IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER: 1072/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

14/1/2022 [redacted]
DATE SIGNATURE

In the matter between:-

ABSA HOMELOANS GUARANTEE COMPANY (RF) (PTY) LTD First Plaintiff/First Applicant

ABSA BANK LTD Second Plaintiff/Second Applicant

and

STEFAN WATERMEYER Defendant\Respondent

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

[1] The plaintiffs applied for summary judgement against the defendant, seeking payment of the sum of R587 205.64 (FIVE HUNDRED AND EIGHTY-SEVEN THOUSAND, TWO HUNDRED AND FIVE RAND, AND SIXTY-FOUR CENTS), together with interest at a rate of 11.56% per annum from 30 November 2019 to date of payment, both dates inclusive, together with monthly service fees of R57.00 (FIFTY-SEVEN RAND).

[2] The plaintiffs further seek an order declaring the mortgaged property, specially executable. Consequential to this relief, the plaintiffs seek a warrant of execution to be issued and the mortgaged property to be sold in execution on certain terms.

BACKGROUND

[3] The plaintiffs' claim against the defendant arises from a written home loan agreement concluded between the parties. The defendant admits the home loan agreement and all the terms contained therein as pleaded by the plaintiffs, the written indemnity agreement, the indemnity bond and the majority of compliance by the plaintiffs with that set out by the National Credit Act 34 of 2005 ("the NCA").

[4] Although the defendant does not deny his breach of the home loan agreement and his failure to act in terms thereof, he avoids same by contending that the plaintiffs failed to comply with the provisions of Sections 80 and 81 of the NCA, with the effect that the loan agreement is a reckless credit agreement.

[5] In addition to the aforesaid, the defendant raised a special plea, that the court does not have the required jurisdiction to adjudicate upon the matter.

JURISDICTION

[6] It flows that a court which has no jurisdiction to entertain an action cannot have jurisdiction to adjudicate upon an application for summary judgment in that action. If, however, a court is vested with jurisdiction in an action, it has the necessary jurisdiction to hear and dismiss an application for summary judgment

brought in respect of said cause of action. Does that mean that challenge to the jurisdiction of the court automatically has the effect that the defendant is entitled to defend the action and summary judgment therefore stand to be refused? Such a situation will offend the purpose of a summary judgment and is therefore untenable.

[7] This then brings us to the question how is such a challenge treated? Should it be adjudicated as just another defence which the trial court will eventually consider if raised at summary judgment stage in a manner justifying a finding that its bona fide defence. Or does it require a finding on the issue before proceeding with the summary judgment enquiry.

[8] In my view the latter would be the correct approach. If the court is found to be devoid of jurisdiction in respect of the action, it would not enjoy the power to order leave to defend. A finding is thus necessary in order to bring an end to the action due to the lack of jurisdiction or move to the summary judgment application.

[9] I proceed to adjudicate the issue of jurisdiction as is required.

[10] The defendant contends that the court lacks jurisdiction as the plaintiffs in their particulars of claim allege that the basis for the jurisdiction of the court is founded on the fact that the defendant resides within the court's jurisdiction and that the mortgaged property, forming the subject matter of the action, is similarly so situated. From the documents before court, it appears that at least the latter is not factually correct. Does that however oust this court's jurisdiction?

[11] The defendant argued that he does not reside within the court's jurisdiction and have not done so since 2015. In support of this argument, the defendant filed an affidavit by his wife, wherein she confirms that the defendant is residing with her at Hartbeespoort since 2016. According to the defendant the North West Division of the High Court therefor has jurisdiction.

[12] In the founding affidavit supporting the summary judgment application it is

alleged and founded on the common cause facts that the home loan agreement was partially concluded in Nelspruit and that the defendant chose his *domicilium citandi et executandi* address to be within the jurisdiction of this court. A track-and-trace report, dated 24 August 2021, confirms the defendant to be resident at 428 Elawini Lifestyle Village, Riverside, Nelspruit and employed by the Mpumalanga Rugby Union. The defendant argued that this was an attempt by the plaintiffs, contrary to that which was pleaded in the particulars of claim, to change tact.

[13] It was argued on behalf of the plaintiffs that notwithstanding that pleaded in the particulars of claim, this court enjoys jurisdiction based on the common cause facts, more particularly the fact that the home loan agreement was concluded in Nelspruit. Therefore, the home loan agreement came into effect in Nelspruit. Further, the indemnity (which is undisputed) was similarly signed at Nelspruit; the power of attorney granted to the agent of the defendant was signed at Nelspruit; the defendant chose his *domicilium*-address to be in Nelspruit and the track-and-trace report indicates the defendant to be resident in Nelspruit and employed by the Mpumalanga Rugby Union.

[14] In amplification it was argued that notwithstanding the defendant's contention that he resides within the jurisdiction of the North West Division of the High Court, and that the mortgaged property is situated within the jurisdiction of the North West Division of the High Court, same is factually incorrect as the address where the defendant alleges to have been residing since 2015, falls within the jurisdiction of the North Gauteng Division of the High Court, Pretoria.

[15] Ordinarily, the *onus* of establishing that a division of the High Court concerned has jurisdiction, rests upon the plaintiff who, as *dominus litis*, must establish the court's jurisdiction. However, where a defendant frames an objection to jurisdiction in such a form to constitute a substantive plea, then such *onus* rests upon the defendant.[1]

[1] See **Botha v Andrade** 2009 (1) SA 259 (SCA) at 264I-265A

[16] In the present matter the defendant elected to raise the issue of jurisdiction by way of a special plea, therefore the defendant stands to prove that this court does not have jurisdiction. The only evidence in support of the defendant's contention is an affidavit by the defendant's wife, which does not in totality align with the allegations by the defendant. According to her, the defendant has been resident in the Hartbeespoort area since 2016 oppose to 2015 as alleged by the defendant. This aspect does not take the matter any further.

[17] In terms of Section 21 of the Superior Courts Act 10 of 2013, jurisdiction can appropriately be described as meaning the power vested in the division of the High Court to deal, adjudicate upon, determine and dispose of disputes between the parties in a manner brought before it. It reads:-

> "*A division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction, and all other matters of which it may according to law take cognisance, and has the power …*"

[18] The time for determining whether a court has jurisdiction is when proceedings commence. That is when the initiating papers are served on the defendant or the respondent. Once jurisdiction is established, it persists to the end of the proceedings, even though the ground may have ceased to exist.[2] With that in mind, the current proceedings were served on the defendant on 8 April 2019 at 428 Elawini Lifestyle Village, Riverside, Mbombela by attachment.

[19] The phrase "*causes arising*" has the result that the court's jurisdiction under Section 21 of the Superior Courts Act 10 of 2013 is simply determined by reference to the common law or any relevant statute. In such determination regard must therefore be had to the jurisdictional connecting factors recognised by the common law.[3]

[20] In considering the connecting factors, it should be kept in mind whether a court has jurisdiction in particular matters, require (1) that it be established that there

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2 **Communication Workers Union v Telkom SA Ltd** 1999 (2) SA 586 (T)

3 **Golf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk** 1963 (2) SA 10 (T) at 17G

are recognised grounds for jurisdiction and (2) if there are, that the court has the power to give effect to the judgment sought.[4] In the matter at hand there is clearly a recognised ground for jurisdiction, as founded in the pleadings of the plaintiffs.

[21] It is common cause that on 2 September 2015 and at Nelspruit the defendant accepted the offer of a loan and signed the loan agreement. This allegation is suffices to found jurisdiction on this court. In addition to that the following jurisdictional connecting factors, as recognised by the common law, are present:-

(a) The plaintiffs offer to loan money to the defendant in terms of the home loan agreement, which the defendant accepted and signed at Nelspruit on 2 September 2015. Therefore the home loan agreement came into effect on 2 September 2015 at Nelspruit.

(b) The indemnity was similarly signed on 2 September 2015 in Nelspruit.

(c) The agent of the defendant, Denise van Tonder, acted on behalf of the defendant in terms of a power of attorney which was given to her at Nelspruit by the defendant on 2 September 2015, thereby giving effect to the transaction.

(d) The defendant chose his *domicilium*-address to be at 428 Elowini Lifestyle Village, Riverside, Nelspruit.[5]

(e) The undisputed track-and-trace report dated August 2021 confirms the defendant's address to be within Nelspruit, as well as his employer being the Mpumalanga Rugby Union.

[22] Although the defendant's contention that he has not resided within the court's jurisdiction since 2015, on his version, and 2016 on the version of his wife, he

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4 **Hugo v Wessels** 1987 (3) SA 837 (A) at 849H-J

5 See **Geyser v Nedbank: *In re* Nedbank v Geyser** 2006 (5) SA 355 (WLD) at 360E-F

does not take issue with the correctness of the facts set out in sub-paragraphs supra. Nor does he explain how, in such circumstances where the summons was served at the defendant's chosen *domicilium*-address, he became aware of it. Comprehensiveness is expected of a party who want to demonstrate to the court how far he is removed from the jurisdiction of the court. But that is simply not the true position.

[23] It seems to be suggested that convenience will dictate the matter to have been brought in the High Court of the North West province. A court is not entitled to elect to hear or not to hear applications or actions founded on convenience in circumstances where a recognised ground for jurisdiction exists.[6]

MERITS OF THE SUMMARY JUDGMENT APPLICATION

[24] The enquiry is not whether the plea discloses "*an issue for trial*" in the literal sense of those words. It is whether the ostensible defence that has been pleaded is *bona fide* or not.[7] The effect of this requirement is to require a defendant to deal with a plaintiff's explanation in its opposing affidavit.

[25] In the matter at hand the defendant contended that he has a *bona fide* defence to the plaintiffs' claim, founded on Sections 80 and 81 of the NCA. According to the defendant, the plaintiffs failed to conduct an assessment as required, in that the defendant was not required to provide information in respect of his financial means, prospects and obligations; and the defendant did not understand or appreciate the risk, cost and obligation associated with the loan.

[26] The defendant alleged that at the time of signing the home loan agreement, the plaintiff calculated the amount available for repayment as R9 703.00, while the defendant had already committed a further amount of R10 429.00 towards the repayment of two other bond payments. This property is not his primary residence and he purchased same and sought a bond (as he did with the other

6 **Standard Bank of South Africa Ltd and Others v Thobejane and Others** 2021 (3) All SA 812 (SCA)

7 **Tumileng Trading CC v National Security and Fire (Pty) Ltd** 2020 (6) SA 624 (WCC) at par [40]

bonds at unknown banks) for the purpose of speculating in the rental market. The defendant explained that he entrusted one Mr Rossouw with the administration in respect of the bond application. The defendant further alleges that:

26.1 he understood mortgage bonds only to be granted where the property value meets the amount of the mortgage bond as a minimum;

26.2 nobody from the plaintiffs' office ever engaged with him to explain the risk and implication of entering into a mortgage bond.

[27] Above allegations were canvassed by the plaintiffs in the affidavit in support of the summary judgment application, as a plaintiff is required to do in terms of sub-rule (2)(b). From this it was clear that as per the application submitted by the defendant in support of a home loan, the defendant confirmed his basic gross salary to be R32 000.00 per month, and after deductions and expenses, there was a nett surplus of R9 703.00.

[28] In the defendant's list of expenses, it is indicated that the total home loan instalments paid by the defendant monthly is R0.00. The plaintiffs further dealt with the defendant's bank statements and salary advices, as provided by the defendant to the plaintiffs. So too an affordability assessment was dealt with.

[29] The misrepresentations seemingly relied on by the defendant relate to a third party whom was not a party to the home loan agreement. The mere conducting of a valuation by the plaintiffs does not support a conclusion that the plaintiffs undertook to only provide a bond in respect of a property of equal value.

[30] The totality of the terms on which the plaintiffs contracted with the defendant is set out in the admitted home loan agreement and bond documents. In the home loan agreement, more particularly clauses 45 to 49, the extent of the defendant's obligations was specifically set out. This document was duly signed by the defendant.

[31] The defendant, notwithstanding aforesaid being specifically dealt with in the affidavit supporting the summary judgment application, failed to deal with the aforesaid documents. The defendant did not even deny the specific paragraphs or said documents. He therefore accepted the correctness thereof, attempts to avoid it with bare challenges and suggestion that one Mr Rossouw was in charge of the process. Its untenable in light of the common cause facts of the matter and the proper execution of all the documents.

[32] A defendant is required to present facts with sufficient particularity for the court to judge that they constitute a defence. This appears to be the gist of the legal requirement of *bona fides* in the context of summary judgment proceedings.

[33] As held in **Mercantile Bank Ltd v Star Power CC and Another**[8] , in testing the defendant's *bona fides,* the totality of his allegations are to be considered rather than isolating a particular averment and characterising it as bold, vague or laconic.

[34] It is contended on behalf of the defendant that from his opposing affidavit it is clear that there is a triable issue of fact. This, as set out above, is however not the yard stick. The words "*an issue for trial*" in Rule 32 ought not to be taken literally, as dealt with in the matter of **Tumileng Trading** (*supra*).

[35] In the absence of the defendant actively engaging the allegations in the plaintiff's affidavit supporting summary judgment, firstly denying the allegation and documents in support, and then explaining why these facts and documents should be rejected they stand conclusive on the issues. What *inter alia* exacerbates it for the defendant is that his version is that in taking part in Mr Rossouw's 'scheme' he did not fully disclose the true extent of his financial obligations to the plaintiffs.

[8] 2003 (3) SA 309 (T) 311I

[36] Founded on the common cause facts as evident from the pleadings and affidavits, the conclusion is unavoidable that the facts set out by the defendant do not constitute a bona fide defence to the plaintiffs' claim.

[37] Consequentially, the following order is made:-

1. Payment of the sum of **R587 205.64** (FIVE HUNDRED AND EIGHTY-SEVEN THOUSAND, TWO HUNDRED AND FIVE RAND, AND SIXTY-FOUR CENTS).

2. Interest on the aforesaid amount at the rate of 11,56% per annum from 30 November 2019 to date of payment, both dates inclusive, together with monthly insurance premiums of R0.00 and monthly service fees of R57.00.

3. The following mortgaged property is declared specially executable:-

(1) A Unit consisting of:

(a) Sectional Plan Number SS342/2005, in the Scheme known as Villa De Bell in respect of the land and building or buildings situated at Erf 424, Dassierand Township, Local Authority: Tlokwe City Council, of which Section the floor area, according to the said Sectional Plan, is 35 (thirty-five) square meters in extent; and

(b) an undivided share in the common property in the Scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

(Held by Deed of Transfer 5189199/2015 and subject to such conditions as set out in the aforesaid deed of transfer)

(2) An Exclusive use area known as Parking P98, measuring 13 (thirteen) square meters, an undivided share in the scheme known as Villa De Bell in respect of the land and building or buildings

situated at Erf 424 Dassierand Township, Local Authority: Tlokwe City Council, as shown and more fully described on Sectional Plan No. 55342/2005

(Held by Notarial Deed of Session SK 05754/15 and subject to the conditions as set out in mentioned Notarial Deed of Session)

4. The issuing of a warrant of execution, and directing that execution against the mortgaged property is authorised.

5. The mortgaged property is to be sold at a sale in execution without a reserve price.

6. Costs on an attorney-and-client scale.

[redacted]

GREYLING-COETZER AJ

DATE OF HEARING:	25 October 2021
FURTHER SUBMISSIONS:	28 October 2021
DATE RESERVED:	29 October 2021
DATE OF JUDGMENT:	14 January 2022
FOR THE PLAINTIFFS:	Advocate Eastes Instructed by Delport Van den Berg Inc E-mail: liana@delberg.co.za c/o Swanepoel Attorneys Ref: L Killian/LM/AS0085
FOR THE DEFENDANT:	Advocate Theart Instructed by Viljoen Attorneys c/o Du Toit Smuts Attorneys E-mail: stownsend@dtsmp.co.za Ref: WIL316/2