

REPUBLIC OF SOUTH AFRICA



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

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

CASE NO: 24597/2017

.....
DATE SIGNATURE

In the matter between:

FIRST RAND BANK LIMITED

APPLICANT

and

**THE TRUSTEES FOR THE TIME-BEING OF THE
GORAN FAMILY TRUST** (IT3206/1993)

JOHANNES JACOBUS BADENHORST, NO

FIRST RESPONDENT

QUINTON ROWAN O'NEAL, NO

SECOND RESPONDENT

JUDGMENT

DREYER AJ:

[1] This is an application for a money judgment in the sum of R793 330,63, together with accrued interest from 1 July 2017 to date of payment, and an order that the immovable property, Erf [...], Randpark Rif Ext. 45 Township, Registration Division IQ, Province of Gauteng, situate at [...] Street, Randpark Ridge Ext. 45, be declared specially executable.

[2] In the course of August 1999, Saambou National Building Society ("Saambou") entered into a written loan agreement ("the first loan agreement"), with the duly authorised then trustee of the Goran Family Trust ("the Trust"), and loaned and advanced the sum of R387 000,00 to the Trust, together with an additional amount of R77 400,00, as continuing further security. It was a suspensive condition of the grant of the loan that a first mortgage bond would be registered over the property. This was effected on 9 September 1999.

[3] A further loan agreement was concluded between Saambou and the duly authorised representative of the Trust on 1 November 1999 for the sum of R207 000,00, which second loan was to be secured by a second mortgage bond registered over the property. The second mortgage bond was registered on 11 November 1999.

[4] These facts are common cause

[5] The Applicant ("First Rand") pleads that it *"was deemed to have entered into the first loan agreement with the trust in terms of section 54(3)(c) of the Banks Act, 94 of 1999 in that Saambou changed its name to First Rand Financial Company Limited on 28 August 2006 and whereafter First Rand Bank Limited, the Applicant, took transfer of the assets and liabilities of First Rand Finance Company on 1 March*

2009 with the consent of the Minister of Finance in terms of Section 54(1) of the Banks Act". It is, similarly, pleaded that First Rand was deemed to have entered the second loan agreement with the Trust on the same basis.

[6] The Respondents dispute that First Rand has the necessary *locus standi* to launch these proceedings as in a prior action instituted before this Court under case number 8902/2011, (which action has subsequently been withdrawn), the entity that instituted the action was Secured Mortgages (Pty) Ltd. In these earlier proceedings, Secured Mortgages (Pty) Ltd pleaded that Saambou had, an out and out cession, ceded its rights under the mortgage bond to it.

[7] In reply, First Rand states firstly that the Respondents are confused by the cession of the mortgage bond, which took place on 14 February 2002, where rights under the loan and mortgage bonds were ceded to Secured Mortgages Two (Pty) Ltd; secondly, that Secured Mortgages Two (Pty) Ltd, though an independent company, was run as a division of First Rand; thirdly that on 15 January 2014, the loans and mortgage bonds previously held by Secured Mortgages Two (Pty) Ltd, were ceded to First Rand, who is currently the only entity entitled to enforce the rights in terms of the loan agreement and the mortgage bonds.

[8] This is the first time that First Rand contends that there has been a cession, of the rights under the loan and mortgage bond to it.

[9] In argument, counsel for First Rand brought to my attention that both mortgage bonds had been endorsed by cessions, which it was argued was evidence that a cession had taken place. The first mortgage bond endorsement is found on p. 42 of the pages and the second at p. 67. These endorsements indicate a first

cession from Saambou to Secured Mortgages Two (Pty) Ltd on 14 February 2002 and a second cession to First Rand Bank Ltd on 15 January 2014. This, it was argued, was sufficient evidence of the cession, though not specifically pleaded and should be accepted by the Court.

[10] Counsel for the Respondents argued that First Rand's case, as pleaded, was at odds with the endorsement of the mortgage bond and that this did not evidence a legal basis, properly pleaded, that a cession of rights had occurred.

[11] The contentions in the founding affidavit are at odds with that in the replying affidavit. A cause of action founded on cession (contended for in the replying affidavit and in argument) is in stark contrast to one founded on a transfer of assets and liabilities in terms of a sale of business (contended for in the founding affidavit).

[12] It is trite that a party relying on a cession must allege and prove the contract of cession.¹

[13] First Rand has not pertinently pleaded the cession, nor has it provided proof of the contract of cession. What First Rand relies on, is the consequence of the cession, namely the endorsement of the mortgage bond, a public document. There is no evidence apparent in the affidavits filed of, record of a regular and valid cession, as required, to sustain a cause of action reliant on a cession.²

¹ **Leaf NO v Dettmann** 1964(2) SA 252 (A); and
Johnson v INC General Insurance Ltd 1983(1) SA 318 (A)

² **Hippo Quarries Tvl (Pty) Ltd v Eardley** 1992(1) SA 867 (A), at 873

[14] The Respondents do not dispute the endorsement; they merely dispute that the endorsement in and of itself is proof of the cession to clothe First Rand with the necessary *locus standi*. I agree.

[15] But for the question of *locus standi* of First Rand, I would have granted First Rand the relief it seeks as there was no real dispute on the papers in respect of the Respondents' indebtedness to the Applicant. In so far as the question of executability is concerned, I would have been bound by the decision of **First Rand Bank Ltd v Folscher and Another** and similar matters³ that the words "*judgment debtor*" refers to natural persons only and excludes legal persons and trusts. The property, would consequently fall to be declared executable.

[16] In the result, I make the following order:

1. *The application to strike out is dismissed;*
2. *The application is dismissed with costs.*

C.J. DREYER

Acting Judge of the High Court of
South Africa
Gauteng Local Division
Johannesburg

APPEARANCES:

Date of hearing: 21 August 2019

Date of judgment: 23 August 2019

³ 2011(4) SA 314 GP

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Instructed by:

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