IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 3483/10
Date Heard: 01 February 2011
Date Delivered: 17 March 2011

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

JOHANNES JACOBUS MEYER First Defendant

FRANCINA MEYER Second Defendant

JUDGMENT

EKSTEEN J:

[1] This is an application for summary judgment. On 18 November 2010 the plaintiff issued summons against the defendants, who were married to each other in community of property, based on four credit agreements, in terms of which agreements sums of money were lent and advanced to the defendants. The agreements were entered into in 1983, 2004, 2005 and 2006 respectively. The total outstanding amount claimed is R154 337,41 together with interest thereon. Each of the loans was secured by a mortgage bond registered over the same immovable property, being Erf 186, Despatch (the property) for the due fulfilment by the defendants of their obligations.

[2] In the summons the plaintiff seeks judgment in respect of the above stated

capital sum and seeks a further order that the property bonded as security for the due fulfilment by the defendants of their obligations be declared executable. The plaintiff alleges that the parties concluded the four credit agreements in the total sum of R158 500, each agreement being secured by the registration of a bond over the property. The agreements were ultimately consolidated into one loan. Defendants have failed to honour their obligations in terms of the consolidated agreement in that they fell into arrears as a result of which, the plaintiff contends that in terms of the agreements, the full amount outstanding has now become due and payable.

[3] It is common cause that at some stage prior to the issue of summons the defendants applied under the National Credit Act, No. 34 of 2005 ("the NCA") for debt review in terms of section 86 of the NCA. The application was successful and the defendants' debts were restructured by an order made in terms of section 87 of the NCA. Plaintiff alleges that notwithstanding the successful debt review the defendants were in default of the court order restructuring their liabilities and that they had failed to make payments in accordance with the restructured payment plan.

[4] In the affidavit resisting summary judgment the defendants raised two defences *in limine* in terms of the NCA. Firstly, the defendants set out their restructuring order and contend that they have consistently complied with the obligations under the restructuring order. Secondly, the defendants contend that no notice had been received prior to the issue of summons herein as envisaged in section 129 of the NCA. When the matter was called before me Ms **Beneke**, on behalf of the defendants, acknowledged that on a proper reading of the papers

placed before the court the defendants were indeed in default of their obligations under the restructuring order. In these circumstances it was acknowledged that it was not necessary for the plaintiff to have given notice in terms of section 129 of the NCA. The defences raised in terms of the NCA were accordingly abandoned, correctly in my view.

[5] Ms **Beneke** raised three arguments. Firstly, it is argued that a substantive defence has been set out in the papers and accordingly the defendants should be granted leave to defend. Secondly, in the event of my holding that a substantive defence has not been made out Ms **Beneke** argues that the deponent to the summary judgment application, *ex facie* his affidavit, does not have personal knowledge of the facts which are alleged in the summons. On this basis I am urged to dismiss the application. Thirdly, in the event of my not upholding either of the first two arguments Ms **Beneke** has urged me to exercise my discretion under the new amended Rule 46 of the Uniform Rules of Court and to refuse to declare the property executable.

[6] The first defence was argued somewhat tentatively and is easily dealt with. In the matter of ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*** 2009 (5) SA 1 (SCA) at 11G-12D the Supreme Court of Appeal considered the procedure of summary judgment and stated as follows:

> "The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a

> sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor."

It is therefore required of a defendant seeking to resist summary judgment to disclose the nature and the grounds of his defence with sufficient detail and clarity to satisfy the court of the *bona fides* of the defence. In addition he must set out facts which, if proved at the trial, would constitute a defence good in law.

[7] The foundation for the argument raised on behalf of the defendants, in this matter is to be found in the fact that one of the original loans was extended by Saambou Bank and one of the bonds was registered in favour of Saambou Bank. The defendants allege as follows:

> "Saambou Bank was placed under curatorship during February 2002 and First National acquired their home loan book at the same time.
>
> It was subsequently reported that Saambou Bank had overcharged its clients and the First National Bank persisted with the practice.
>
> First National Bank subsequently started a process of recalculation (of) clients interest from April 1989 to 19 June 2006.

> As is evident from my Saambou Bank bond, attached as SJA 57 and further to the applicant's papers, my bond was in existence during the period in question as my bond was registered on 28 April 1983.
>
> I, through my son, lodge a query to have my account recalculated. To date I still await feedback on this issue.
>
> In view of the above I oppose the content of the balance certificate …"

[8] The plaintiff has alleged in the summons that it acquired the rights of Saambou National Bank by way of cession.

[9] It may be seen from the manner in which the defence is set out in the opposing affidavit that the high-water mark of the defence set out is that it has been "reported" that Saambou Bank had "overcharged its clients". Defendants rely for this averment on an article by one Bianca Capazorio published on 13 January 2011 in "SA Reporter". Nothing is stated of the standing of either the author or the publication. No facts are put up which may suggest that the repayments on the defendants' loan was or may have been effected by such malpractice and no basis for their subjective suspicion is alleged. I am of the view that if everything which has been alleged in the opposing affidavit were to be proved at the trial it would not constitute a *bona fide* defence good in law.

[10] The second argument, as I have stated, is that the deponent to the founding affidavit does not have personal knowledge of the events to which he deposes.

[11] This argument may be swiftly dealt with. The deponent in the founding

affidavit declares as follows:

> "1. I am an adult male in the employ of the Plaintiff herein as Operations Manager Arrears – Legal, and I am duly authorised to depose to this affidavit. All the records of the Plaintiff relating to this action are under my control, and I have personally inspected same, and accordingly I can and do swear positively to the facts set out in the Affidavit and Summons."

[12] In reply this paragraph is admitted. On the papers it is accordingly common cause that the deponent to the summary judgment application can swear positively to the facts set out in the summons.

[13] Notwithstanding the admission I shall assume for purposes of this judgment that it remains open to the defendants to raise the argument.

[14] Where the plaintiff is an artificial person, as in the present case, it cannot itself make an affidavit and the facts must be deposed to by "some other person or persons" if need be. In ***Barclays National Bank Ltd v Love*** 1975 (2) SA 514 (D) at 515H-517B Miller J concluded that the manager of a bank would by virtue of his/her office have personal knowledge of the extent to which a client had overdrawn his/her account and would be entitled to rely upon the bank's records in that regard. This approach was approved in ***Maharaj's*** case. Facts of which the deponents to affidavits in support of summary judgment should have knowledge are the facts on which the cause of action is based, namely those facts in the Particulars of Claim or

summons, as the case may be. It is not expected of the deponent to the summary judgment application to have personal knowledge of facts upon which the defendant might seek to base a defence, real or bogus, additional to or extraneous to the facts on which the cause of action is based. (See ***Barclays Western Bank Ltd v Bill Jonker Factory Services(Pty) Ltd and Another*** 1980 (1) SA 929 (SE) at 937A-B.)

[15] In ***Standard Bank of South Africa Ltd v Secatsa Investments*** (***Pty) Ltd and Others*** 1999 (4) SA 229 (CPD) Van Heerden AJ, as she then was, stated as follows:

> "It is clear from the case law that first hand knowledge of every fact which goes to make up the plaintiff's cause of action is not required and that, where the plaintiff is a corporate entity, the deponent may well legitimately rely for his/her personal knowledge of at least certain of the relevant facts and his/her ability to swear positively to such facts, on records in the companies possession."

[16] In the present case deponent to the summary judgment affidavit, Mr Freeborough, is the Operations Manager, Arrears – Legal in the plaintiff bank. He records that all the plaintiff's records relating to the action are under his control and he has inspected them. A similar argument to that raised by the defendants in respect of the said deponent was considered by Satchwell J in ***Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd*** 2009 (3) SA 384 at 391H-392B where she held as follows:

> "In the present instance the deponent to the founding affidavit is the 'operations manager arrears legal', which title clearly indicates knowledge of arrears in moneys owing to plaintiff and legal responsibility therefor. In the present case the deponent does not ask the court to rely on inferences to be drawn. He states that the facts contained in the affidavit

> fall within his personal knowledge and are based on records and documents available to him. He is indeed pre-eminently the person who would have knowledge of the relevant facts. It may well be that the 'relationship managers' with whom the second respondent dealt created or accessed the same records and documentation to which the deponent had access and upon which he relied in deposing to the affidavit."

I agree with these findings.

[17] Ms ***Beneke*** has placed considerable reliance on the recent decision in ***Firstrand Bank Ltd v Beyer*** 2011 (1) SA 196 (GNP). That matter too dealt with a loan advanced by Saambou Bank and secured by a bond over immovable property. In that matter the deponent stated that the plaintiff acted as agent for Saambou Bank Limited. In that context Ebersohn AJ noted at p. 200C that although the deponent to the summary judgment application refers to her knowledge of "records", the records are not identified at all and one is left with doubt whether it is the records of Firstrand Bank Limited or Saambou Bank Limited, and whether the records were complete or not.

[18] I consider that the position would indeed be different had the affidavit to the summary judgment application been attested to by an employee of an agent of the plaintiff. It is instructive to note that the judgments upon which reliance are placed by Ebersohn AJ deal predominately, if not exclusively, with situations where the founding affidavit in the summary judgment proceedings had been attested to by the attorney on behalf of the plaintiff. In these circumstances Ebersohn AJ might rightly have been uncertain as to the records in possession of the deponent. In the present matter, however, the deponent is indeed an office-bearer of the plaintiff who would ordinarily in the discharge of his duties obtain personal knowledge of arrear

payments and the extent thereof. He declares that he is in possession of all the plaintiff's documentation relating to the cause of action. It is not in dispute on the papers that this is correct. In the circumstances I do not consider that the second argument can succeed.

[19] The third argument raised finds no application to the summary judgment and is directed at the discretion which the court holds in terms of the amended Rule 46(1)(a)(ii) of the Uniform Rules of Court in respect of the order sought to declare the property executable. Rule 46(1)(a)(ii) reads as follows:

> **"46 Execution - Immovables**
>
> (1) *(a)* No writ of execution against the immovable property of any judgment debtor shall issue until-
>
> (i) …
>
> (ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property. "

[20] Previously the process of execution in the High Court was similar to that which existed in the Magistrate's Court. Once a judgment was granted (in undefended actions for a liquidated debt it may have been granted by the registrar) and the judgment debt was not paid, the judgment creditor was entitled to execute against the property of the judgment debtor in satisfaction of the judgment. It required the judgment creditor to proceed first against movable property. If insufficient movable property was found to satisfy the judgment debt the judgment creditor would then proceed to attach immovable property to be sold in execution

without further intervention by the courts.

[21] In the Magistrate's Court the procedure was embodied in section 66(1) of the Magistrate's Court Act, 32 of 1944 which provided as follows:

> "Whenever a court gives judgment for the payment of money … such judgment in case of failure to pay such money forthwith … should be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment …, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given …"

[22] The provisions of section 66 of the Magistrate's Court came under scrutiny in the Constitutional Court in the matter of ***Jaftha v Schoeman and Others***; ***Van Rooyen v Stoltz and Others*** 2005 (2) SA 140 (CC). The Constitutional Court considered the provisions of section 26(1) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitutiion), which enshrines "the right to have access to adequate housing". The Constitutional Court held that section 26(1) embodies both a positive and a negative aspect. Positively, the provision obliges the State to take measures to achieve the progressive realisation of the right. In its negative aspect, the right operates horizontally: it obliges private parties not to interfere unjustifiably with a person's existing access to "adequate housing". After considering the negative component Mokgoro J said it was not necessary to delineate all the circumstances in which measure will constitute a violation of such right but that: "… at the very least, any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)". She then proceeded to add that nonetheless, a measure may be a reasonable and justifiable limitation of the right to access to "adequate housing" as

contemplated in section 36(1).

[23] The amendment to Rule 46 of the Uniform Rules of the High Court serves merely to bring the rule in the High Court in line with the findings in ***Jaftha's*** case.

[24] ***Jaftha's*** case concerned the sale in execution which deprived the debtor of title to a modest home which had been built by the State as part of a national housing scheme and which had been acquired with the assistance of a state subsidy. The debtor had incurred a relatively trifling debt which was not secured and was unrelated to the property.

[25] It was accepted in ***Jafhta's*** case that the forfeiture in issue was a deprivation of "adequate housing" as envisaged in section 26(1) of the Constitution. Not every sale in execution would, however, constitute a deprivation of "adequate housing". The concept of "adequate housing" is necessarily relative. (See ***Standard Bank of South Africa Ltd v Saunderson and Others*** 2006 (9) BCLR 1022 (SCA) at 1029; and ***Government of the Republic of South Africa v Grootboom*** 2000 (11) BCLR 1169.)

[26] In the present instance the defendants have not taken the court in their confidence in respect of the value of the property. The extent of the bonds do however give some indication of its minimum value. The loans advanced against the

security of the house amounted to R158 500. The defendants have filed a supplementary affidavit herein in order to set out those considerations which they have urged me to consider in exercising a discretion in terms of Rule 46(1)(a)(ii). They allege that there is no risk to the plaintiff of suffering any loss as there is sufficient equity in the property to cover the debt if it is sold upon their demise. It can therefore safely be assumed that the property has a value in excess of R158 500. The outstanding balance on the bonds amounts to R154 337,45 which is the amount which the plaintiff currently claims.

[27] The nature of the property in issue in this matter is therefore clearly markedly different from that which was in issue in ***Jaftha's*** case. The defendants have, nevertheless, alleged that the sale in execution will infringe their rights in terms of section 26(1) of the Constitution. The first defendant, on behalf of the defendants, has filed a supplementary affidavit setting out those facts upon which reliance are placed. He states as follows:

"2.

I wish to bring the following circumstances to the attention of the Honourable Court for considering:

2.1 I am a 65 year old Telkom pensioner with ailing health.

2.2 I am hearingly impaired and suffered a stroke 5 years ago.

2.3 I suffer from chronic high blood pressure and cholesterol for which I received medication on a monthly basis.

2.4 I am a diabetic for which I receive chronic medication.

2.5 My medical aid provides ± R8 000.00 per annum for chronical illness treatment. My monthly in this regard is ± R1 800.00 per month. This means that my medical aid contribution for chronical medication is depleted after ± 4 months of the year, after which I must foot the entire medical bill for the remaining months of the year.

2.6 My wife, the Second Respondent, is 60 years old and she suffers from Alzheimer's.

2.7 My wife has a small income of R3 040.00 per month which she contributes towards the general expenses of our household.

3.

This dwelling house, which the Plaintiff wishes to attach, is our primary and only residence. My wife and I have been living there since 1983 and still occupy the dwelling.

4.

In the event of the Honourable Court granting the Plaintiff's application my wife and I will suffer immense hardship as we have nowhere else to go.

5.

With my small pension income of R4 290.00 per month and my high medical expenses, we will not be able to afford alternative accommodation.

6.

The alleged prejudiced of (*sic)* the Plaintiff cannot be compared to the hardship and prejudice which my wife and I will be suffering if the application is granted."

[28] The history of the matter which emerges from the summons itself shows the following:

In 1983 the defendants borrowed R24 500 from Saambou Bank and a bond to the extent of R26 500 was registered in favour of Saambou Bank over the property. The reason for this loan is not stated in the papers, although it would appear that it was probably entered into in order to acquire the property. Nothing turns on this. In 2004 the defendants again borrowed R30 000 from the plaintiff hypothecating the property as a second mortgage bond to secure the debt. In 2005 the defendants again approached the plaintiff in search of a loan. On this occasion they borrowed R40 000 from the plaintiff again hypothecating the property as a third mortgage bond to secure the debt. In 2006 the defendants yet again sought to borrow money and a further loan of R40 000 was advanced to the defendants by the plaintiff. Again the defendants hypothecated the property as a fourth mortgage bond to secure the debt.

[29] On each occasion the defendants were able to obtain such loans by virtue of them offering the property as security. On each occasion a bond was registered over the property.

[30] ***Jaftha's*** case did not decide what the effect of the registration of a bond would be upon section 26(1) of the Constitution (see ***Saunderson's*** case *supra* at p. 1030 para [18]). Mokgoro J did, however, state as follows in ***Jaftha's*** case:

> "Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his/her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of the court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge."

There has been no suggestion of any abuse of the court procedure in this matter.

[31] In ***Saunderson's*** case Cameron JA and Nugent JA, in writing the judgment of court, held as follows in this regard at p. 1030 para [19]:

> 'The present case does not require us to decide whether section 26(1) may be compromised when the rights conferred by a mortgage bond are sought to be enforced in cases where the property concerned does in fact constitute "adequate housing". But even accepting for present purposes that execution against mortgaged property could conflict with section 26(1) such cases are likely to be rare. It is particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property will be denied altogether; and it is therefore not surprising that the Constitutional Court noted in ***Jaftha*** that in the absence of abuse of court procedure – and none is alleged here – a sale-in-execution should ordinarily be permitted against even a home bonded for the debt sought to be reclaimed. Nor can the approach differ depending on the reasons the property owner might have had for bonding the property, or the objects on which the loan was expended. Mr *Marcus* for the *amici*, pointing out that the instruments before us are covering bonds (as mortgage bonds usually are), which observe no such distinctions, suggests in effect that execution should "ordinarily" follow only where the bond was taken out to fund inessential lifestyle choices; but this gives no weight to the fact that in all cases the bond-holders claim in its essence is against the property, and that its entitlements springs from a limitation in title the owner chose to accept in obtaining the loan.'

[32] It seems to me that the manner in which these debts arose and the registration of the bond in each case over the property, which is of substantially greater value than that in issue in ***Japhta***, does in this case give rise to an entitlement on the part of the bond-holder to an order that the property be declared executable.

[33] I have been referred by Ms ***Beneke***, on behalf of the defendants, to two cases from which she seeks support in her submission that I should exercise my discretion in favour of the defendants. The first is the matter of ***Firstrand Bank Ltd t/a First National Bank v Seyffert, Jan George Stephaus & Another and three similar cases*** [2010] JOL 26332 (GSJ). In this matter defendants had all applied for debt review in terms of the NCA. The plaintiff had, as it was entitled to do, given notice in

terms of the provisions of section 86(10) of the NCA to terminate the debt review process in respect of the particular credit agreement upon which the plaintiff relied. In each of these cases Willis J granted a summary judgment but added, however, the following:

> "… I consider that, although it would be right to grant the applicants summary judgment for the debts due to them, it would be an appropriate exercise of a discretion not to make orders that the immovable property in question be declared to be specially executable. After all, among the clear purposes of the NCA is to afford a debtor a reasonable opportunity to discharge a debt on terms that may be less onerous than may otherwise be the case."

[34] The second matter to which reference was made is ***Absa Bank Ltd v Ntsane & Another*** [2007] JOL 19031 (T). In this matter Bertelsmann J considered an application for default judgment. Plaintiff bank had sued the defendant for an amount of R62 042,43 said to be owing as the principle sum under a mortgage bond registered over the defendants' property. The debt became due as a result of the defendants failure to pay the monthly instalments which had to be made in terms of their loan agreement with the bank. The arrear amount which gave rise to the acceleration of debt was an amount of R18,46. The court highlighted the fact that the bank was seeking to deprive the defendants of their home whilst the amount that was in arrears was trifling. It was this consideration, of the trifling arrears which triggered the action, which weighed heavily with Bertelsmann J.

[35] These matters appear to me to be distinguishable from the present. In the present case the defendants voluntarily secured loans of substantial proportion by the registration of the bonds. The last of these debts was incurred in 2006. In

August 2009 the defendants obtained a restructuring order in terms of section 87 of the NCA. The papers relating to this restructuring are annexed to the defendants answering affidavits. It reveals that the defendants had undertaken in terms of the original bond agreements to make repayments which at the time of the restructuring order amounted to R1 722,54 per month. In accordance with the restructuring order the onerous effect of this commitment was ameliorated and defendants were afforded the opportunity to pay off their debt over a longer period by making payments of R1 134,10 per month. At the time of argument of the summary judgment application before me it was common cause that by November 2010 the defendants had defaulted on the restructuring order and were in arrears in respect of such payments to the tune of R2 922,36.

[36] In the present case therefore the arrears on the repayments due in terms of the loan agreements was not trifling at all. Defendants being unable to meet those commitments sought debt review, as they were entitled to do. The object of this process, as stated by Willis J in the ***Seyffert*** matter referred to above is to afford the debtor a reasonable opportunity to discharge a debt on terms that may be less onerous than may otherwise be the case. In the present case the defendants have been afforded this opportunity and have exhausted this process. Despite the reprieve granted to them they have been unable to meet the restructured commitment. They have again fallen in arrears even as measured against the restructured commitment. These arrears do not seem to me, in their context, to be trifling. Within a period of fourteen months of the granting of the restructuring order the defendants have fallen in arrears by nearly three instalments.

[37] In all the circumstances the plaintiff is entitled to the relief which it seeks.

In the result the following order is made:

1. There will be judgment in favour of the plaintiff for payment of the amount of R154 337,53.

2. The defendants are ordered to pay interest on the said amount of R154 337,45 at the rate of 9.8%, calculated daily and compounded monthly as provided for in the said bonds with effect of 1 November 2010 to the date of payment, both dates inclusive.

3. The property specially hypothecated being

ERF 186 DESPATCH, IN THE NELSON MANDELA BAY METROPOLITAN MUNICIPALITY AND DIVISION OF UITENHAGE, PROVINCE OF THE EASTERN CAPE

IN EXTENT: 860 SQUARE METRES

HELD UNDER DEED OF TRANSFER No. T 14253/1983;

is declared to be executable.

4. The defendants are ordered to pay the costs of the suit on a scale as between attorney and client.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv Mullins instructed by Spilkins, Port Elizabeth

For Defendants: Adv Beneke instructed by Van Vollenhoven & Associates, Port Elizabeth