

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]**

CASE NUMBER: 24710: 2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

1/2/2017

In the matter between:

STANDARD BANK OF SA LTD

PLAINTIFF

And

DOUW GEBRAND WESSEL MARAIS
(ID NO.: ...)

FIRST DEFENDANT

DENESE MARAIS
(ID NO.: ...)

SECOND DEFENDANT

JUDGMENT

MAVUNDLA J.

[1] This is an opposed application for summary judgment against the defendants, for:

1.1 payment in the amount of R1 3 12 5 96. 35;

- 1.2 interest at the rate of 7.55% per annum, calculated from 5 February 2015 to date of payment.
- 1.3 An order declaring Portion 1 of Erf [...] Montana Park Extension 12, *Registration Division* J.R, Province of Gauteng, measuring 1029 square metres, Held by Deed of Transfer T93466 /2004 (subject to the conditions therein Contained) specially executable,
- 1.4 An order authorising the Plaintiff to execute against the said property as envisaged in Rule 46(1)(a)(ii) of the Supreme Court Rules;
- 1.5 An order authorising the sheriff to execute the writ of execution; 1.6 An order for costs on attorney and client scale.

[2] The plaintiff's claim arises from three written agreements concluded in 2004, 2006, and 2008, respectively, in terms of which monies were lent and advanced to the defendants. The aforesaid loan agreements were secured by three separate mortgage bond agreements.

[3] In terms of the three separate loan agreements the cumulative principal debt amounted to R800 000. 00; R41000. 00 and R25 000. 00 respectively. It is common cause that the current monthly instalments payable was an amount of R12 342. 97. It is also common cause that as at 5 February 2015, the defendants were in arrears in the amount of R80 442. 82, with an outstanding amount of R1 312 596. 35.

[4] During the course of 2007 up until 2009, the plaintiff ceded all rights, title and interests in terms of the abovementioned mortgage bonds to Blue Granite Investments 9Pty) Ltd which cession was duly registered by the Registrar of Deeds.

[5] It is not in dispute that the plaintiff complied with the provisions of the National Credit Act and more specifically section 129 thereof in that a notice dated 5 February 2015 was sent to the defendants at the chosen *domicilium citandi et executandi* which was received at the correct post office.

[6] The defendants in opposing the summary judgment application:

- 6.1 deny that they concluded the first loan agreement during 2004 as alleged by the plaintiff;

6.2 further contend that the plaintiff neglected to indicate if the cession agreements referred to in the particulars of claim were in writing or oral and furthermore if in writing, neglected to attach same to the particulars of claim;

6.3 the amount claimed in the particulars of claim does not accord with what is stated in the certificate of balance and that the certificate of balance only refers to one bond;

6.4 the deponent to the affidavit in support of summary judgment did not attach a resolution to reflect authorisation to depose to the affidavit.

[7] It is trite that in summary judgment applications the Court need not decide any balance of probabilities or determine the likelihood of the deponent's allegations being true or false. All what the Court needs to concern itself with at this stage is whether the respondent has in his affidavit sufficiently set out facts which, if proven at the trial, will constitute an answer to the plaintiffs claim. If the Court is satisfied that the respondent has placed sufficient facts which show that the applicant's case is not unassailable, then it must dismiss the summary judgment application and grant leave to defend; *vide Marsh and Another v Standard Bank of SA LTD*;¹ *Shepstone v Shepstone*². The defendants' affidavit should set out facts and particulars disclosing that he has a *bona fide* defence. The defence must go to the merits of the application and not consist merely of an attack on the language of the summons and the plaintiff's affidavit.

[8] The defendants' contention that the deponent to the summary judgment application has not attached a resolution authorising him to depose to the affidavit is of no consequence, regard being had to the fact that the Supreme Court held in the matter of *Ganes and Another v Telecom Namibia Ltd*³ that it is irrelevant whether the deponent to an affidavit has been authorised to depose thereto. It is the institution of the proceedings and the prosecution thereof which must be authorized.

[9] In casu the deponent to the applicant's summary judgment applications has averred that she is a bank manager in the applicant's Home loan Legal Personal and Business Braking Credit division of the applicant. She has been duly authorised by the applicant

¹ 2000(4) SA 947 at 949B-950B.

² 1974 (2) SA 462 (N) at 467A.

³ 2004 (3) SA 615 (SCA) at 624G-625A.

to institute the proceedings and to depose to the affidavit. Through her position she has access to the records in possession of the applicant pertaining to this matter, which record she has perused and acquitted herself therewith, and therefore the facts fall within her personal knowledge. She can positively verify the facts and the cause of the action set out in the particulars of claim and verify the amount as set out in the certificate of balance and in her opinion there is no *bona fide* defence. In the circumstances I am of the view that the criticism of the respondents regarding the authority of the deponent to the applicant's affidavit.

[10] In the matter of *FirstRand Bank v Beyer*⁴ it was held that:" [9] An analysis and consideration of rule 32(2) clearly show that the court must, from the facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed to the affidavit was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any, and be able to form the opinion that there was no bona fide defence available to the defendant, and that the notice of intention to defend was given solely for the purpose of delay." *In casu* this Court is satisfied that the deponent to the summary judgment application has met the prerequisites mentioned in the authority cited herein.

[11] A perusal of the documents attached to the particulars of claim it is clear that although the certificate of balance of Belinda Brauns the home loan manager of the applicant, refers to the mortgagor, in singular, it nevertheless relates to the bond account by: Mr DGW and Mrs D Marais. As such the reference in singular does not take away the fact that the bond account is in regard of both the defendants. This is the type of imperfection of the language the Court can condone, because nothing much turns around this issue. Furthermore, the balance in the certificate is reflected as R1 312596.35 in respect of the bond account over Portion 1 of Erf [...] Montana Portion 1 of Erf [...] Montana P.⁵

[12] Attached to the particulars of claim are there mortgage Bond Agreements, respectively Annexure "A1" B 79206/2004; Annexure "A2" 645482/ 2006 and Annexure

⁴ 2011 (I) SA 196 (GNP).

"A3" 630661/ 2008 in respect of Portion 1 of Erf [...] Montana Park Extension 12, registration Division J.R. Province of Gauteng. These mortgage bonds could only have been consequential to valid agreements concluded between the mortgagors being both defendants and the applicant. The years of registrations are explicit from these bonds. The denial of the existence of the first loan, second loan and even the third loan by the defendants can only be without merits but calculated to unduly delay the inevitable.

[13] In the result, it is this Court's considered view that the defendants do not have a *bona fide* defence to the applicant's claim and therefore the summary judgment stands to be granted with costs.

[14] Consequently, it is ordered that summary judgment in favour of the applicant/ plaintiff is granted against the defendants jointly and severally, the one paying the other to be absolved, as follows:

1. payment in the amount of R1 312 596. 35;
2. interest at the rate of 7.55% per annum, calculated from 5 February 2015 to date of payment.
3. An order declaring Portion 1 of Erf [...] Montana Park Extension 12, Registration Division J.R, Province of Gauteng, measuring 1029 square metres, Held by Deed of Transfer T93466 /2004 (subject to the conditions therein contained specially executable)
4. An order authorising the Plaintiff to execute against the said property as envisaged in Rule 46(1)(a)(ii) of the Supreme Court Rules;
5. An order authorising the sheriff to execute the writ of execution;
6. An order for costs on attorney and client scale.

N. M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 01 / 02 / 2017

⁵ Annexure "B" paginated page 57 of bundle I.

PLAINTIFFS ADV	: ADV. C.G.V.O. SEVENSTER
BRIEFED BY	: S. RAUTENBACH VEZI & DE BEER INC
DEFENDANTS ADV	: ADV Z SCHOEMAN
INSTRUCTED BY	: MACHOBANE KRIEL INC