

# SUMMARY OF THE JUDGMENT

## DEBTOR IN DEFAULT: DELAY TACTICS WON'T WORK

### De Villiers v Human and Another (236/2016) [2016] ZAECGHC 85 (22 September 2016)

*It is most infuriating for a lender to be met with a borrower's lame or bogus defence when payment becomes due. A strong weapon in the hands of a creditor is to invoke the summary judgment procedure promptly after the debtor indicates his intention to defend the claim. Summary judgment is a unique procedure where a court may grant a final order against a debtor in a defended action without having to go to trial. The judgment here illustrates the workings of this mechanism.*

The Judgment can be viewed [here](#).

### FACTS

De Villiers and Mr and Mrs Human concluded an oral agreement during May 2013, the terms of which were that De Villiers would lend them R1,3 million and that this capital amount would be repaid in full on or before 31 August 2013. Initially the capital amount would attract interest at the rate of 12% per year but, failing which, a different rate of interest would accrue.

The Humans failed to comply and De Villiers instituted an action against them. To his papers he attached a "certificate of balance" which set out the amount owing and interest applicable until 31 August, as well as increased interest that applied in respect of the debt after this date.

The Humans filed an appearance to defend which prompted De Villiers to apply for summary judgment, contending that the appearance to defend was delivered solely for purposes of delay as, so De Villiers contended, the Humans had no *bona fide* defence against the action. (A summary judgment procedure generally aims to prevent abuse of the court process by a defendant who has no defence to a claim. The plaintiff gets the right to apply to the court for summary judgment, i.e. judgment granted without a full trial, after the defendant enters appearance to defend the plaintiff's claim. As it is a far-reaching remedy, the requirements the plaintiff must meet are strict and it is only available in certain circumstances, including where the claim is based on a signed, unconditional, written acknowledgment of indebtedness in specific amounts of money (liquid document).)

The Humans contended that they had a *bona fide* defence. They however also raised a preliminary point, namely that the certificate of value purported to be an original liquid document, yet the claim was founded on an oral agreement. According to the Humans, this could give rise to the inference that De Villiers' claim was founded upon a liquid

document.

De Villiers responded that it was clear from the Humans' response that they understood the case against them and were not prejudiced by the impression created that the claim was based on a liquid document. De Villiers in any event then abandoned a claim to interest calculated at a higher rate than 12% per year. (The Humans never disputed that it was agreed that the capital would attract 12% interest per year.)

As regards the *bona fide* defence, the Humans argued that the oral agreement was subsequently varied to provide that the date of repayment would be the date of sale of a property they owned. The sale and transfer of the property had not taken place and therefore the amount owing to De Villiers was not yet due, owing and/or payable.

**HELD:**

***The preliminary question***

- De Villiers' abandonment of any claim to interest calculated at a higher rate than 12% meant that he did not rely on the certificate of balance. The certificate in the present matter mainly dealt with (contested) increases in the interest rate if the monies were not repaid on the due date. The preliminary issue thus fell away.

***The bona fide defence***

- Summary judgment applications are governed by Rule 32 of the Uniform Rules of Court which provide that:

*"32 Summary judgment*

*(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-*

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

*together with any claim for interest and costs.*

*(2) The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary*

*judgment shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof.*

*(3) Upon the hearing of an application for summary judgment the defendant may-*  
*(a) give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given, or*  
*(b) satisfy the court by affidavit ... or ... by oral evidence ... 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."*

- The facts showed that as far as the capital amount was concerned as well as the rate of interest agreed upon in May 2015, namely 12% per year, there was no dispute between the parties.
- In resisting an application for summary judgment, a defendant must fully disclose the nature and grounds of the defence and the material facts on which it is based. The defendant must depose to facts which, if accepted as the truth or proved at the trial, would constitute a defence to the plaintiff's claim. This is because of the nature of the summary judgment procedure which procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. Therefore the defence so disclosed must be both *bona fide* and good in law, and a "court that is satisfied that this threshold has been crossed is then bound to refuse summary judgment."
- Have the Humans crossed the threshold referred to above? It appeared not. The allegation by the Humans that the agreement was varied did not contain enough particulars or details to satisfy the standard set for a defence in a summary judgment application. The Humans did not state, for example, when, where, in whose presence and under what circumstances the terms of the contract were varied or did not furnish any other material facts to the Court other than a bald statement that their agreement was subsequently verbally varied.
- It was also strange that De Villiers would persist in demanding payment from the Humans knowing that there was a variation of the agreement and knowing, as the Humans contended, that the property in question had not been sold yet and why this was so. In any event, it could not be assumed that the fact that De Villiers was aware of the difficulties encountered by the Humans in selling the property meant that he acquiesced or agreed to the moving of the goal posts as far as the payment due date was concerned.

The Humans thus did not comply with the provisions of Rule 32(3)(b) and judgment was granted in favour of De Villiers.

#### CONTACT US

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