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REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 01796/2015

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

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DATE

.....
SIGNATURE

In the matter between:

ABSA BANK LIMITED

Plaintiff

And

BOBBY & KEITH HOLDINGS (PTY) LTD

Defendant

J U D G M E N T

FISHER AJ:

[1] This is an application for summary judgment.

[2] The Plaintiff claims payment of the sum of R343 917.50, being in respect of moneys lent and advanced by the Plaintiff to the Defendant and secured by a mortgage bond over the Defendant's immovable property. It claims furthermore that the property be declared executable for the amount owing.

[3] The Plaintiff pleads that, on 15 March 2001, the Plaintiff and the Defendant entered into a written loan agreement under account number [8.....] in terms of which a capital amount of R 500 000 was lent and advanced to the Defendant.

[4] The Plaintiff pleads further that the original loan agreement became lost at the Plaintiffs National Securities and Bond Centre and that after a diligent search it has been unable to find the original or a copy of the loan agreement.

[5] The Plaintiff attaches to its particulars of claim a copy of what it alleges to be the standard form of its loan agreement together with hard copies of documents, which are alleged to set out information captured on the Plaintiff's computer system and which relate to the loan agreement entered into with the Defendant. The allegation is essentially that the standard terms and the information on the computer system (which allegedly discloses all information which would have formed part of the loan agreement, such as the capital amount lent, the instalments payable, the interest rate and the like) evidences the terms of the contractual relationship

between the parties. The Plaintiff also attaches the relevant mortgage bond to the particulars of claim. It bears mention that, in terms of the loan agreement pleaded, the terms of the mortgage bond are to be read together with the terms of the loan agreement and the mortgage bond itself makes provision for an acceleration of the indebtedness under the loan agreement in the event of default. The mortgage bond furthermore provides that, in the event of any conflict with its provisions and the loan agreement, the provisions of the mortgage bond will prevail.

[6] The Plaintiff's case is that the Defendant has fallen into arrears under the loan agreement. The Defendant is alleged to have been 6 months in arrears as at the date of issue of the summons, being 21 January 2015.

[7] The Defendant filed an affidavit in opposition to the summary judgment. The following emerges therefrom:

1. it does not dispute that it entered into a mortgage loan agreement with the Plaintiff and that the mortgage bond was registered over the property pursuant to the entering into of the loan agreement;
2. it does not dispute that the capital amount was advanced under the loan agreement;
3. it admits that that the Plaintiff has lost the loan agreement;

4. it does not dispute that there are arrears owing under the loan agreement (although it makes a vague allegation that the arrears owing “are less”);
5. it contends that the loan agreement concluded is “*unique*” and differs from the standard loan agreement annexed;
6. all that is stated in relation to the alleged unique nature of the agreement is the following:

“In this regard, I wish to bring the Court’s attention that the Applicant does not state in its documents that the agreement that it concluded with the Respondent incorporates a flexi reserve agreement.”

7. it alleges that it is prejudiced by the Plaintiff’s inability to produce the loan agreement concluded.

[8] The Defendant appears to contend that the fact that the loan agreement is not available means, of itself, that the Plaintiff must fail. In this it is not correct. There is no substantive rule that a party to a written contract is precluded from enforcing the contract merely because it has been lost or destroyed. (See **ABSA Bank Limited v Zalvest 20 (Pty) Ltd** 2014 (4) SA 119 (WCC) at paras [2] to [9]).

[9] Where a loan agreement has been lost and cannot be found despite a diligent

search, the party who relies on the contract can adduce secondary evidence of its conclusion and terms. Such party is not unsuited simply because of its inability to annex the agreement to its particulars' of claim.

[10] In the matter of **ABSA Bank Limited v Jenzen; ABSA Bank Limited v Grobbelaar** (Gauteng Local Division case numbers 2014/877 and 2014/7728) Sutherland J dealt with two summary judgment applications where the loan agreements were lost in each instance. (The applications were similar to one another and are similar to this application). It was found in both cases that summary judgment should be refused because of specific defences raised in relation to each. However, the learned Judge went on to hold as follows:

"In my view, it would be inappropriate to pre-judge the merits of the defendant's allegations and the plaintiff should extricate itself from its regrettable predicament on trial not by way of summary judgment. This finding should not be construed to mean that I take the view that merely because the fundamental document is unattached to a claim, whether by summons or by application, that summary judgment is not feasible. The decision in each case will be determined by the import of the allegations made by a defendant to question the version of the plaintiff about the terms of the agreement alleged by the plaintiff. Where such challenges are susceptible to rebuttal on the papers, or demonstrated not be bona fide, the remedy of summary judgment remains available". (Emphasis added)

[11] Accordingly, the mere fact that the agreement is lost does not preclude the Plaintiff from seeking and obtaining summary judgment. It is the *bona fides* of the defences raised that must be tested in all instances.

[12] In the matter of **Oos-Randse Bantoesake Administrasie v Santam (2)** 1978 (1) SA 164 at 171H, Coleman J had the following to say in relation to the obligations of a defendant in a summary judgment application in demonstrating that he has a *bona fide* defence :

“What is required of him is not a great deal. But he must lay enough before the Court to persuade it that he has the genuine desire and intention of adducing, at the trial, evidence of facts which, if proved, would constitute a valid defence. In order to achieve that degree of persuasiveness the defendant must do more than assert his intention to establish his defence by evidence at the trial. He must place on affidavit enough of his evidence to convince the Court that the necessary testimony is available to him, and that, if it is accepted, it will constitute a defence. That applies even if the onus of negating the defence will ultimately rest upon the plaintiff as, for example, in a case where the plaintiff is claiming enforcement of a contract, and the defence is a denial that such a contract was concluded.”

[13] The case made out in the opposing affidavit amounts to no more than a complaint about the inability to annex a copy of the loan agreement (which, it is common cause between the parties, is lost) and that the contract concluded between the parties differs from the standard contract annexed on the basis that it incorporates “a *flexi reserve agreement*” which was not disclosed.

[14] I have dealt with the first complaint above. In relation to the second, reference to the standard documents annexed reveals the existence of provisions dubbed “*flexi reserve terms and conditions*” which form part of the loan agreement.

Accordingly it is not correct that these provisions have not been disclosed by the Plaintiff. These provisions are essentially in the nature of what is commonly termed an “*access bond*”. They allow a borrower during the course of the loan agreement the option to access further amounts during the life of the loan agreement by agreement between the parties. The Defendant does not state that this option was ever taken up nor what impact this would have had on the agreement between the parties. (It must be said that would presumably make the position of the Defendant in relation to its indebtedness more onerous if it had made further withdrawals under this option.) In any event, the mere reference to this flexi reserve agreement does not suffice to make out a defence.

[15] In relation to the vague assertion that the arrears “*are less*” – the fact that no detail whatsoever is given means that the Defendant again does not meet the requirement of *bona fides*. The Defendant, had it made payments which were not taken account of, should have been in a position to set out details relating to such payments or at least explain why it was unable to do this.

[16] To my mind the Defendant has not gone any way to establishing that there are defences available to it at trial.

[17] One final point requires to be dealt with: the Defendant makes reference to the fact that an earlier court process in relation to the indebtedness was issued in the North Gauteng High Court, but that this action was withdrawn. It appears that, in that matter, there was a postponement granted to allow the Plaintiff to supplement

the papers with a copy of the loan agreement. The point is made by the Defendant that, instead of complying with the court order, the Plaintiff withdrew the matter. This assertion, apart from the fact that it does not constitute a defence in the matter, misconstrues the order of the North Gauteng High Court. Such order does not enjoin the Plaintiff to retrieve the loan agreement from the quarters mentioned therein, it merely affords an opportunity for supplementing the papers.

[18] The Defendant has not established any basis as to why execution against the mortgaged property should not follow in the ordinary course.

[19] The agreement pleaded makes provision for costs to be awarded on the scale as between attorney and client.

[20] In all the circumstances I grant summary judgment as follows:

1. Payment of the amount of R343 917.50.
2. Interest on the aforesaid amount at the rate of 9.25% per annum calculated and capitalised monthly in arrears, from 6 January 2015 to date of payment.
3. An order declaring the following property specially executable:

The Remaining Extent of Portion 1..... (a portion of Portion 1) of

the Farm [K.....] [5.....], Registration Division IQ, province of Gauteng, measuring 2,0852 hectares held under deed of transfer [T6.....]

4. An order authorising the Registrar of this Court to issue a writ of attachment in respect of the property.
5. Costs on the scale as between attorney and client.

DC FISHER

Acting Judge of the High Court

APPEARANCES:

For the Plaintiff:

Adv JA Swanepoel, instructed by Smit Sewgoolam Inc

(Tel: 011 646 0006; Ref: JE/KH/LS/MAT 19654)

For the Defendant:

Adv NS Petla, instructed by Motalane Attorneys

(Tel: 011 655 7108; Ref: Mr L Motalane: B7KHOLD/04/15)

DATE OF HEARING

27 May 2015

DATE OF JUDGMENT

23 June 2015