

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22948/2013

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

ABSA BANK LTD

Applicant

and

VAN WYK, DEON

Respondent

J U D G M E N T

MASHILE, J:

[1] The parties entered into a loan agreement which was subsequently secured by the registration of a mortgage bond over the Respondent's immovable property being PORTION 1 OF ERF 250 BEDFORDVIEW

EXTENSION 68 TOWNSHIP. When the Respondent experienced financial difficulties the parties agreed to enter into what they called a “Help-You-Stay” agreement whose main objective was to reduce the monthly instalments by 50%. The reduced instalments would however escalate at 10% every 6th month until the Respondent had financially recovered such that he could revert to his normal monthly instalments as per the mortgage bond.

[2] The Respondent defaulted with his instalments under the new arrangement prompting the Applicant to institute an action against him claiming:

- 2.1 Payment of the sum of R2,609,570.88;
- 2.2 Interest on the sum of R2,609,570.88 at the rate of 8.50% per annum calculated and capitalised monthly in arrears, from 04 JUNE 2013 to date of payment, both dates inclusive;
- 2.3 An order declaring certain PORTION 1 OF ERF 250 BEDFORDVIEW EXTENSION 68 TOWNSHIP, REGISTRATION DIVISION I.R., PROVINCE OF GAUTENG, MEASURING 1761 (ONE THOUSAND SEVEN HUNDRED AND SIXTY ONE) SQUARE METRES, Held under Deed of Transfer T50825/07 specially executable;

2.4 An order authorizing the Registrar of the above Honourable Court to issue a Writ of Attachment in respect of the Respondent's immovable property; and

2.5 Costs to be taxed on the attorney and client scale.

[3] The Respondent defended the action and the Applicant, believing that the Respondent was defending solely to delay the matter, launched this summary judgment application. The Respondent has raised lack of personal knowledge of the deponent to the Applicant's affidavit in support of summary judgment as a point in *limine*. On the merits, he asserts that the loan agreement and the mortgage bond by which it was secured were novated by the "Help-You-Stay" agreement. It is under that novated agreement that the Respondent maintains that he is not in arrears with his instalments.

[4] I have noted that notwithstanding that the answering affidavit makes no reference to a point in *limine*, Counsel for the Respondent has nonetheless raised it in his heads. Counsel for the Applicant too has despite noting that the point was not taken in the Respondent's papers addressed it regardless. I do not intend to dwell on the point in *limine* as I do not want to be detained with matters that were not raised in the founding papers.

THE DEPONENT'S LACK OF KNOWLEDGE TO SWEAR POSITIVELY TO THE FACTS, TO VERIFY THE CAUSE OF ACTION AND AMOUNT CLAIMED

[5] With the plethora of recent cases on the subject holding that a corporate employee in the same situation as *in casu* has personal knowledge and can swear positively to the facts, I am inclined to regard this defence as frivolous and of course an abuse of the court processes especially regard being had to the manner in which it was raised.

[6] Ms Sabashnee Naidoo states in her affidavit that:

“The facts stated herein set out fall within my personal knowledge and are true and correct.

I am a secured home loans recoveries manager in the retail bank collections department of the plaintiff. In my capacity as such I presently manage the Defendant’s account with the plaintiff and have direct control over the plaintiff’s files and computer records pertaining to the defendant’s account.

I can and do positively swear to the facts set out in the plaintiff’s summons. I also hereby verify the plaintiff’s cause of action and confirm that the defendant is indebted to the plaintiff in the amount claimed and on the grounds stated in the plaintiff’s summons.”

[7] Firstly, Counsel for the Applicant referred to the case of *First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd & Another* 2009 (3) SA 384 (GSJ) Satchwell J considered a similar defence. She dealt with the deponent’s position at work, his responsibilities, his possession of personal knowledge and that he could swear positively to the facts and concluded:

“He is indeed pre-eminently the person who would have knowledge of the relevant facts. It may well be that the ‘relationship managers’ with whom the second respondent dealt created or accessed that same records and documentation to which the deponent had access and upon which he relied in deposing to the affidavit.”

See also *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A) to which Counsel for the Applicant referred this court, and *Firststrand Bank Ltd v Ego Specialised Services CC* 2012 JDR 0057 (GSJ). In view of those cases I find that the Respondent's defence is devoid of any merit and it is accordingly rejected.

THE RESPONDENT HAS COMPLIED WITH ITS OBLIGATIONS UNDER THE NOVATED AGREEMENT

[8] I turn now to the Respondent's defence on the merits, which is in short as stated above. The Respondent's contention is in essence that the original loan agreement and mortgage bond which secured it have been novated. This is despite the express provisions of the parties in Clause 8.4 of the "Help-You-Stay" agreement to the contrary. Clause 8.4 of the "Help-You-Stay" agreement provides:

"No addition to, variation, novation or agreed cancellation of any provision of this agreement shall be binding upon the parties unless reduced to writing and signed by or on behalf of all the parties."

[9] Although the attached "Help-You-Stay" agreement is signed only by the Respondent, the Applicant admits having concluded it with the respondent. That it is signed by one party is therefore of no consequence to its validity and applicability.

[10] The Respondent relies on Clause 8.4, its ousting of intention to novate notwithstanding. The presence of the clause unequivocally demonstrates that the parties never intended that the “Help-You-Stay” agreement should be a novation. If intention is central to voluntary novation, the Respondent’s contention to the opposite stands to be dismissed.

[11] I note that Counsel for the Applicant has conscientiously dealt with this giddy defence, which in my opinion he should not have done. I say so in view of the clear intention of the parties as articulated in the “Help-You-Stay” agreement. I will therefore not go to great lengths to elaborate on novation. It should suffice to state that the Respondent’s reliance on that agreement is totally untenable and must be rejected. Even if one were to accept that the securities have been novated, the Respondent, as will be seen below, has dismally failed to demonstrate that he has effected payment as agreed.

[12] The Respondent also makes a bald allegation that he has been paying as contemplated in the “Help-You-Stay” agreement yet he fails to illustrate to this court why he is in arrears in the amount cited by the Applicant in its papers. He does not for a moment even attempt to challenge the Applicant’s calculations by putting forward the total amount that he has paid.

[13] Obviously, if the Applicant’s claim is that it did not receive the money, one would have expected the Respondent to confute that contention by possibly showing an account into which it deposited the agreed monthly instalments. It is inexorable to conclude that the Respondent is indeed in

arrears when one has regard to the obscure manner in which he deals with his payments. Clause 3.1.4 of the “Help-You-Stay” agreement provides:

“If the debtors fail to comply with this agreement in full the full monthly instalment due under the credit agreement shall immediately be due, owing and payable and the Bank may, amongst other rights that it may have, immediately proceed to sell one or more of the properties, either as provided for in Clause 4 or through a sale in execution.”

[14] The presence of the acceleration clause makes it clear that the intention of the parties was not to replace the original securities but rather to assist the Respondent to recover financially so that he could revert to his original monthly instalments. A default by the Respondent under this agreement entitles the Applicant to invoke the provisions of the original mortgage bond by allowing it to claim the whole amount due thereunder.

[15] In the result the application for summary judgment succeeds and I make the following order:

1. Summary judgment is granted; and
2. The Respondent to pay costs as at the scale between attorney and client

**B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

COUNSEL FOR THE Applicant: Adv. J A Swanepoel

INSTRUCTED BY: Smit Sewgoolam Inc. Attorneys

COUNSEL FOR THE Respondent: Adv. H P Van Nieuwenhuizen

INSTRUCTED BY: Spencer Tarr Malan Geyer Inc.

DATE OF hearing: 26 November 2013

Date of judgment: 06 May 2014