

**IN THE HIGH COURT OF SOUTH AFRICA**

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 725/2010  
Date heard: 11 May 2010  
Date delivered: 15 June 2010

In the matter between:

**ABSA BANK LIMITED**

Applicant

and

**JOHANNES ADOLF FERREIRA**

First Respondent

**ANDRIES JACOBUS FERREIRA**

Second Respondent

**BARENDINA FERREIRA**

Third Respondent

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**J U D G M E N T**

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**DAMBUZA, J:**

[1] This is an application for summary judgment against the second and third respondents. These respondents are sued in the summons as sureties by virtue of deeds of suretyship signed by them.

[2] In the summons the applicant pleads that the amount of R912,498.10 which is the balance of the principal debt due by the first respondent, is in respect of moneys loaned and advanced by it to the first respondent and was secured under mortgage bond number BZ70411/2007.

- [3] In opposing the application for summary judgment, the second and third respondents contend that the summons is excipiable and that this constitutes a complete defence to the applicant's claim. In this regard paragraph 1 of the particulars set out in the summons provides that the sum claimed is **"the balance of the principal debt together with finance charges thereon in respect of moneys loaned and advanced by plaintiff to first defendant at the latter's special instance and request"**. Further in the summons the applicant alleges that, **"the aforesaid sum now being due and payable in terms of mortgage bond B70411 of 2007, by reason of the first defendant's failure to pay either punctually or at all the instalments which fell due under the said bond, notwithstanding demand and the amount and interest claimed being certified"** (my emphasis).
- [4] The second and third respondents' contention in this regard is that the amount claimed does not arise from the mortgage bond as set out in the summons, but from the loan agreement which is a credit agreement in terms of the National Credit Act, Act No. 34 of 2005 ("the Act"). It was submitted therefore on behalf of these respondents that in this respect the particulars provided are vague and embarrassing in that the applicant relies on a mortgage bond to establish the cause of action, when the bond only secures the moneys loaned.

[5] A further contention by the second and third respondents is that as the contracts of suretyship upon which the applicant relies constitute a credit guarantee as defined in section 1 of the Act read with section 4(1) and 4(2)(c) and section 8(5), the suretyship contract is a credit agreement in terms of the Act. Consequently, so the argument goes, the applicant was obliged to comply with the provisions of the Act applicable to credit agreements, including conducting an assessment of the credit recipient as required by section 81(2) of the Act. The respondents contend that the applicant failed to conduct such an assessment in respect of the loan agreement which is the subject of these proceedings. In particular, the contention is that the applicant failed to first take reasonable steps to assess the respondents with regard to the following:

- (a) Their general understanding and appreciation of the risks and costs of the proposed credit and their rights and obligations under the suretyship agreement.
- (b) Their debt repayment history as consumers under credit agreements
- (c) Their existing financial needs, prospects and obligations, and
- (d) Whether there is a reasonable basis to conclude that any commercial purpose may prove successful if the first

respondent had such a purpose when applying for the credit agreement.

[6] Apart from copies of the mortgage bond, other documents attached to the summons include the suretyship contracts executed by the second and third respondents, notices to all three respondents in terms of section 129 of the Act and a certificate of balance issued by the applicant. On the face of the suretyship contracts, it appears that they were signed by the respondents on 27 September 2001, prior to the Act coming into effect. It was submitted on behalf of the respondents that although, ordinarily, the applicant would not have been under any obligation to comply with the terms of the Act, it not having been in place when the suretyship contracts were concluded, when the loan agreement was revised or the terms thereof revisited, the applicant was obliged to reassess all other agreements ancillary to the loan agreement and in respect of which the Act applies.

[7] It is trite that a Court hearing an application for summary judgment in terms of Rule 32 of the Rules of Court, has a discretion to refuse or grant summary judgment. One of the relevant factors in the exercise of such discretion is the extraordinary and stringent nature of the remedy accorded to an applicant by Rule 32. It is therefore when there is no reasonable doubt about the applicant's claim that the application should be acceded to.<sup>1</sup> On the other hand it has been held

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<sup>1</sup> Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition at 445.

that the discretion should be exercised, not capriciously or on the basis of mere conjecture or speculation so as to deprive an applicant of his remedy of summary judgment when he is entitled to it. The Court must consider the material before it as to whether it appears that a reasonable possibility exists that an injustice may be done if judgment is so granted.<sup>2</sup> Summary judgment proceedings are inappropriate for dealing with clearly arguable questions of law that should be properly dealt with on exception. If, however, a case can be decided on a crisp point of law, there is no reason why the point should not be determined in an application for summary judgment.<sup>3</sup>

- [8] Regarding the first defence raised by the respondents my view is that the cause of action is clearly set out in the particulars to the summons. I am of the view that the respondents would be able to plead to the summons. The fact that the applicant later in the same particulars refers to the amount owed being **“due and payable in terms of mortgage bond”** does not render the summons vague and embarrassing. While it is true that the main cause of the respondents’ indebtedness to the applicant is the loan agreement, that cause of indebtedness is repeated in the portion referred to as the **“acknowledgment of debt”** in the mortgage bond securing the loan. In that **“acknowledgment of debt”** it is stated that mortgagor is truly and lawfully held to be bound in favour of the bank (applicant) in the sum of R1 million Rand. The mortgage bond also provides that the

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<sup>2</sup> Herbstein & Van Winsen *supra* at 445.

<sup>3</sup> Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa, 5<sup>th</sup> Edition Vol 1 at 540-541.

mortgagor shall repay all amounts owing by him to the applicant which are secured under the bond in accordance with **the provisions of such written agreement or agreements as have been concluded**, which in my view, would include the loan agreement. Consequently while the loan agreement is, on its own, a complete document which embodies the cause of the respondents' indebtedness to the applicant, the mortgage bond is an "**extension**" thereof and I am not persuaded that any embarrassment or confusion arises as a result of reference to the repayment being due in terms of the mortgage bond. I therefore would not dismiss the application for the reason that the summons is vague and embarrassing.

- [9] Regarding the contention that the applicant failed to comply with the terms of section 81(2) of the Act, whilst the suretyship agreements were concluded in September 2001, it appears from the mortgage bond that it was registered on 26 July 2007. It seems to me that the argument on behalf of the respondents that at the time the moneys secured under the mortgage bond were advanced to the respondents, the terms of the Act were applicable, merits consideration. Although it is not stated in the bond when the amount of R1 million Rand was advanced to the respondent, the fact that the mortgage bond was registered only in 2007 raised questions as to when the debt secured in terms of the mortgage bond arose, and whether the terms of the Act are (not) applicable to the suretyship agreements which secure the debt. In my view, the respondents have raised a legal issue regarding

compliance with the terms of the National Credit Act and it would not be proper for this Court to decide such an issue in summary judgment proceedings.

[10] Consequently, I make the following order:

- (a) Summary judgment is refused.
- (b) The respondents are given leave to defend.
- (c) Costs of the application are to be costs in the cause.

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**N. DAMBUZA**  
**JUDGE OF THE HIGH COURT**

Appearances:

For the applicant: Adv A Beyleveld SC instructed by McWilliams & Elliott Inc Attorneys of Port Elizabeth.

For the second and third respondents: Adv J Nepgen instructed by De Villiers Inc Attorneys of Port Elizabeth