

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 62/2023

Matter heard on: 28 November 2023

Judgment delivered on: 30 January 2024

In the matter between:

CHANGING TIDES 17 (PTY) LTD N.O.

Plaintiff

And

BUYISWA GRACE PASIYA

Defendant

KPMG (PTY) LTD

First Third Party

ALLEN FEW

Second Third Party

	(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED. Signature Date
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JUDGMENT

SMITH J:

[1] The plaintiff applies for summary judgment against the defendant in the sum of R1 411 298.95, compounded interest on that amount and ancillary relief. It initially also sought an order declaring erf 3[...], Queenstown (the hypothecated property),

executable, but has since abandoned that relief and now only seeks an order sounding in money.

[2] The contractual relationship between the parties is regulated by an intricate web of agreements, indemnities, and securities, all essentially aimed at protecting the interests of home loan funders. The plaintiff is the South African Home Loan Guarantee Trust, represented by its trustee, Changing Tides 17 (Pty) Ltd 2001. During 2001 the plaintiff entered into a Common Terms Guarantee Agreement (the CTGA) with Blue Banner Securitization Vehicle RCI (Pty) Ltd (the lender) in terms of which the lender would provide loans to consumers in South Africa against security of immovable property. The plaintiff would also guarantee the consumer's obligations to the lender in terms of home loans agreements. Home loans to consumers would be secured by indemnity bonds registered against immovable property.

[3] The CTGA furthermore provides that home loan agreements must provide that the plaintiff agrees, as guarantor, on terms and conditions set out in the CTGA, to guarantee the consumer's obligations to the lender under the home loan agreement. Consumers would also indemnify the plaintiff and allow the registration of an indemnity bond over the immovable property in its favour. If the lender calls upon the plaintiff to make payment in terms of a guarantee, the plaintiff must assign to the lender or its nominee all its right, title, and interest in the relevant indemnity and the indemnity bond.

[4] If the plaintiff is unable to assign the indemnity bond to the lender or to procure registration of such assignment in the Deeds Office within a period determined by the lender, the latter may require the plaintiff to institute legal proceedings against the consumer and foreclose on the indemnity bond.

[5] The lender and the defendant concluded a home loan agreement on 20 September 2006 and on the same day the plaintiff and defendant entered into an indemnity agreement. In terms of the latter agreement the defendant unconditionally indemnified the plaintiff, inter alia, from any loss, cost, claim, expense, or liability incurred by the plaintiff as a result of the defendant failing to perform any of her contractual obligations in terms of the housing loan.

[6] On 21 September 2006, the plaintiff issued a written guarantee in favour of the lender and an indemnity bond was duly registered over the mortgaged property on 23 March 2007.

[7] It is not disputed that the defendant fell in arrears with the monthly payments and the lender consequently called upon the plaintiff to assign all its rights, title, and interest in the indemnity bond. When the plaintiff failed to do so timeously and having received indemnity from the lender in respect of its costs and expenses, the plaintiff instituted legal proceedings for foreclosure on the indemnity bond. It is also common cause that the plaintiff has complied with all the relevant provisions of the National Credit Act, 34 of 2005.

[8] The defendant has filed third party notices against KPMG (Pty) Ltd and the curator, Mr Allen Few. However, their involvement in the matter has no bearing on the issues that fall for decision in the summary judgement application.

[9] The defendant opposes the application on two grounds, namely that (a) the plaintiff took a further procedural step by filing an exception to her plea and counter-claim. It is accordingly deemed to have abandoned the application and is consequently precluded from applying for summary judgement; and (b) the plaintiff owed it a duty of care to ensure that the curator continued with monthly payments when the mortgaged property was seized in terms of the provisions of the Prevention of Organized Crime Act 121 of 1998 (the POCA). Its failure to do so has caused her to suffer damages in respect of which she has a counter-claim against the plaintiff for an amount equal to the arrears.

[10] The defendant initially also raised the defence of res judicata but - apparently realizing that the point was without any merit - understandably did not pursue it during argument.

[11] In my view the first ground can also be dismissed out of hand. After the defendant delivered her plea and counter-claim on 18 April 2023, the plaintiff filed its application for summary judgment on 12 May 2023, without having taken any further procedural steps. It filed an exception to the defendant's plea and counter-claim on

16 May 2023, but subsequently withdrew it on 31 July 2023, tendering to pay the defendant's wasted costs. There were accordingly no legal obstacles preventing the plaintiff from applying for summary judgment.

[12] The only question that therefore remains for consideration is whether the defendant has averred facts which, if proved at a trial in due course, will find a cause of action for a counter-claim against the plaintiff or constitute a valid defence to the plaintiff's claim. In this regard the defendant asserts that after the hypothecated property was seized in terms of the provisions of the POCA on 30 October 2008, the court appointed curator, who had taken control of the property, failed to ensure that monthly payments are maintained in terms of the home loan agreement, thereby allowing the bond to fall into arrears. The plaintiff owed her a duty of care to ensure that its (and the lender's) interest in the property was protected and to take reasonable steps to compel the curator to maintain regular monthly payments. Had the plaintiff not breached its duty of care, the loan would not have fallen into arrears and the lender would not have called upon it to make good on its guarantee. As a consequence of the plaintiff's negligent breach of the duty of care she has suffered damages in an amount equal to the sum of the arrears.

[13] The defendant's claim is thus delictual in nature and founded on the principles of the *Lex Aquilia*. Since she relies on an actionable omission, she must establish wrongfulness by averring facts which found a legal duty of care that had been breached by omission. She was accordingly required to show the nature of the alleged duty of care. (*SAR&H v Marais* 1950 (4) 610 (A))

[14] It is established law that negligent causation of pure economic loss is not prima facie wrongful. Wrongfulness will depend on whether public policy and constitutional norms require the imposition of a duty of care, the breach of which would attract legal liability for the resulting damages. (*Fourways Haulage SA (Pty) Ltd v SA National Roads Agency* 2009 (2) SA 150 (SCA)) A bald assertion regarding the existence of a duty of care is not sufficient, and it is incumbent on the person seeking to rely on it to aver facts that establish the legal basis and nature of the contended duty.

[15] While the facts averred by the defendant in her plea and counter-claim may well establish some basis for a claim against the curator, she has failed to set out any facts that could establish the nature of the duty of care which the plaintiff allegedly owes her. First, the terms of the indemnity agreement and the indemnity bond concluded by the plaintiff and defendant exclude a claim based on delict; second, the plaintiff is not a party to the home loan agreement concluded by the defendant and the lender; and third, despite the seizure of the hypothecated property in terms of the POCA, she never lost ownership and was accordingly not absolved from her contractual obligations towards the lender.

[16] To my mind, the facts averred by the defendant in her plea and counter-claim do not support her assertion that the plaintiff owed her a duty of care. She has consequently failed to establish that she has a bona fide and valid defence to the plaintiff's claim, neither has she established a cause of action for her contended counter-claim. The application for summary judgment must therefore succeed.

[17] In the result there is summary judgment for the plaintiff in the following terms:

1. Payment of the sum of R1 411 298.95;
2. Interest on the aforesaid sum at the rate of 7.9% per annum, compounded monthly in arrears from 3 November 2022 to date of payment;
3. Costs of suit on the attorney and client scale.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

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