

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

Case number: 4984/2010

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

J W SILVER

First Defendant

M SILVER

Second Defendant

JUDGMENT

- (1) The plaintiff (Absa Bank Ltd) instituted action against the defendants (Mr and Mrs Silver) for payment of the sum of R1 320 106.67, interest, costs and an order declaring their immovable property executable, such property having been mortgaged by the defendants in favour of the plaintiff.

- (2) The plaintiff alleges, in short, that it concluded four written agreement with the defendants, that each of these principal obligations is secured by a registered covering bond over the defendant's property and that the covering bonds, copies of which are attached to the declaration, contain all the terms and conditions of the said contracts. It further alleges that, save for the amounts, the four written contracts contain similar terms. These terms are set out in paragraph 12 of the declaration. The plaintiff further alleges that pursuant to the contract (sic) certain advances were made to the defendants, that the defendants breached the terms of the contract (sic) in that they failed to make the monthly instalments as agreed, as a result of which the full amount has in terms of the contract become due and payable. A certificate of balance (indebtedness) setting out the amount due and payable in terms of the bonds is attached to the declaration.
- (3) The defendants admit the existence of the covering bonds, but deny that any monies were advanced to them as alleged and they also allege a plea of reckless credit as envisaged in the National Credit Act 43 of 2005 in respect of the fourth mortgage bond.

- (4) The following is clear from the covering bonds and the certificate of balance, the authenticity of which was not in dispute:
- (5) On 21 December 1990 a covering bond was registered in favour of the plaintiff over the defendants' property, ie Erf [.....] Township (the defendants' property) as security for payment by the defendants of the capital sum of R150 000, being the agreed amount the plaintiff would lend and advance to the defendants after registration of the bond *'and subject to the terms, conditions and provisions of this [bond] and [Absa's] letter to the Mortgagor(s) advising the Mortgagor(s) of the terms and conditions of approval of the loan application by the Mortgagor(s)'* and future debts arising from any cause whatsoever and interest thereon plus an additional amount of R32 000 in respect of incidental costs. (The first bond).
- (6) In terms of clause 4 of the first bond the loan amount would be repaid in consecutive equal monthly instalments of R2 575.00, the first payment to be made on the first day of the month following the registration of the bond.

- (7) In terms of clause 10 of the bond 'A certificate purporting to be signed by the General Manager or Assistant General Manager or a Branch Manager for the time being whose authority and appointment need not to be proved or any person acting in any such capacities showing the amount owing to the Bank in respect of the Capital, additional sum and interest and all other amounts . . . shall be sufficient and satisfactory proof for the purpose of obtaining provisional sentence or summary judgment under this Bond or for any other purpose and it shall rest with the Mortgagor(s) to prove that such amount is not owing to Bank.'
- (8) On 21 March 1996 a second covering bond was registered over the defendants' property in favour of the plaintiff as security for payment of the capital amount of R270 000, interest thereon plus an additional amount of R67 000 in respect of incidental costs that may from time to time be owing arising from any cause whatsoever. (The second bond).
- (9) On 2 May 2002 a third covering bond was registered over the defendants' property in favour of the plaintiff as security for payment of the capital amount of R420 000 and interest thereon plus an additional amount of R82 000 in respect of

incidental costs that may from time to time be owing arising from any cause whatsoever. (The third bond).

(10) On 21 June 2007 a fourth covering bond was registered over the defendants' property in favour of the plaintiff as security for payment of the capital amount of R863 000, interest thereon plus an additional amount of R157 100 in respect of incidental costs that may from time to time be owing arising from any cause whatsoever. (The fourth bond).

(11) The second to fourth covering bonds contain, inter alia, the following provisions:

'1. CAUSE OF INDEBTEDNESS - The Appearer declared that the mortgagor has become indebted to and/or will from time to time become indebted to the Bank which indebtedness arose and/or will arise *from any cause whatsoever.*'

'6. REPAYMENT - The mortgagor shall repay all amounts owing by him to the Bank and which are secured under this bond *in accordance with the provisions of such written agreement or agreements as have been concluded or which may be concluded* from time to time hereafter between the mortgagor and the Bank.'

'7. INTEREST - Interest on all amounts owing by the mortgagor to the bank and secured under this bond shall be calculated in the manner or

manners and at the rate or rates determined or to be determined *in terms of any written agreement or agreements concluded or to be concluded between the Bank and the Mortgagor* from time to time . . . '

'8. DEFAULT - Unless otherwise agreed in writing, if the Mortgagor fails to observe or perform any of the terms or conditions *of any written agreement or agreements between the Mortgagor and the Bank* in respect of any amounts which are secured under this bond. . . or if the Mortgagor upon demand by the Bank fails to pay the Bank any amount which is legally claimable by the Bank or if the Mortgagor fails to discharge any obligation or liability to the bank on the due date thereof then all the amounts which are secured under this bond shall . . . immediately become payable in full, . . . '

'9. PROOF OF INDEBTEDNESS - 9.1 - The amounts at any time owing by the Mortgagor to the Bank which are secured under this bond (including any interest at the rate or rates at which and the period or periods for which interest is calculable) and the fact that such indebtedness is due and payable may be determined and proved by a certificate signed by any manager of the Bank whose appointment and authority to sign such certificate need not to be proved. 9.2 - Such certificate shall be accepted as proof of the facts stated therein, unless the Mortgagor is able to prove the facts incorrect.'

(Own italics).

- (12) On 1 December 2009 a certificate was signed by one of the managers of the plaintiff, that reads as follows:

'CERTIFICATE OF BALANCE

01 DECEMBER 2009

CLIENT NAME: MR JW & MRS M SILVER

ACCOUNT NUMBER: [...]

I, the undersigned SUNAY DU PLESSIS, in my capacity as Manager:

DEBT RECOVERY SERVICES of ABSA Bank Limited, and duly authorised thereto, do hereby certify that the above-mentioned client is indebted to ABSA Bank Limited, registration number 86/004794/06 in respect of a MORTGAGE BOND NO B 60722/90 [the first bond], B 15713/96 [the second bond], B 18363/02 [the third bond], B4 8912/07 [the fourth bond].

The total amount due and payable on 1 December 2009 is R1 320 106.67 [amount in words] together with interest at the rate of 8,7% per annum, capitalised monthly, from 2 DECEMBER 2009 to date of payment.

[Signed] S DU PLESSIS

MANAGER: PRACTITIONER MANAGEMENT

HOME LOANS

- (13) The plaintiff called three witnesses, namely Mr Prinsloo, Ms Dittloff and Ms Khan. Suffice to say that none of the witnesses had any personal knowledge of the defendants' contractual obligations secured by the covering bonds nor was any

document pertaining to the alleged agreements discovered or placed before the court.

- (14) The only evidence relating to an outstanding balance in respect of whatever agreement was concluded between the parties, was that of the plaintiff's expert witness, Mr Prinsloo. He testified that, based on the information obtained from the plaintiff's main computer frame, the defendants had a flexible home loan account with number [.....] in respect of which he recalculated the outstanding amount. (The bank statements of the home loan account from September 1998 onwards formed part of the court bundle, which was handed in by agreement between the parties. The authenticity of the bank statements was not in dispute). Mr Prinsloo was cross-examined about a few items appearing on the bank statements. He further testified that his evidence relating to the account was solely based on information obtained from the plaintiff's main computer frame and that he did not verify any of the figures with any source documents. He further testified that he did not take any movements between the opening of the account in 1990 and September 1998 into consideration because the defendant's account showed a credit balance of R12.88 on the

latter date. He was further uncertain as to the meaning of some of the acronyms used for certain items on the account. He also testified that, subject to two minor adjustments that had to be made, his calculations corresponded with the outstanding amount contained in the certificate of balance.

- (15) The defendants closed their case without calling any witnesses.
- (16) It is trite law that a covering bond is always accessory to a principal obligation: its existence and its continued existence is dependent upon the existence of a future or a present and future debt which it secures and it can only be foreclosed on default of the debtor of one or other of the terms of the bond.
- (17) It follows that the plaintiff must, first of all, prove that the defendants were in default of the terms of one or more of the bonds.
- (18) The agreements and their terms *as alleged in the declaration* are simply nowhere to be found in any of the bonds attached to the declaration: The first covering bond clearly stipulates that the plaintiff would send a letter to the defendants advising them of the terms and conditions upon which the defendants'

application for a loan would be approved. No such letter was placed before the court.

- (19) The second to fourth agreements and their terms *as alleged in the declaration* are likewise nowhere to be found in any of these bonds.
- (20) The agreements referred to in the second to fourth covering bonds were also not placed before the court.
- (21) Furthermore, the declaration does not allege in terms of which or what 'contract' the alleged advances were made.
- (22) Lastly, although all the bonds contain a certificate clause it is unclear in terms of which bond(s) the certificate was issued. Be that as it may, apart from an account number, the certificate also tells us nothing about the principal obligation(s).
- (23) Without proof of the terms of the principal obligation(s), I cannot make any finding as to whether the defendants were in default of the terms of the bonds entitling the plaintiff to foreclose same.

(24) The next question is whether the bank statements and the certificate of balance could be of any assistance in proving plaintiff's claim.

(25) Bank statements in themselves cannot be used to prove the drawings and deposits on an account. (*Nedbank Ltd v Van Zyl* 1990 (2) SA 478 (AD) 478 D), neither does it throw any light, without reference to the terms of the agreement to which it relates, as to whether the bank's cause of action is complete. It does not even establish a *prima facie* case. It can, at most, create a suspicion that money is owing. (*Narlis v South African Bank of Athens* 1976 (2) SA 573 (AD) 577D-579H).

(26) The plaintiff also relied on a certificate that was issued in terms of s 15(4) of the Electronic Communication and Transactions Act 25 of 2005 (ETC) in order to give the bank statements evidential weight. The authenticity of the certificate was not in dispute. The certificate was issued by Mr Seedat, an officer in the employ of the plaintiff. The certificate reads as follows:

I am a male manager and do hereby certify as an officer in the employ of ABSA Bank Limited that annexure "A" [the bank statements], hereto is a copy and printout of a data message in respect of account number [.....] made by ABSA Bank Limited in the ordinary course of business.

I certify this in terms of Section 15(4) of Act 25 of 2002.

(27) Section 15(4) of ETC reads as follows:

'A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message *certified to be correct* by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.'

(Own emphasis).

(28) Because Mr Seedat did not certify the bank statements as correct, I am of the view that the certificate is of no value. Even if it was certified as correct, it would not have availed the plaintiff without proof of the terms of the principal obligation(s).

(29) Regarding the probative value of the certificate of balance, the following:

(30) The certificate in question is merely an evidentiary tool to facilitate proof of the *quantum* of the amount claimed (*Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) 880H-383F) and

of the facts underlying defendant's liability to pay the said amount.

- (31) A certificate issued pursuant to a certificate clause does not constitute part of a cause of action. It is not necessary to allege it and it does not have to be in existence when the summons was issued. It is not a fact which must be proved before a plaintiff is entitled to judgment. If it is alleged, plaintiff's cause of action will not undergo any change. Its only function is to serve as proof and nothing more. (*Trust Bank of Africa Ltd v Senekal* 1977 (2) SA (WLD) 592A-B, *Trust Bank of Africa Ltd v Hansa and another* 1988 (4) SA 102 (WLD) 104H-105D).
- (32) The certificate relied upon by the plaintiff does not qualify as a certificate in terms of clause 10 of the first mortgage bond: It was not signed by a General Manager or Assistant General Manager or a Branch Manager of the plaintiff as required by the said clause.
- (33) If the certificate was issued in terms of clause 9 of the second to the fourth mortgage bonds, then the following: Clause 9.1 stipulates that the certificate may be used to determine the outstanding amount *and* whether the outstanding amount is

due and payable. Clause 9.2 deals with the information the certificate should contain in order to make such a determination: It provides that the *facts* contained in the certificate shall be accepted as proof thereof, unless the mortgagor is able to prove the *facts* incorrect.

(34) Therefore, if it was the plaintiff's intention to utilise the full potential of the certificate it should not only have specified the outstanding amount but also the facts pertaining to the principal obligation from which one could determine that the specified amount is due and payable. Facts not contained in the certificate can, of course, be proved in the usual manner.

(35) The certificate only certifies the specified amount, but it contains no *facts* from which one can draw an inference that the amount is due and payable. The statement that the specified amount is 'due and payable' does not avail the plaintiff because it is not a fact but a legal conclusion, the correctness of which cannot be determined *ex facie* the certificate.

(36) If the certificate had contained sufficient facts in connection with the principal obligation from which one could determine that the

specified amount is due and payable, a *prima facie* case would have been made out. I am not suggesting that an otherwise defective summons can be cured by the facts contained in a certificate attached to the summons, because it cannot.

(37) In the premises I find that the plaintiff has failed to prove its case.

(38) In view of my finding I find it unnecessary deal with the defence of reckless credit.

(39) In the result, I make an order in the following terms:

1. An order of absolution from the instance is given in favour of the defendants.
2. The plaintiff is ordered to pay the defendants' costs, including all reserved costs.

A B ROSSOUW A J

DATE: 29 MAY 2015

DATE OF HEARING: 18 AND 19 MAY 2015

DATE OF JUDGMENT: 29 MAY 2015

FOR THE PLAINTIFF

ADVOCATE: J MINNAAR

ATTORNEYS: OLTMAN ATTORNEYS

FOR THE DEFENDANT

ADVOCATE: M SILVER

ATTORNEYS: JACOBSON & LEVY ATTORNEYS