

**(REPUBLIC OF SOUTH AFRICA)
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No.: 43590/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES:NO

(3) REVISED.

DATE: **30/10/23**

SIGNATURE

In the matter between:

STANDARD BANK OF SOUTH AFRICA Plaintiff/Applicant

and

CARRINGTON FRANCIS PHILLIP 1st Defendant/1st Respondent

CHERRYL PETLELE 2nd Defendant/2nd Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] In its notice for summary judgment against the first and second defendants, the plaintiff seeks an order on the following terms:

- 1.1 Rectification of the loan agreement to reflect the defendants' *domicilium citandi ex executandi* to read as '2[...] I[...] Street, Observatory, Johannesburg, 2198.
- 1.2 payment of the amount of R5, 809,301.20.
- 1.3 interest on the aforesaid amount at the rate of 8.150% per annum, calculated from 11 June 2019 to date of payment, both dates inclusive.
- 1.4 Payment of the monthly insurance payments in the amount of R1, 792, 67 from 11 June 2019, for the full period the applicant makes payment thereof, until such time as the property is no longer registered in the defendants' name alternatively, until such a time as the risk of the mortgage property passes completely and remains with the owner, both dates inclusive; and
- 1.5 Costs of suit on the scale as between attorney and client.

[2] It is common cause that the defendants choose '2[...] I[...] Street, Observatory, Johannesburg, 2198' as its *domicilium citandi et executandi*. However, the domicilium address was incorrectly recorded as '2[...] I[...] ST, OBSERVATORY 21982198'.

[3] The plaintiff has also instituted proceedings in terms of uniform rule 46A in which it seeks an order for the property to be declared specially executable. According to the plaintiff, the rule 46A application was served on the defendants' attorneys of record on 9 October 2020 and no notice of intention to oppose was filed nor did the defendants did file an opposing affidavit.

[4] In the particulars of claim the plaintiff further alleges that despite numerous repayment arrangements being made with the defendants, their account is still in arrears as the last repayment made as arranged was made in have been made with the defendants. By November 2020 the outstanding balance stood at R6, 414, 143. 64.

[5] The defendants filed a notice to defend and as a result the plaintiff launched summary judgment proceedings. The defendants have filed their plea and an affidavit opposing summary judgment. In its affidavit opposing the granting of summary judgment, the defendants allege that they have a bona fide defence against the plaintiffs' claim and that they are not opposing summary judgment solely in order to delay the plaintiffs claim.

[6] The defendants have raised the following points *in limine*:

6.1 that the deponent to the affidavit in support of summary judgment based his knowledge of the issues raised on hearsay evidence.

6.2 that rectification sought by the plaintiff falls outside the scope of uniform rule 32(1);

6.3 that the loan agreement contained no tacit and/or alternatively implied terms and contends that none have been pleaded by the plaintiff;

6.4 that the court has no jurisdiction to hear the summary judgement application as the address of the property is in Cape Town.

6.5 that they were not in breach of agreement given the fact that they entered into a tacit agreement with the plaintiff;

6.6 that the plaintiff failed to send the section 129 notice;

6.7 that as the domicilium address was not correctly reflected in the loan agreement and the mortgage bond, the plaintiff cannot execute against the property based on the bond until rectification has been applied for and granted.

[7] Although the defendant have raised the above points in limine, in their opposing affidavit the defendant deal mainly with two issues, namely,

rectification and as relates to the rule 46A application, the fact that the property is their primary residence.

[8] With regard to rectification, it is apposite to quote the relevant clauses in the mortgage bond relating to the point raise.

[9] Clauses 34.1 and 34.2 of the loan agreement read as follows:

“34.1 The Borrower chooses the street address set out below as the address to which notices and documents in any legal proceedings against the Borrower, including notices of attachment of the property, may be served:

2[...] I[...] ST, OBSERVATORY 219826 ST OBSERVATORY
7825

34.2 The Borrower chooses the postal address set out below as the address to which letters, statements and notices may be delivered, and the Borrower accepts that any letters and notices posted to this address by the Bank by registered post will be regarded as having been received within 14 (fourteen) days after posting:

AS ABOVE, OBSERVATORY, 2198.”

[10] On behalf of the defendants it was submitted that the prayer for rectification falls outside the purview of uniform rule 32. It is the defendants’ contention that the plaintiff ought to seek the rectification of the loan agreement, the mortgage bond and the amended particulars of claim to reflect the correct domicilium address being ‘2[...] I[...] Street, Observatory, Johannesburg’ and that the summary judgment application was premature. In this regard the defendant rely on the SCA judgement in *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2007 (4) SA 68 (SCA) where the court stated that:

“[3] ... A prayer for rectification does indeed fall outside the provisions of rule 32. It does so not because it is a claim impliedly excluded by that rule, but because it is not, in the true sense, a claim at all”.

[11] On behalf of the defendants it was argued that granting the order for the rectification of the loan agreement would not make sense. It is only in argument that it was argued that the mortgage bond also needs to be rectified. It was submitted that the plaintiff could not seek the rectification of the loan agreement in a rule 32 application as what was required was for the plaintiff to first seek the rectification of both the loan agreement and the mortgage bond and thereafter amend its particulars of claim. The defendants also allege that the mistake made in the recordal of their domicilium address was solely due to the fault of the plaintiff.

[12] On behalf of the plaintiff the following submissions were made. That the mistake in the recordal of the domicilium address was a common mistake, particularly when one takes into account the fact that the defendants signed the agreement is as, the period that has lapsed since the conclusion of the agreement and the fact that the defendants do not dispute that the address sought to be substituted is their domicilium address. It was submitted that in terms of uniform rule 32 the document on which the claim is base has to be liquid document in which the amount of the debt must be ascertained without the need for extrinsic evidence to prove that the debt is due. It was further argued that the defendants’ argument that before summary judgement can be sought, it is imperative for the applicant to first apply for rectification of the agreement is incorrect I light of the authority relied on by the defendants which in fact supports the plaintiff’s case. In this regard counsel referred the court to the following passage in the PCL (*supra*) judgment where the court continued from where the defendants quotation ends in [3], stated that:

[3] But the plaintiff’s claim remains a claim for arrears owing in respect of the lease of the 4th floor office and rectification, although

essential to enable the plaintiff to prove its claim, is not part of that claim.

The court went further and held that:

“[5] In summary judgment proceedings a plaintiff is required, in terms of rule 32(2), to ‘verify the cause of action’ — not to verify that it will be able to prove the cause of action. The cause of action in the present matter is that the defendant hired the 4th floor office in Fedsure Towers from the plaintiff, in consequence of which it became obliged to pay amounts totalling R396 188,35 to the plaintiff, which it has failed to do. There was no dispute as to the terms of the agreement and in particular, the identity of the premises let. The plaintiff was therefore not obliged to cross the evidential hurdle of proving that despite the provisions of the written lease which referred to the 6th floor office, it was the 4th floor office which was in truth let to the defendant. Had the defendant placed in issue what the terms of the agreement were, the plaintiff would have been obliged to prove its version of the agreement at a trial, and summary judgment would have had to have been refused. But the defendant did not do this.”

[13] Counsel for the plaintiff further submitted that since the defendants cannot dispute the need to rectify the address of the property as currently reflected in the loan agreement. Counsel further submitted that referring the issue of the mis-described address to oral evidence as it will not assist the defendants in its challenge of the summary judgment as both parties are aware that the address of the property as reflected is incorrect. to be rectified is correct there is no need for oral evidence and that the application for rectification is not part of the summary judgment application.

[14] It is common cause that the parties had concluded a loan agreement the terms of which there was no dispute which forms the basis for the plaintiff's application for summary judgment. As correctly pointed out by counsel for the

plaintiff, the rectification application has no effect on whether the plaintiff's claim was valid.

- [15] As correctly pointed by counsel for the plaintiff, in a rule 32 application the plaintiff is required to verify the cause of action and the amount said to be due and owing. There is no dispute between the parties that the loan agreement was concluded and the terms of that agreement. Further, there is no dispute as to the identity of the property over which the mortgage bond covered. Under the circumstances the fact that the address of the property was mistakenly recorded, is not fatal, particularly when one takes into account that the erf number of the property is correctly recorded in the mortgage bond. In line with what the decision in PCL (*supra*), I am of the view that the wrong reflection of the address of the property is not an essential in an application for summary judgment. This was clearly a typographical mistake which went unnoticed by both parties to the agreement. The defendant were served with the summons and the section 129 notice delivered at the property. It cannot therefore be said that either party did not know which property was covered by the bond.
- [16] As correctly pointed out in the PCL judgment, the rectification does not affect the essence of the claim the plaintiff is making. In the main the claim is for payment of arrears owed based on the terms of the loan agreement which the defendants do not dispute.
- [17] I am therefore satisfied that the plaintiff has shown sufficient cause for the rectification of the loan agreement.
- [18] There is no dispute that the defendants are in default of their bond repayments which have become due and owing.
- [19] Nothing turns on the defendants' point that the deponent to the plaintiff's affidavit in support of summary judgment is based on hearsay evidence as the deponent clearly indicates in his affidavit the position he occupies, his line of work and that he is familiar with the facts relating to the defendants' loan

agreement. Further, the mere fact that the incorrect address referenced a property in Cape Town is baseless as the property is situated in Johannesburg.

[20] The defendants' contention that the plaintiff is estopped from bringing this application because of the existence of an alleged tacit agreement between the plaintiff and the defendants, does not hold water in light of the non-variation clause in the agreement and the clause to the effect that any indulgence given to the defendants by the plaintiff does not amount to a waiver by the plaintiff to seek redress based on the terms of the agreement. Any variation to the terms of the agreement had to be in writing.

[21] The only other issue raised by the defendants was that the plaintiff has not complied with the provisions of section 129 of the National Credit Act. However, from a perusal of the plaintiff's particulars of claim, it is clear that the notices issued by the plaintiff in terms of section 129 reached the relevant post offices which post offices had issued first notifications to the defendant. As correctly pointed out by counsel for the plaintiff, it is not necessary for the plaintiff to make sure that the notices actually reached the defendants. The fact that the post offices gave notification to the defendants that there was mail for them, it was up to the defendants to collect the mail. I am satisfied that there has been compliance with the requirements of section 129 of the NCA.

[22] It is apparent that the defendants have not shown that they have a bona fide defence to the plaintiff's claim and I am of the view that their opposition is merely to delay the claim of the plaintiff.

[23] The defendants have not raised any defence disputing the plaintiff's claim save to make submissions with regard to the uniform rule 46A application, which is unopposed. In their heads of argument the defendants contend that the property against which execution is sought is their primary residence and that they could not afford to buy or purchase another house in the same area

and they had two children and would be left destitute if the property was sold. Further, the defendants seek a restructuring of the loan repayments.

[24] Taking into consideration the history of the relationship between the parties and the debt payment rearrangements the plaintiff has given to the defendants, the defendants have not made any further payments towards reducing their indebtedness to the plaintiff since November 2018. In the meantime the debt to the plaintiff has grown exponentially. I am of the view that the plaintiff has made out a case for summary judgment to be granted and for the property to be declared specially executable. I am in agreement with the plaintiff's suggested reserve price to be set when the property is sold.

[25] In the result an order is granted in terms of the draft order marked "X".

N. P. MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT

Date of hearing : 18 February 2021

Date of judgment : 30 October 2023

Appearances

For Plaintiff: Adv M Riley (Instructed by Hannes Gouws & Partners Inc.)

For Defendants: Adv A P Allison (Instructed by Anthony Berlowitz Attorneys)