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

CASE NO: 42242/14

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
.....	
DATE	SIGNATURE

In the matter between:

NEDBANK LIMITED

Applicant

And

**CHRISTOFFEL ANDRIES SCHOEMAN N.O.
IN HIS CAPACITY AS THE TRUSTEE OF
THE MALUTI TRUST**

First Respondent

CHRISTOFFEL ANDRIES SCHOEMAN

Second Respondent

JUDGMENT

KRIEGLER AJ:

1. The applicant is a registered bank and credit provider in terms of the company and banking laws of South Africa, and in terms of the National Credit Act 34 of 2005 (NCA).
2. It claims an order against the respondents jointly and severally as follows:
for payment of the sum of R2 549 615,89; interest on that sum at 7.35% per annum from 31 August 2014 to date of payment; declaring specially executable immovable residential property described as Erf 1..., N....., Ext 1.. Township, Gauteng at 9 W... Street N...., Ext 19 (the property); authorising the registrar of this court to issue a warrant of execution for the attachment of the property; and attorney and client costs.
3. The second respondent, Mr Schoeman, is a businessman and attorney. He is cited as the first respondent in his capacity as trustee of the Maluti Trust (the trust) with its place of business and chosen *domicilium citandi et executandi* as Office 1..., L.... A..... C....., corner R.... and C.... D....., N..... Mr Schoeman is cited as the second respondent in his personal capacity, as surety and co-principal debtor for the trust's indebtedness to the bank. The trust owns the property. The property's address – 9 Winterberg Street – is the second respondent's chosen *domicilium citandi et executandi* and his primary residence.

4. The bank's claims against the trust rely on two written loan agreements, each incorporated into a first and second mortgage bonds registered in its favour by the trust over the property. The bank relies on a manager's certificate of balance and on bank statements to establish the existence and amount of the indebtedness claimed under both loan agreements and mortgage bonds.
5. Mr Schoeman deposed to the respondents' opposing affidavits in his personal capacity and as (sole) trustee for the trust. He admits the trust entered into the first loan agreement with the bank concluded on 11 March 2005; that it was concluded on the further terms of a "mortgage loan agreement" concluded on 13 July 2005; that he represented the trust in so doing; that the first mortgage bond was registered over the property; and that the bank advanced to the trust the amounts of R1 692 000.00 and R169 200.00 during July 2005 under the first loan agreement.
6. According to the bank, the second loan amount and mortgage bond were entered into on 19 November 2007 and 3 January 2008 respectively; under the second loan agreement, as in respect of the first loan agreement and first bond the trust registered, a second mortgage bond was registered over the property in favour of the bank and the trust (still represented by Mr Schoeman) acknowledged its indebtedness to the bank in the sum of R1 305 130.00, plus a further sum of R327 000.00, repayable by the trust

in monthly instalments commencing on the first day of the month within 30 days after the day of the month in which the monies were advanced; and that these sums were duly advanced under the second loan agreement and mortgage bond to the trust in January 2008.

7. The bank contends more specifically, based on a certificate of balance, that the trust's bond account (a single consolidated account in respect of both bonds and both loan agreements) was in arrears immediately before these proceedings were commenced in the amount of R101 320.57, and that the full balance due, owing and payable by the trust under both loan agreements at the time was R2 549 615.89, plus interest on the amount at the rate of 7.35% per annum (as agreed in both loan agreements) calculated and capitalised monthly in advance from 31 August 2014, which despite due demand the trust has failed to pay.
8. Mr Schoeman denies any liability to the trust under the first loan and bond, alleging the loan advanced has been "fully paid up"; he denies the second loan agreement was concluded at all, including his signature on it; he denies any moneys were advanced under (the disputed) second loan agreement; he denies a second bond was registered over the property; he denies his signature on the suretyship and (on that basis alone) denies ever binding himself as surety or co-principal debtor for or on behalf of the trust for any of the amounts claimed. Mr Schoeman further challenges the

certificate of balance on the basis that it contains a mistake; he nevertheless alleges the same mistake indicates that the bank “may” have ceded (“securitised”) the trust’s indebtedness to another entity, depriving the bank of its locus standi in these proceedings. Mr Schoeman further denies receiving any notice in terms of s 129 of the NCA of the bank’s claims; and he alleges the credit was recklessly extended to the trust in terms of the NCA, claiming the bank in fact performed no risk assessment on the trust as consumer.

9. The respondents claim in the circumstances there are “genuine” disputes on these “material” aspects of the applicant’s case, “raised in good faith” which they submit cannot be adjudicated by way of motion and must therefore be referred to trial, or justify a dismissal of the application with costs.

10. In *National Director of Public Prosecutions v Zuma*¹ Harms DP said:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant’s ... affidavits, which have been admitted by the respondent ... , together with the facts alleged by the latter, justifies such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably

¹ (2009) 2 SA 277 (SCA) 290 par [26]

implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers ...”

11. I examine each of the disputes with these principles in mind.

SECTION 129 OF THE NCA

12. Mr Schoeman selected as the trust’s *domicilium citandi et executandi* under the first mortgage bond, the address of the mortgaged property and his home address, 9 W..... S....., N..... Ext. 1..... Under the (disputed) second mortgage bond Mr Schoeman chose Office 1....., L.... A.... C.... N... for this purpose on behalf of the trust. As his personal *domicilium citandi et executandi* under the (disputed) suretyship Mr Schoeman again chose 9 W..... Street – that is, his residential address and the same address he had chosen under the first mortgage bond for the trust. To avoid confusion and out of caution the bank caused notices in terms of s 129 to be sent (by pre-paid registered mail and by sheriff) to Mr Schoeman in both capacities, to both these addresses.

13. The applicant’s notice of motion was served by sheriff on the trust at Office 101, Los Arcos Centre address and on Mr Schoeman in his personal capacity at his residence at the 9 W..... Street address. A notice of intention to oppose the application was served on 24 February 2015 on behalf of both respondents, represented by the same attorneys. Copies of the original notices were attached to the founding affidavit, containing all

relevant detail about service and about the claims against both respondents. Therefore, even if the original notices did not come to Mr Schoeman's attention, he nevertheless received the s 129 notices, in his personal capacity and in his representative capacity, at the very latest when the notice of motion was served on him and on the trust at the "correct" addresses, on his.

14. The bank as credit provider must make averments that satisfy me on a balance of probabilities² that the s 129 notices reached the trust and the second respondent. Whether or not the notice actually came to the attention of "either" respondent when they were first sent (by registered post and by the sheriff) need not be decided – though it is overwhelmingly probable that those notices did come Mr Schoeman's attention – since the notices indisputably reached the respondents and plainly came to Mr Schoeman's attention (in both capacities) when the notice of motion attaching copies of the original notices were served on him.³

15. The respondents request that the matter be adjourned in terms of s 130(4)(b) of the NCA and that I set out steps which the applicant must take before the matter may resume. I see no need to do so in the present circumstances. As I have said, the original notices came to Mr Schoeman's attention at the latest when the notice of motion was

² *Sebola and Another v Standard Bank of South Africa Limited and Another* (2012) 5 SA 142 (CC) [74]

³ *SA Taxi Development Finance (Pty) Ltd v Phalafala* (2013) JDR 0688 (GSJ) per Van Eeden AJ par 9.

served on him. In any event, Mr Schoeman says nothing about how the respondents may have been prejudiced by allegedly not receiving the notices at the outset or since, or how they might have act if they had received the notice and therefore how an adjournment under s 130(4)(b) might assist.⁴

16. The entire challenge under s 129 of the NCA therefore has no merit.

THE CERTIFICATE OF BALANCE: *LOCUS STANDI* AND PROOF OF DEBT

17. As I have said, the respondents claim any indebtedness reflected in the certificate of balance has or may have been ceded, and that the bank therefore has no *locus standi*. They further claim that first loan advanced has been paid up, they deny the entire second loan agreement, they deny any second bond over the property, they deny that any amount was advanced under any further loan agreement and they ultimately deny owing any amount under the trust's bond (home loan) account. The respondents make each of these claims and raise each of these factual disputes by asserting that the certificate of balance contains a mistake and is therefore not sufficiently reliable as proof of any indebtedness. Yet they rely on the same certificate as a *prima facie* indication that any debt owing to the bank was ceded to a third party.

⁴ *Phalafala* pars [10] and [11]; and see *ABSA Bank Limited v Petersen* (2013) 1 SA 481 (WCC) per Binns-Ward J at par 25

18. The idea that the debt may have been ceded stems from a single reference to “*Greenhouse Funding (Pty) Limited*” in the certificate of balance. The respondents speculate that this may indicate a cession or securitisation of the debt by the bank to Greenhouse. Confronted by this challenge the bank explained in its replying affidavit the reference to Greenhouse in the certificate was an inconsequential mistake and, out of caution, the bank produced and attached another “fresh” certificate, confirming and updating the first.
19. There is no substance to the respondents’ challenge to the first certificate nor do they have any answer to the “fresh” certificate. Both complied with all the prerequisites for a valid certificate of balance stipulated in the loan agreements and in the suretyship. The reference in the first certificate to Greenhouse appears opposite the words “*Institution Name*”. Nothing further is stated in the certificate about Greenhouse or about the “*Institution*”. On their own and seen in context these references to Greenhouse as institution have no apparent meaning or significance. And whatever else they might mean or imply, it certainly does not state or imply that the debt described in the certificate has or might have been ceded or “securitised” to any entity, let alone to Greenhouse. Quite the contrary must in my view be inferred. The certificate is printed on a Nedbank letter head, and signed by a manager of Nedbank’s “Mortgage, Collections and Recoveries” division. Immediately below the line item and

words “*Institution Name: Greenhouse Funding (Pty) Limited*” appears the following unambiguous statement:

“The above mentioned bond holder [correctly identified as ‘Maluti Trust IT 12386/96’] is indebted to the Bank in terms of a loan secured by a mortgage bond for: bond account no. 8... ..”

20. There can in this light be no real question that the words “*the Bank*” refer to the applicant, and that the debt is therefore owing to the bank and not to Greenhouse. The certificate on its plain terms therefore confirms the indebtedness of the stated amount (R2 549 615.89 plus interest at the agreed interest rate) by the trust to the bank, as the manager of “*Mortgage Collections and Recoveries*” intended (according to the deponent to the founding affidavit) to confirm for purposes of the present application.
21. Mr Schoeman in my view grasps at an apparent, fully explained and inconsequential mistake to indulge in “*pure speculation*” as Eksteen J recently described a similarly misdirected challenge to a certificate of balance in *Thompson v Investec Bank Limited*⁵. In that case the creditor bank produced direct evidence, uncontradicted by the respondent, that the agreements had in fact not been securitised or ceded. In this case the creditor bank likewise produced direct evidence in its founding papers, uncontradicted by the respondent, that the agreements had in fact not been securitised or ceded in confirming:

⁵ At 69, unreported case number 846/2010 ECLD HC dated 1 July 2014

“Neither the bond nor the loan agreement have been ceded or endorsed in terms of any securitisation agreement nor has the Applicant’s rights in terms thereof been ceded, compromised or surrendered in any way or manner whatsoever, in favour of any Third Party.”

22. Mr Schoeman “*vehemently*” denies these allegations, saying the mistake “*makes this Certificate of Balance suspect as this implies that securitisation has in fact occurred.*” In the apt words of the learned judge in *Thompson*, Mr Schoeman’s reasoning similarly “*involves a considerable leap of logic*”, particularly in the face of the bank’s direct evidence that in fact the debt was not ceded or securitised.
23. That disposes of the respondent’s challenge to the bank’s locus standi. And if the certificate does provide *prima facie* proof of the existence and amount of the trust’s indebtedness to the bank, it potentially also disposes of the respondents’ challenges in that regard. However, each issue concerning the existence and amount of the indebtedness must further be considered in its own context.
24. The respondents bear the onus to prove the indebtedness under the first loan and mortgage bond was fully paid up.⁶ The basis on which the bank relies on a certificate to prove the contrary, and to prove all aspects of the debt and the amount owing, is contractual. The mortgage bond and suretyship provide that the certificate will be regarded as *prima facie*

⁶ *Pillay v Krishna* (1946) AD 946 at 958

evidence or proof of the existence and amount of the indebtedness which of course includes the identity of the debtor to the stated creditor – in this instance, the bank. But the bank has gone further by producing a second certificate of balance, also duly signed and in all other respects in accordance with its requirements under the suretyship and the loan agreements.

25. In the bank's supplementary replying affidavit a senior "*Legal Manageress*" employed by the bank in its home loans litigation department introduced copies of all the trust's bank statements under its home loan account, from its inception up to and including November 2015. The statements confirm that on 13 July 2005 an amount of R1 693 402.00 was advanced to the trust; that the amount has not been paid up as the Mr Schoeman alleges; that on 19 December 2007 a further amount of R1 300 000.00 was advanced to the trust, matching precisely the second advance alleged by the bank under the second loan agreement and mortgage bond; and that the total amount claimed as at the relevant date remained outstanding and owing by the trust to the bank under the same account.

26. The respondents have not rebutted the *prima facie* proof represented by either of the two certificates of balance. Either therefore serves as conclusive evidence for purposes of these proceedings.⁷
27. The bank has gone well beyond the certificate and produced credible and uncontradicted evidence confirming the correctness of the certificate and thereby established the amount of the indebtedness, the nature of the debt (arising from a loan agreement), in relation to the correct debtor (the trust) owing to the bank and to no other potential creditor.
28. I am satisfied that the statements on their own establish that the amount due and owing by the trust to the bank as at 29 October 2015 on the bond account and was R2 792 443.00 (at the agreed rate of interest), which includes sufficient proof that the first loan advanced was not paid up. I am further satisfied, based in the certificates and the statements, or on either certificate, that the trust is liable for these amounts to the bank and that according to the first and second loan agreements, the trust is liable for the bank's costs of these proceedings at the scale as between attorney and client costs.
29. No issue is raised over whether I might or should exercise my discretion against the bank by not declaring the property especially executable or by

⁷ See *Senekal v Trust Bank of Africa Limited* (1978) 3 SA 375 (A); and see *Veltsman and Other v Standard Bank of SA Limited* [2004] All SA 704 (E)

not authorising the registrar to issue a warrant of execution for the attachment of the property. The bank has provided satisfactory grounds, based on undisputed facts, which in my view warrant an order to such effect.

RECKLESS CREDIT

30. Mr Schoeman is an attorney and businessman. As counsel for the bank submitted, it is fair to assume he would have understood the risks, costs and obligations involved in accepting the credit on the terms of the loan agreement, on behalf of the trust. Counsel for the bank further submitted, correctly, that no facts or relevant circumstances are stated by Mr Schoeman in support of his claim that the loan agreements ought to be declared reckless in terms of s 80 of the NCA. The respondents bear the onus to prove that allegation.⁸ They were required to set out, with sufficient particularity, facts about the negotiations leading to the conclusion of the agreement, about the parties involved in the negotiations, and the relevant details of any credit application signed by or on behalf of the debtor should have been disclosed.⁹ I agree with counsel for the bank that the respondents have set out no facts, let alone sufficiently detailed facts, to sustain any aspect of this defence.

⁸ Scholtz *et al*, *Guide to the National Credit Act* par 11.5.7

⁹ Ibid.

31. Counsel for the respondents readily and properly conceded in argument that Mr Schoeman's entire reckless credit defence contradicts and is mutually destructive of Mr Schoeman's denial of the entire second loan agreement and mortgage bond. I therefore cannot attach any weight to Mr Schoeman's evidence on any issue not supported by any other evidence.
32. The only relevant assertion by Mr Schoeman in this regard was that the bank in fact performed no risk assessment. The bank however in reply established this claim to be clearly untrue. The bank did so by attaching a printed home loan application form, completed by Mr Schoeman himself on behalf of the trust. The further credit extended under the second loan agreement was approved and advanced on the basis of this application for further credit, and the financial and other information pertinent to the assessment of risk provided in it by Mr Schoeman. The application form includes a statement of the trust's assets and liabilities, including a declaration by Mr Schoeman that the mortgaged property (described as his primary residence) at 9 W..... Street at the time was worth R4,5 million – as it happens, far exceeding the bank's present claims. The application form also reveals that the further credit sought was in the precise amount (R1,3 million) which shortly thereafter was advanced under the second loan agreement. Mr Schoeman did not seek to challenge any of this

evidence and counsel for the respondents, quite properly, offered no explanation for it either.

SURETYSHIP

33. It is against the backdrop of such clearly untenable evidence by Mr Schoeman that I assess his claim that the signature on the suretyship plainly purporting to his signature, is not his. I also assess that version on its inherent probabilities and by further considering it is entirely unsupported, in circumstances calling for substantiation from the respondents.

34. The denial is inherently improbable. It was a condition under both mortgage bonds that the trust's debts be secured by personal suretyship. (The first mortgage bond is admitted; the dispute raised over the very existence of the second bond is so untenable that it may be considered plainly false – not least because the bank and the notary under whose hand the bond was ostensibly registered would on that version be implicated in a fraud.) As a condition to both bonds one would therefore reasonably expect a suretyship to exist in favour of the bank by some surety. The second respondent is the only trustee of the trust. He applied for the loans on behalf of the trust. The loans are secured by bonds registered over the property which is his primary residence at an address which Mr Schoeman furnished as his own chosen domicile. It is overwhelmingly probable – as

the suretyship on which the bank relies reflects – that Mr Schoeman himself would have stood surety in respects of the trust’s debt. And if he did not stand surety for the debt, or if no-one did so, Mr Schoeman should have personal knowledge as to whether anyone else or no-one had done so. Yet Mr Schoeman provides no such evidence or context that might explain why the bank would (or whether it did) forego such security altogether or who else might have stood surety. In denying his signature on the suretyship Mr Schoeman effectively imputes a fraud of some kind to the bank – there is no potentially innocent explanation for a signature purporting to be his appearing on the document. One would expect such a far-reaching assertion to be based on something more than a bald claim that it is not his signature.

35. I cannot accept Mr Schoeman’s version. I therefore find he did bind himself as surety and co-principal debtor to the trust, on the terms alleged by the applicant.

CONCLUSION

36. On my assessment the second respondent’s version on each of the issues which the respondents say must be referred to trial “*consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably*

implausible, far-fetched” and is “*so clearly untenable that the court is justified in rejecting ... [it] ... merely on the papers.*”¹⁰

37. I am satisfied in relation to each such issue that the respondents have raised no *bona fide* dispute and that each of their defences may and should be rejected on the papers.

38. I make the following order:

A. The first respondent and the second respondent are ordered jointly and severally, the one paying the other to be absolved –

(a) to pay to the applicant the sum of R2 549 615.89;

(b) to pay interest on such sum to the applicant at the rate of 7.35% per annum calculated and capitalised monthly in advance from 31 August 2014 to the date of payment.

B. The immovable property, Erf 1....., N....., Ext 1... Township, Registration Division IQ, Province of Gauteng, measuring 1 396 (one thousand three hundred and ninety six) square meters, held by Deed of Transfer No. T1....., situate at 9 W..... Street, N..... Ext. 1..., mortgaged under mortgage bond no. B..... and B..... is declared specially executable for the sum and interest thereon set out in paragraph A of this order and for the costs set out in paragraph D of this order.

¹⁰ *National Director of Public Prosecutions v Zuma*, *ibid.*

- C. The Registrar is authorised to issue a warrant of execution for the attachment of the property described in paragraph B of this order.
- D. The first and second respondents are jointly and severally liable to pay the applicant's attorney and client costs.

MA KRIEGLER
ACTING JUDGE OF THE HIGH
COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION,
JOHANNESBURG)

APPEARANCES:

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