griesel and Samela JJ sitting as court of appeal):

1 The application for the postponement of the appeal is dismissed with costs on an attorney and client scale.
2 The appeal is dismissed with costs on an attorney and client scale.

JUDGMENT

Mhlantla JA (Majiedt, Pillay and Mbha JJA and Van Der Merwe AJJA concurring):

[1] This appeal, with special leave of this court, arises from summary judgment proceedings in the Magistrates' Court, Somerset West launched by Nedbank Limited (the bank) against South African Land Arrangements CC (the first appellant), Guido Louis Marc Marien and Anne Josepha Louis Delaet (the second and third appellants respectively). An appeal to the Western Cape Division of the High Court, Cape Town (per Griesel J and Samela J concurring) against the summary judgment granted in the magistrates' court, was dismissed. It is against this decision that the appellants appeal to this court.

[2] The appeal concerns two issues. First, whether leave to adduce further evidence in the form of a written agreement should be granted.

Second, whether the appellants have set out sufficient facts to establish a defence on the merits and in the form of a counterclaim. The background is set out hereafter.

[3] During July 2009 the bank concluded a loan agreement with the first appellant in terms of which the bank lent and advanced to the first appellant an amount of R1 250 000 on various terms. The bank also granted the first appellant an overdraft facility with a limit of R365 000 which was later increased to R667 000. A mortgage bond over the property of the first appellant was registered in favour of the bank. The second and the third appellants signed deeds of suretyship guaranteeing the first appellant's obligations to the bank.

[4] The first appellant defaulted with the repayment of the loan capital and exceeded the limit of the overdraft facility. As a result the bank instituted action in the magistrates' court, against the first appellant as principal debtor as well as against the second and third appellants in their capacities as sureties. The bank claimed an amount of R1190 590.27, being the balance on the loan, and R725 966.75 in respect of the overdraft facility. The appellants entered an appearance to defend.

[5] Upon the expiry of the dies, the bank applied for summary judgment. The appellants opposed this application. In their opposing affidavit, the appellants admitted that they were indebted to the bank but averred that the amounts were not yet due. They further alleged that they had a counterclaim which was in excess of the amounts claimed by the bank. The appellants' defence was that the facility agreement relied upon by the bank had been superseded by a credit restructuring agreement dated 28 June 2010 (the restructuring agreement). In terms of this

agreement, the first appellant would be replaced by another entity, Seasons Find 593 CC (Seasons Find), as principal debtor. Furthermore the appellants alleged that the bank had breached the terms of that agreement and that they had demanded from the bank payment of an amount of R2 800 000. In support of this allegation, a letter of demand which had been sent to the bank was annexed to the opposing affidavit. This was their counterclaim to the bank's claims.

[6] After the application was heard, the magistrate concluded that the appellants had no bona fide defence to the bank's claim and granted summary judgment. An appeal against the magistrate's decision was dismissed by the Western Cape Division of the High Court, Cape Town. Griesel J held that the restructuring agreement was subject to suspensive conditions and these had not been fulfilled. He concluded that that agreement never came into effect and therefore the appellants had failed to disclose a defence.

[7] In the circumstances that will be described later, the appeal in this court proceeded in the absence of the appellants' counsel after their application for the postponement of the appeal was dismissed with costs. In the result, this court when considering the issues in the appeal, had regard to the appellants' heads of argument which were filed on 6 October 2014.

[8] Regarding the first issue, the appellants in their heads of argument sought leave to adduce further evidence, in the form of the restructuring agreement. They contended that the said document was erroneously omitted and should have been attached to the affidavit opposing summary judgment. They further submitted that their legal representative had

referred to this agreement during the hearing of the summary judgment application and the magistrate had deprived them of an opportunity to tender this written agreement in evidence.

[9] Section 19 of the Superior Courts Act 10 of 2013 empowers a court on hearing an appeal to receive further evidence. It is incumbent upon an applicant for leave to adduce further evidence to satisfy the court that it was not owing to any remissness or negligence on his or her part that the evidence was not adduced at the trial[1].

[10] In this case, no application was launched for leave to present a supplementary affidavit to introduce the restructuring agreement. The appellants could have done so in the Magistrate's Court in terms of Rule 55[2]. Furthermore no proper application was launched in this court. Instead, the appellants raised this issue in their heads of argument. No explanation has been furnished for the failure to tender the document save to state that the restructuring agreement was erroneously omitted from the record. In my view, that explanation is insufficient and does not constitute exceptional circumstances. In the result, the application to adduce further evidence must fail.

[11] In my view, the granting of leave to adduce further evidence would, in any event, not have assisted the appellants in that the restructuring agreement relied upon was not signed by all the parties and it was subject to suspensive conditions or 'conditions precedent'. In this regard, the first appellant and Seasons Find were obliged to provide

[1] *De Aguiar* v *Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) at para 11.
[2] Rule 55 (1) (*a*) of the Magistrates' Courts Rules provides:
55 **Applications**
(1)(a) Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.'

various documents, amongst others; their financial statements, auditor's certificates, cession of certain insurance policies, suretyships by the second and third appellants as well as by a third party. Furthermore they were required to register a first covering bond over certain immovable property in favour of the bank. It is common cause that the suspensive conditions were never fulfilled, and that therefore the restructuring agreement never came into existence.

[12] This then brings me to the next question, that is, whether the appellants disclosed a bona fide defence and in particular whether their counterclaim can be regarded as a defence that is good in law. Rule 14 of the Magistrates' Courts Rules and which is similar to Uniform rule 32 of the Superior Courts enables the plaintiff to apply for summary judgment where the claim is:

(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of a specified movable property; or
(d) for ejectment,

together with any claim for interest and costs. The defendant, on the other hand, must set out a defence that is bona fide and good in law and also disclose fully the nature and grounds of his or her defence.

[13] The legal principles governing summary judgment proceedings are well-established. In *Maharaj* v *Barclays National Bank Ltd*, [3]Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment as follows:

'…[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide*

[3] *Maharaj* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 A-D.

defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (*a*) whether the defendant had "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (*b*) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. 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 particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence.'

[14] Regarding the remedy provided by summary judgment proceedings, Navsa JA said in *Joob Joob Investments (Pty) Ltd* v *Stocks Mavundla Zek Joint Venture*[4]:

'[31]…The summary judgment procedure was not intended to "shut a defendant out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. [32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary.'

[4] *Joob Joob Investments (Pty) Ltd* v *Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA).

[15] Where a counterclaim is put up as a defence, a full disclosure of the nature and the grounds of the counterclaim as well as the material facts upon which a defendant relies must be made in order for it to be successful in a defence[5].

[16] In this case the appellants relied on their counterclaim as a defence. They contended that the bank had breached the terms of the restructuring agreement in that it prevented the first appellant from accessing its available funds and that it closed all the banking facilities of Seasons Find in breach of the agreement. The appellant, however, did not provide any facts supporting the allegation of the breach.

[17] On the appellants' own version they admit that they are indebted to the bank. Furthermore on their own version they admit that the restructuring agreement never came into effect. This is so because that agreement was subject to suspensive conditions which were not fulfilled. It follows that an agreement that never came into effect cannot be breached. No reliance can be placed on this contract and the alleged breach thereof. The appellants' reliance on this non-existent contract is misplaced and the counterclaim falls away. In the result, the defence raised by the appellant is not bona fide. Therefore, I am satisfied that the court a quo was correct when it dismissed the appeal against the grant of summary judgment. The appeal falls to be dismissed.

[18] Insofar as the costs are concerned, counsel for the bank advised the court from the bar that clause 17 of the agreement concluded by the parties made provision that all legal costs shall be on an attorney and

[5] *Soil Fumigation Services Lowveld CC* v *Chemfit Technical Products* 2004 (6) SA 29 (SCA) at para 10.

client scale. An order to that effect will be made.

[19] It remains for me to deal with the issue of the application for the postponement of the appeal. The appeal in this court was heard on Tuesday 5 May 2015. On the day before the hearing of the appeal, the appellants filed an application for a postponement of the appeal. This application was supported by an affidavit deposed to by the second appellant. The bank opposed the application. After considering argument the application was dismissed with costs. Mr Lubbe, who represented the appellants, excused himself from the proceedings stating that he held no instructions with regard to the appeal. As previously indicated, the appeal thereafter proceeded in the absence of appellants' representative.

[20] It is apposite at this stage to consider the principles governing the grant or refusal of postponements. In *National Police Service Union & others* v *Minister of Safety and Security & others*, [6] Mokgoro J held that a postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the court and must show that there is good cause for the postponement. The applicant must furnish a full and satisfactory explanation of the circumstances that gave rise to the application. Lastly, whether a postponement will be granted is in the discretion of the court and cannot be secured by mere agreement between the parties.

[21] In *McCarthy Retail* v *Shortdistance Carriers CC*, [7]Schutz JA said:

'A party opposing an application to postpone an appeal has a procedural right that the appeal should proceed on the appointed day. It is also in the public interest that there

[6] *National Police Service Union & others* v *Minister of Safety and Security & others* 2000 (4) SA 1110 (CC) at 1112C-F.
[7] *McCarthy Retail Ltd* v *Shortdistance Carriers CC* [2001] 3 All SA 482 (A) para 28.

should be an end to litigation. Accordingly in order for an applicant for a postponement to succeed, he must show a "good and strong reason" for the grant of such relief…'

[22] The Constitutional Court restated these principles in *Lekolwane & another* v *Minister of Justice and Development,*[8] where it held:

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest.'

[23] In this matter, the application for a postponement was filed in court on the eve of the hearing of the appeal. The second appellant furnished an explanation that their advocate had returned his brief on 21 April 2015 and their attorney, Mr Osborne, had withdrawn on 28 April 2015 after he was not successful in engaging new counsel to argue the appeal on short notice. The second appellant, however, failed to take the court into his confidence and set out the steps he took to obtain the services of new attorney and counsel, nor did he provide the reason for Mr Osborne's withdrawal, who continued to act for the appellants in other matters before the high court. Regarding counsel's withdrawal, the second appellant merely stated that counsel who previously attended to the matter was involved in a dispute with Mr Osborne. It is worth mentioning

[8] *Lekolwane & another* v *Minister of Justice and Constitutional Development* 2007(3) BCLR 280 (CC) para 17.

that the notice of withdrawal prepared by the attorney stated that the appellants had terminated the mandate. This explanation differs from the explanation provided by the second appellant under oath.

[24] In the result the applicant has failed to provide a full and satisfactory explanation of the circumstances that gave rise to the application. The application on this ground alone had to fail.

[25] In addition to the abovementioned factor it became clear to the court that the appellants had no intention of proceeding with the appeal in view of their responses to the respondent when the issue of a postponement was raised between the parties. In this regard it is apposite to refer to the decision of Harms JA in *Take and Save Trading CC & others* v *Standard Bank of SA Ltd*, [9] where he said:

'A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.'

[26] This is precisely what transpired in this case. The second appellant raised every possible excuse in an attempt to have the appeal postponed. He initially relied on the withdrawal of their legal representatives. When

[9] *Take and Save Trading CC & others* v *Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at para 3.

he was advised that he could engage another team of legal representatives from Cape Town or Bloemfontein, he responded that there was insufficient time to do that. When it was then brought to his attention that he, as a member of the first appellant, could represent it and himself, he furnished a bizarre explanation that the first appellant had since April 2015 been converted into a company and since directors were not allowed to appear on behalf of companies, he could not attend court. There is however no confirmation from the Registrar of the Companies and Intellectual Property Commission of the first appellant's conversion. Regarding his appearance, he stated that he had to appear in the court a quo in respect of other applications (this turned out to be interlocutory applications where his presence was not required). Strangely enough, Mr Osborne who had withdrawn in this matter, was representing the appellants in those applications. The third appellant, in her affidavit, deposed that she was ill and annexed a doctor's certificate dated 28 April 2015. Curiously, the diagnosis was that she suffered from general anxiety disorder and that she should not be exposed to any form of stress or to appear before any court. It is clear that the appellants tried every trick in the book to get the appeal to be postponed.

[27] On the other hand, the interests of the bank had to be considered. The bank would be severely prejudiced by the postponement as it would not obtain final determination of its claim and payment of a debt that has been outstanding since 2011.

[28] It was for these reasons why the postponement was refused. For purposes of completeness, I intend to include an order in respect of the appellants' application for a postponement.

[29] Consequently, I make the following order:

1 The application for the postponement of the appeal is dismissed with costs on an attorney and client scale.
2 The appeal is dismissed with costs on an attorney and client scale.

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JUDGE OF APPEAL

APPEARANCES:

For Appellant:	E L Lubbe
Instructed by:	Thomas Wilks Inc
	Stellenbosch
	c/o Van Pletzen Lambrechts Attorney
	Bloemfontein
For Respondent:	C W Kruger
Instructed by:	Van der Spuy Attorneys
	Cape Town
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