IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 4075/2016

In the matter between:

FIRSTRAND BANK LIMITED trading inter alia as FNB HOME LOANS Plaintiff

and

KGOSOGAEO DANIEL FREDDIE 1st Defendant

HENDRIETTA PATIENCE BELLA MABEL FREDDIE 2nd Defendant

HEARD ON: 10 NOVEMBER 2016

JUDGMENT BY: JACOBS, AJ

DELIVERED ON: 17 NOVEMBER 2016

INTRODUCTION

[1] The plaintiff instituted action against the 1st and 2nd defendants (the defendants) premised on a building loan agreement. The

plaintiff claims from the 1st and 2nd defendants, jointly and severally, the one paying, the other to be absolved:

1.1 "Payment in the amount of **R251,183.69 (TWO HUNDRED AND FIFTY ONE THOUSAND ONE HUNDRED AND EIGHTY THREE RAND AND SIXTY NINE CENTS);**

1.2 Interest on the abovementioned amount, from 30 JULY 2016 to date of final payment, at a variable interest rate which is linked to the prime interest rate, which variable interest rate was 10.20% nominal per annum, as at the date of the certificate of balance.

1.3 An order declaring the mortgaged property specially executable by virtue of the provisions of the mortgage bond, being:

ERF 244, TUMAHOLE, DISTRICT PARYS
PROVINCE FREE STATE
MEASURING: 491 (FOUR HUNDRED AND NINETY ONE) SQUARE METRES
HELD BY DEED OF TRANSFER NUMBER T6646/2006
BETTER KNOWN AS 244 BROWN STREET, TUMAHOLE, PARYS, PROVINCE FREE STATE.

1.4 Costs of the cause."

[2] Subsequent to the filing of an appearance to defend and prior to the defendants filing their plea or **any further court process being undertaken, t**he plaintiff lodged an application for summary judgment. Defendants, on their part, filed opposing

papers and pursuant thereto, the parties agreed that 'leave to defend' the main action will be granted to the defendants.

[3] The plaintiff, thereafter, filed two further affidavits deposed to by I Mofokeng and TM Abbots, ostensibly the deponent to the Plaintiff's Affidavit filed in support of summary judgment and the Commissioner of Oaths who attested thereto respectively.

[4] The plaintiff is not proceeding with the application for summary judgment against the defendants as the defendants have since paid the outstanding balance in full. The remaining issue for adjudication relates to the costs in the summary judgment application.

IN LIMINE

[5] The defendants' raised a point *in limine* that the plaintiff is not entitled to file the supplementary affidavits to the summary judgment application and that such affidavit should, be disregarded.

[6] It is common cause between the parties, as such, that the place at which the affidavit was signed, Johannesburg, does not coincide with the address of the Commissioner of Oaths. It is, thereto the Defendants' contention that the affidavit was, in fact, not signed in the presence of the Commissioner of Oaths as is required by law.

[7] The defendants further submit that in order for a court to consider documents, in addition to the affidavit, the said documents need

to be properly put before court according to which the defendants, is not the case with the two further affidavits .

[8] The plaintiff, in response, submits that the affidavit in support of the application for summary judgment (the affidavit) was signed by its deponent, Innocent Mofokeng at Johannesburg on the 22nd of September 2016. The said affidavit, plaintiff submits, was commissioned by a commissioner of oaths Tania Mary Abbotts, an attorney practicing at Hammond Pole Majola Inc. in Boksburg.

[9] The plaintiff submits that the commissioner of oaths made an affidavit from which the following is evident:

9.1 She confirms that the affidavit was signed and sworn before her at the offices of the plaintiff situated in Johannesburg by the deponent thereof, namely **Innocent Mofokeng** on **Thursday 22 September 2016.**

9.2 Even though the offices of **Hammond Pole Majola Inc**. are situated in **Boksburg**, the commissioner of oaths travelled to Johannesburg on the aforesaid date as she had to attend to a matter in the Johannesburg High Court.

9.3 The commissioner of oaths dated the affidavit incorrectly by dating it the **23rd of September 2016** instead of the correct date which was in fact the **22nd of September 2016.** The aforesaid was occasioned by a *bona fide* mistake.

[10] The plaintiff submits that the deponent of the plaintiff's affidavit in support of the application for summary judgment, **Innocent**

Mofokeng, also made an explanatory affidavit in which it was confirmed that he signed the affidavit before the commissioner of oaths at the offices of the Plaintiff situated in Johannesburg on Thursday **22 September 2016.**

[11] Regulation 3(1) of the Regulations Governing the Administration of an Oath or Affirmation, GN R1258 of 21 July 1972[1], (as amended) reads as follows:

"The deponent shall sign the declaration in the presence of the commissioner of oaths."

[12] In Cape Sheet Metal Works (Pty) Ltd v JJ Calitz Builder[2] the court held that the provisions of Regulation 3 are not peremptory[3]. In S v Kahn the court stated that it has the discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with the regulations has been proved or not[4].

[13] In *Standard Bank of SA Limited v Jonathan Drennan Redmond*[5] Khumalo J stated, with reference to the unreported *case Ingersoll Rand Company SA (Pty) Ltd v Frandcorp CC*[6] that: **"A party disputed that the deponent to an affidavit signed in the presence of the commissioner. The facts of the matter were**

[1] Regulations promulgated in terms of the Justices of the Peace and Commissioners of Oath Act16 of 1963.
[2] *Cape Sheet Metal Works (Pty) Ltd v JJ Calitz Builder* 1981 (1) SA 698 (O) at 699 A – B
[3] See also *ABSA Bank Ltd v Botha NO and Others* 2013 (5)SA 563 (GNP)
[4] *S v Khan* 1963 (4) SA 897 (A) at 900C
[5] Unreported case Gauteng Division, Pretoria no: 80438/2015 delivered 02 June 2016 at para 14
[6] *Ingersoll Rand Company SA (Pty) Ltd v Frandcorp* CC, Case no: 40111/2015 delivered on 23 October 2015

different in that the date on the certificate that which the commissioner declared to be the date of deponent's signature of the affidavit differed from the date on the stamp that was affixed on the certificate to indicate the date on which the commissioner signed and completed his particulars. The certificate stated that deponent signed the affidavit on 5 July 2015 whilst the stamp affixed on signature by the commissioner had 6 July 2015. The handwriting that completed the certificate seemed different to that of the commissioner of oaths that had a different date. The court held that in the absence of a verifying affidavit from the deponent or commissioner the inference should be that the deponent did not sign in the presence of the commissioner…[7]"

[14] It is clear that the explanatory affidavits are not in support of the summary judgment application but rather clarify the discrepancies in the supporting affidavit. Not to allow the applicant the opportunity to do so in the circumstances of the instant matter would, in my view, be tantamount to placing form before substance. In having regard to what is contained in the explanatory affidavits, I accept that in dating the affidavit the 23rd of September 2016 the commissioner made a bona fide mistake and I, further, accept that the deponent signed the affidavit in the presence of the commissioner. The point *in limine,* therefore, stands to be dismissed.

THE PLAINTIFF'S CASE

[7] See footnote 5 above

[15] Adv. Sander submits that the defendants on their own version state that they were in arrears for a period of 5 months. He further submits that the defendants only paid the arrears after the application for summary judgment was filed. He confirms that the loan agreement provides in par 5.16 that the defendant **“is entitled to settle the amount outstanding in full..”**, He however, submits that this does not mean that in between the defendants were entitled to pay any amount they wanted or not to make payment at all.

[16] He submits that defendants only made payment after the summary judgment application was lodged. The defendants should, in his view, have paid the costs occasioned by the application at the time they made payment on the loan agreement as the costs are reasonable costs incurred in enforcing the agreement.

THE DEFENDANTS’ CASE

[17] The defendants submit that due to the first defendant’s long service in the Department of Education, running just a few months short of 40 years’ service, there was no doubt that his lump sum pension pay out would be far more than sufficient to pay the outstanding amount on the bond. The defendants submit, further, that it was only under these circumstances that the contract between the plaintiff and the defendants was concluded.

[18] This, the defendants submit, resulted in their having negotiations with Jeanette from the South African Home Loans and acting on behalf of the Plaintiff, during April 2016 in order to bridge the time between the first defendant's retirement and his receipt of lump sum pension pay-out. The defendants submit that due to this they, on request, visited FNB Parys and completed documentation marked "Distress Debt Application" during July 2016.

[19] The defendants further submit that after summons was received they were requested by a representative of the Plaintiff, after the relevant information was again conveyed to the Plaintiff, to obtain from the Government Employees Pension Fund (GEPF) stating when the first defendant's lump sum would be paid out. The first defendant submits that although he spoke to the district director for the *Dr Kenneth Kaunda District* he was not able to obtain the required affidavit. He was informed that it was against policy to issue such affidavits. He was nevertheless granted a letter dated 7 September 2016 indicating that his pension pay-out was being processed. This information was also conveyed to the Plaintiff.

[20] All information requested was supplied and the defendants submit that they were informed by the Attorney of the Plaintiff to pay:

22.1 On or before the 30th of September 2016 an amount of R9 191.34;

22.2 At the end of October further amount of R9 191.34 and also to adhere to other conditions as per the plaintiff's letter dated 20 September 2016.

[21] This letter was sent to plaintiff's correspondent Attorney in Bloemfontein on or during 20 September 2016. A response was expected from the defendants on the following day, the 21st of September 2016 before close of business. The Defendants submit that although the Attorney for the Plaintiff was informed about deadlines he could only be able to see the defendants the following week; which was a long way off from the cut-off date of 30 September 2016. An application for summary judgment was served on the 26th of September 2016.

LEGAL POSITION

[22] I refer quite extensively to the majority judgement in *Nkata v FirstRand Bank Ltd and Others*[8] delivered by Moseneke DCJ where the Constitutional Court dealt with the relationship between credit providers and credit consumers. The court stated that:

'The Act seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and it's much needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do

[8] *Nkata v Firstrand Bank Limited and Others* 2016 (6) BCLR 794 (CC) para 94

not, the credit market will not be sustainable. But the human condition suggests that it is not always possible – particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.[9]'

[23] I would also like to refer to the following paragraph in the same judgement

'The purposes of the Act are directly attributable to the constitutional values of fairness and equality." "…The tools for achieving the Act's purposes include the promotion of "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers", and the development of "a consistent and accessible system of consensual resolution of disputes arising from credit agreements. In sum, the

[9] Ibid para 94

Act is “a clean break from the past” and encourages dialogue between consumers and credit providers[10].’

APPLYING LEGAL POSITION TO THE FACTS

[24] In this application the bank was well aware that the first defendant was on pension and would not receive a salary pending his pension pay-out. The National Credit Act[11] (NCA) in encouraging dialogue between consumers and credit providers placed an obligation on the plaintiff to consider, when the defendants informed the plaintiff of their situation, not to storm ahead and issue summons. We are not dealing with recalcitrant defendants. The bank was at all times aware of the financial position of the defendants and also their desire to settle the amount in arrears from the pension pay-out. Therefore had the plaintiff exercised patience and waited a bit longer before issuing summons in this matter they would not have incurred any legal costs in enforcing the agreement. The actions of the plaintiff were therefore not in accordance with the spirit of the NCA or the Constitution.

[25] On this premise I dismiss the application with costs.

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[10] Ibid para 96

[11] National Credit Act 34 of 2005

S. JACOBS, AJ

On behalf of the plaintiff:	Adv W. J. Groenewald Instructed by: Symington & De Kok Bloemfontein
On behalf of the defendants:	Adv A. Sander Instructed by: Lovius Block Bloemfontein