

REPUBLIC OF SOUTH AFRICA



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

Case No: 020142/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

Date: 7/06/2023

In the matter between:

MASHORO PHASHA

First Plaintiff

MBALI DHLAMINI

Second Plaintiff

-and-

KGOSILTSILE AARON MOSWEU

First Defendant

BOITUMELO VICTORIA MOSWEU

Second Defendant

ABSA BANK SOUTH AFRICA LTD

Third Defendant

Neutral Citation: *Mashoro Phasha and Other v Kgosiltsile Aaron Mosweu and Others*
(Case no: 020142/2022) [2023] ZAGPJHC 654 (07 June 2023)

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 07 June 2023

JUDGMENT

INGRID OPPERMAN J

[1] The Third Defendant (ABSA) has taken exception to Claim 2 of the Plaintiffs' particulars of claim on the grounds that it fails to disclose a cause of action against ABSA.

[2] The cause of action against ABSA is founded upon a breach of a mortgage loan agreement¹ concluded between the Plaintiffs and ABSA. They contend that ABSA:

'failed to attend to the valuation of the property, breaching the mortgage bond with the result that a much higher bond was granted in favour of the Plaintiff'.

[3] The Plaintiffs have not relied on a particular clause which places an obligation on ABSA to value the property. This, ABSA argues, is so because clause 12.1 of the mortgage loan agreement provides the exact opposite. It reads:

'[Absa's] valuation of the Property is solely for [Absa] to determine the value of the security for [the Plaintiffs'] Mortgage Loan. [Absa's] Assessors may not have physically inspected the Property and have not assessed the condition of the Property, structural or otherwise. The valuation is not intended to be an indication of the present or future value of the Property and may not be the same as the purchase price.'

[4] Thus, even if ABSA did value the property the Plaintiffs would not have been able to rely on it because it was not intended to be an indication of the value of the property. The Plaintiffs argue that ABSA had a duty to attend to the valuation of the property as this was necessary for the Plaintiffs to obtain property insurance based on

¹ Paragraphs 16 and 17 of the particulars of claim.

the replacement value of the property. The Plaintiffs rely on clause 15.1 which provides:

‘Until you have paid off your Mortgage Loan you agree to maintain:

- Credit life Insurance, if required, for an amount not less than the outstanding balance on your Account;
- Property Insurance for all risks against which such property is normally insured, for an amount of not less than full replacement value of the buildings and improvements on the Property. Our estimate of the full replacement value is provided in your Quotation.’

[5] The reference to an ‘estimate of the full replacement value’ is precisely that, an estimate. It is not a valuation. To infer from these clauses that a valuation had to be performed is an untenable interpretation. At best for Plaintiffs, they had an estimate provided in the quotation for the replacement value that they could not rely on for market value even if it had been provided. It will be remembered that the Plaintiff’s complaint is that ABSA ‘failed to attend to the valuation of the property’.

[6] The Plaintiffs contend that it is an implied term of the mortgage loan agreement that ABSA would provide it with a market related valuation. An implied term is one which is read into an agreement by operation of law. There is no law which imports a term having this effect. Therefore, I will assume that what was meant is that there is a tacit term to be found which could avail the Plaintiffs. A tacit term is tested for by means of the officious bystander test. A tacit term cannot be found to exist in a contract if the tacit term contended for is at variance with the express provisions of the written agreement. Was there a term that ABSA would provide Plaintiffs with a market valuation?

[7] The express wording provides that ABSA’s valuation is not intended to be an indication of the present or future value of the property. The tacit term sought to be introduced would read: The valuation represents the present or future value of the

property. These propositions are diametrically opposed. No amount of admissible evidence can cure the position at trial on the pleadings as they stand.

[8] It is clear from the express wording that the parties agreed that the valuation does not serve as a representation of the present or future market value of the property. The parties regulated this feature by agreement and any evidence sought to be introduced to contradict the express provisions of clause 12.1 would be inadmissible.

[9] During argument much emphasis was placed on the estimate provided in ABSA's quotation. But the 3rd bullet point of paragraph 1 of the quotation specifically provides:

‘The property to be mortgaged is to be insured for not less than the full asset value (replacement value) of the property as it may change from time to time. We encourage you to seek external advice on the value provided. The current estimated full asset value is R2 685 700, 00.’ (Emphasis provided)

[10] Our courts have, in the absence of a clause such as 12.1, found that the representations relied upon (or risks taken) by the Plaintiffs in this case, lie between seller and purchaser and not between credit grantor and credit receiver.² Thus, even in the absence of clause 12.1, no cause of action would lie.

[11] The Plaintiffs seek the following relief against ABSA: the cancellation of the current registered mortgage loan and the registration of a new bond for the actual value. This relief might conceivably have been competent had the Plaintiffs relied on a delictual cause of action but they have not. Their cause of action is contractual and as such, for the moment, they would be limited to contractual damages which they have not sought.

² *Absa Bank Limited v Kganakga*, 2016 JDR 0664 (GJ)

[12] In conclusion I find that the Plaintiffs have a defective cause of action against ABSA but assuming it is competent (which I have already found it is not), it does not support the relief claimed against ABSA.

[13] I thus conclude that on every interpretation that the particulars of claim can reasonably bear and on every possible construction of the particulars of claim as a whole, no cause of action as against ABSA is disclosed.³

[14] Which brings me to the costs: ABSA argues for a punitive costs order on the basis that prior to noting its exception, ABSA's representatives afforded the Plaintiffs the opportunity to withdraw the claim against ABSA and thereby avoid the costs of the exception and further litigation. This invitation and its rejection are noted in the exception.

[15] There was no obligation to accept the invitation. The Plaintiffs' case was based on what I have found was an untenable interpretation of the agreement, but litigants get interpretations wrong every day. The cause of action against ABSA is manifestly ill-founded. The awarding of costs is a matter of judicial discretion to be exercised having regard to all the facts of the case. Punitive costs are not only awarded to penalise dishonesty or mala fides or where a party has committed a grave or blameworthy transgression in the conduct of the case. It can also be awarded where a litigant was forewarned and invited to withdraw the claim and warned that a punitive costs order will be sought. I do not consider that the Plaintiffs' erroneous interpretation is deserving of a punitive costs order.

[16] I accordingly grant the following order:

1. The Third Defendant's (ABSA's) exception to the Plaintiffs' particulars of claim is upheld with costs which costs are to be paid jointly and severally, the one paying the other to be absolved.

³³ *Vermeulen v Goose Valley Investments (Pty) Ltd*, 2001 (3) SA 976 (SCA) at 997B; *CW v GT* (867/2021) [2023] ZASCA 23 (13 March 2023) at para [9]

2. The Plaintiffs' claim (claim 2) as against the Third Defendant (ABSA) is set aside, and the Plaintiffs are afforded a period of 15 (fifteen) days within which to amend claim 2, if they so wish, failing which their action against ABSA shall be deemed dismissed and they shall pay the costs of the action against ABSA jointly and severally, the one paying the other to be absolved.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Counsel for the Excipient (3rd Defendant): Adv R Scholtz

Instructed by: Lowndes Dlamini Incorporated

Counsel for the Respondents (Plaintiffs): Adv K.T Kgole

Instructed by: MG Law Incorporated

Date of hearing: 22 May 2023

Date of Judgment: 7 June 2023