IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2923/2015

In the matter between:

ISABELLA JOHANNA WOLFAARD Applicant

and

JAN JACOB PETRUS TRYTSMAN 1st Respondent
MAGDALENA PETRONELLA TRYTSMAN 2nd Respondent

CORAM: RAMPAI, J

HEARD ON: 27 AUGUST 2015

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 4 SEPTEMBER 2015

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[1] These were motion proceedings. The applicant applies for a relief whereby the respondents are ordered to pay a capital amount of R779 913.23, plus interest thereon at the rate of 14,75% per annum *a tempore morae* until the date of final payment; the respondents' farm declared specially executable; the special notarial bond perfected and the respondents directed to pay the costs of this application on the scale as between

attorney and client. Only the 2nd respondent resists the application.

[2] The applicant and Mr. Albert George Sebastian Wolfaardt were husband and wife. They were married in community of property. On 11th October 2005 the couple entered into a written loan agreement with the respondents at Hoopstad. The couple lent and advanced an amount of R750 000.00 to the respondents, also a married couple. (vide anx np2)

[3] The respondents owned an immovable property known as Farm Vergenoeg 491, District Viljoenskroon, Province Free State measuring 85,6532 hectares. As security for the repayment of the loan they received from the Wolfaardts, the respondents, as the borrowers caused a mortgage bond to be registered over their landed property in favour of the applicant and her husband, as the lenders. The bond is currently held under title deed number 154/2006. The mortgage bond was registered on 11th October 2005. (vide anx np3)

[4] Furthermore, the respondents caused a special notarial bond to be registered over certain of their immovable assets in favour of the applicant and her husband as additional security for the repayment of the capital loan. (vide anx np4). The special notarial bond BN173/2006 was registered on 4th January 2006. Over and above those two types of securities, the lenders also obtained a contractual cession from the borrowers in respect of the prospective harvest of certain agricultural produce.

[5] The respondents were married to each other out of community of property. On the 17 December 2014 the 2nd respondent filed for a divorce in the Gauteng Division of the High Court, Pretoria. It would appear that those divorce proceedings were acrimonious. (vide anx np6 summons read with anx np7 application for interim payment of maintenance in terms of rule 43).

[6] The respondents have failed to repay the loan. They are currently in arrears. The applicant instituted these proceedings on 23rd June 2015 to recover the balance of the debt. The 2nd respondent disputes the alleged balance of the debt (vide anx np5).

[7] The applicant is now a widow. Her husband died on 25th July 2011. She is the universal heiress of his entire estate in terms of the joint will. Moreover, she is the executrix of his deceased estate. She was issued with letters of executorship by the master – (vide anx np1)

[8] The terms of the loan agreement and those of the mortgage bond were also undisputed. This concludes my summary of the factual background. The facts as summarised were common cause between the parties.

[9] The question in this application is whether the 2nd respondent has any defence, good in law, to successfully resist the applicants claim.

[10] Mr Hefer, counsel for the 2nd respondent submitted that the 2nd respondent has done enough to have the question decided in her favour. However, Mr Tsangarakis, counsel for the applicant differed. He submitted that none of the various defences raised by the 2nd respondent had any substance.

[11] It is tried that motion procedure has been designed to speed up adjudication of disputes in order to avoid unnecessary delay where no really genuine and *bona fide* dispute exists as regards the material fact(s). A party who purports to delay the expeditious finalization of the civil wrangling by claiming that action proceedings and not motion proceedings would render the outcome of the hearing fair and just as would otherwise be the case has to seriously and unambiguously address and elucidate the material fact said to be in dispute in order to demonstrate that a really genuine and honest dispute indeed exists. **Wightman t/a JW Construction v Headfour (Pty) Ltd & Another** 2008 (3) SA 371 (SCA)

[12] It has been held on a number of occasions that a certificate clause in a written agreement is designed to facilitate proof of the amount of liability. Therefore, a certificate of balance is often merely accepted by the courts as an evidentiary tool provided for in terms of an agreement by one contracting party to the other for the purpose of facilitating proof of the amount of the borrower's indebtedness to the lender **Thrupp Investments Holdings (Pty) Ltd v Goldreef** 2008 (2) SA 253 (W) at 256 (A-B).

[13] In **Bank of Lisbon International Ltd v Venter & Another** 1990 (4) SA 463 (AD) at 478 (F-G) the court said the following about the great significance and the wide import of the certificate of balance:

> "Wat wel seker is, is dat die appellant, om mee te begin, niks meer hoef te doen as om net staat te maak op die sertifikaat ten einde die bedrag van eis te bewys nie, en dat, as daar geen verdere getuies vorendag kom met betrekking tot die inhoud van die sertifikaat nie, die appellant geregtig sou wees op vonnis teen die eerste respondent ooreenkomstig die sertifikaat."

I am in respectful agreement.

[14] The salient principle of motion proceedings is that an applicant must make out his/her case in his/her founding affidavit. It is impermissible to make out a new case, for the first time, in the replying affidavit. **Pountas Trustee v Lahanas** 1924 WLD 67 on page 68. In the replying affidavit the applicant is only allowed to elaborate or develop his or her case, already made out in the founding affidavit, by addressing the challenge mounted by the respondent against such case in the answering affidavit.

[15] The 2nd respondent raised several defences in her answering affidavit. Among others, she alleged that the certificate of balance, "anx np5", on which the applicant relied was defective, that the applicant lacked *locus standi* to prosecute the application; that the court has no jurisdiction to entertain the matter; that there were sinister dealings afoot between the 1st respondent's legal representatives and the applicant's legal representatives

which were calculated to prejudice her by undermining her accrual rights; and that the applicants approbates and reprobates with regards to the provisions of the notice in terms of section 129 National Credit Act 34/2005.

[16] The 2nd respondent contended that her aforesaid defences, singularly and collectively considered, indicated that an enormous factual dispute existed which rendered the application procedure not suitable in this matter. In view of all the facts disputed by the 2nd respondent, it was submitted on her behalf that the applicant should not have brought the matter to court by way of motion procedure but rather by way of action procedure. On behalf of the applicant it was contended that there was no substance in all the facts said to be in dispute to justify the finding that a really genuine dispute existed, in these circumstances, which rendered the application procedure unsuitable.

[17] Now I proceed to examine the factual allegations to determine whether or not a really genuine and *bona fide* dispute existed.

[18] As regards the question of the certificate of balance, the 2nd respondent queried the applicant's "anx np5" on the grounds that it was not a proper balance certificate; that the alleged outstanding capital balance was inflated by the addition of all sorts of other things; that it was not drawn up by a qualified person; that she had never seen it prior to the institution of the current application and that it was not signed – vide para 19 answering affidavit.

[19] At para 7.11 of the founding affidavit the applicant declared:

> "Klousule 10 van die ooreenkoms vermeld verder dat die sekuriteite wat ek hou voortdurende dekking sekuriteite is en bevestig die ooreenkoms verder in klousule 26 van die lenningsooreekoms dat 'n sertifikaat gegee en geteken deur 'n lid, 'n prokureur of 'n boekhoudster van die firma Maree & Bernard Prokureurs te Hoopstad, *prima facie* bewys sal wees vir doeleindes van vonnis van die uitstaande bedrag verskuldig."

[20] I deem it necessary to quote the relevant certificate clause, clause 26 "anx np1" which is the loan agreement:

> "'n Skriftelike Sertifikaat gegee en geteken deur lid, 'n Prokureur of boekhouer van die Prokureurs firma Maree en Barnard Hoopstad, Verbandhouer of sy gemagtigdes of agent, wie se hoedanigheid of bevoegdheid dit nie nodig sal wees om te bewys nie en sal *prima facie* bewys wees vir doeleindes van voorlopige of summiere vonnis of enige ander regsmiddel, van enige bedrag hetsy die kapitaalsom, finansieringskoste, *mora* finansieringskoste, voorskotte, koste, hervoorskotte en uitgawes so in berekening gebring asook van die finansieringskoers soos van tyd tot tyd deur die Verbandhouer vasgestel en die bedrag onder hierdie verband verskuldig en/of betaalbaar."

[21] From the certificate clause the following emerge:

- There were no formalities, agreed upon by the parties prior to the signing of the loan agreement, concerning the form or appearance of the envisaged certificate of balance;
- The qualifications, expertise or capacity of an individual authorized to issue such a certificate would not be

necessary to aver and prove in order to establish the lender's cause of action;

- The certificate could be issued and signed by the mortgagee, the mortgagee's authorized agent, a bookkeeper, attorney or any member of the law-firm Maree & Barnard, Hoopstad;
- The calculation of the certified outstanding balance of the debt would include a range of specific constituent components other than a balance of a purely capital nature (for instance disbursements);
- The compliant certificate of balance would, upon its mere production, be *prima facie* proof of the extent of the borrower's (or the mortgage givers) indebtedness to the lender, in other words the mortgage holder, for the purpose of provisional sentence, summary judgment or any other relief of a judicial nature.

[22] It would also be readily appreciated that the mortgage-holder is not obliged in terms of clause 26 "anx np1" to ensure that the certificate of balance does not, by appearance, resemble a statement of account. Moreover, the mortgage-holder is not obliged in terms of the clause to furnish the 2nd respondent as the borrower with a copy of the certificate at any stage prior to the institution of legal proceedings for the recovery of the money lent and advanced.

[23] There is no hard and fast rule that the arithmetic calculations a certificate reflects must, in all cases, have been performed or worked out by a qualified person in the employ of a financial

institution. The decision in **Rossauw v Firstrand Bank** 2010 (6) (SA) 439 (ECA) is no authority for such a preposition. Where, as in the Rossauw's case, a financial institution is a lender, then "such calculations **are better performed** by a qualified person in the employ of the financial institution." Even in such cases, the rule is not rigidly cast in stone as the highlighted three words show.

[24] The certificate complained of appears on page 93 of the record. Upon my painstaking perusal of "anx np5" I could find nothing inconsistent with clause 26 other than the author's omission to append his signature. The omission appeared to have been occasioned by an inadvertent oversight. The applicant introduced the certificate at para 7.12 of the founding affidavit by averring:

> "Ek heg as **Aanhangsel "NP5"** 'n saldosertifikaat aan van gemelde prokureurs **onderteken** deur Mnr Nicolas Petrus Maree."

The impression I got was that, until she read the answering affidavit the applicant was unaware that the document was unsigned. It can hardly be seriously contended that the mere failure of Mr. Maree to sign the certificate irredeemably invalidated that document.

[25] As a result of the 2nd respondent objection, concerning the form and omission to sign "anx np5" the applicant caused the certificate to be redrafted, reshaped and signed. The certificate so freshly redesigned was then labelled "anx iw4", attached to the replying affidavit served and filed together with the confirmatory

affidavit “anx iw3” by Ms. Mia Viljoen, the bookkeeper of the law-firm Maree & Barnard of Hoopstad. The question was whether “anx iw4” constituted a new case made out, for the very first time, in the replying affidavit? I am not so persuaded.

[26] There were a few dissimilarities between the two annexures. Firstly, the one “anx np5” was not singed but the other “anx iw4” was. Secondly, the former was drawn up by the attorney, Mr Maree but the latter by the bookkeeper, Ms Viljoen. The former was annexed to the founding affidavit but the latter to the replying affidavit. All those dissimilar features were, in my view, cosmetic. However, there was a striking similarity between the 2 annexures. The amount of the balance alleged to be still outstanding was precisely the same. About that material fact, which is the core of the matter, there was virtually nothing new in “anx iw4” in particular or the replying affidavit in general. It was common cause that the author of the unsigned certificate was indeed Mr. Maree, an attorney of the law-firm mentioned in clause 26 of the loan agreement, as the applicant alleged in the founding affidavit. Ms. Viljoen averred in her confirmatory affidavit that she is a bookkeeper of the same law-firm as Mr. Maree. Both were qualified to issue and sign the certificate of balance in terms of clause 26.

[27] The applicant and her husband, now deceased, lent and advanced substantial amount of money to the respondents way back in 2005. The terms of that loan agreement concluded between the parties as well as the terms of the mortgage bond whereby the repayment of the loan was secured, were

undisputed. By means of “anx np5”, whose immaterial defect was remedied by way of “anx iw4”, the applicant made out a *prima facie* case that the respondents were still indebted to her in the sum of money as specified in the certificate(s). The applicant has, in my view, substantially complied with the provisions of the certificate clause, notwithstanding her failure to have “anx np5” signed by its author, Mr. Maree. Our law would be imperfect if such an insignificant defect in the certificate of balance could be upheld as constituting a new case in the replying affidavit.

[28] The *prima facie* proof of indebtedness placed the ball in the 2nd respondent’s court to rebut the applicant’s case which showed, *prima facie,* the respondents’ indebtedness. Her challenge to the applicant’s *prima facie* case can be found in para 19 of the answering affidavit. She said:

> “19.1 Die inhoud van hierdie paragrawe word ontken asof spesifiek teengespreek en word die Applikant tot die bewys daarvan geplaas. Ek bevestig spesifiek verder dat Aanhangsel “NP5” nie ‘n saldosertifikaat is nie en ook nie onderteken is soos wat die Applikant daarop steun nie. Ek het ook nog nooit hierdie document gesien voor die aansoek nie en blyk dit duidelik dat dit gedateer is op 12 Junie 2015. Geen bewys is aangeheg dat hierdie document aan my gestuur is nie. Dit is ook verder duidelik dat hierdie nie ‘n saldosertifikaat is nie, maar blyk dit meer soos ‘n rekening.
>
> 19.2 Dit is my respekvolle submissive dat hierdie nie ‘n gelikwideerde bedrag is nie en betwis ek alles wat in hierdie aanhangsel bevestig is. Hier is dus ‘n groot feitedispuut wat nie op aansoekstukke kan slag nie.”

[29] I have already dealt with all the aforesaid objections and found no substance in any of them. There was substance in Mr. Tsangarakis submission that the 2nd respondent seriously and honestly failed to address the applicant’s claim. There are no reasonable prospects that she would be able to if the matter were to be referred to trial. The crux of the applicant’s case was that the respondents were in default, an averment which the 2nd respondent expressly admitted in para 13.1 of the answering affidavit. The breach of the material terms of the loan agreement had been going on for a year at least before the applicant decided to sue them for a loan they received a decade ago. At para 13.3 of the answering affidavit the 2nd respondent stressed that she disagreed with the amount of the applicant’s claim, but made no attempt to state, let alone to calculate, the correct balance in order to demonstrate where Mr. Maree got it all wrong. What we have here was a classic example of a bare denial.

[30] It can be seen, therefore, that the 2nd respondent merely disputes the extent of her indebtedness but dismally fails to specify why the sum as specifically calculated and claimed, was incorrect. Apart from that the 2nd respondent also failed to give details as to how much the sum of the correct outstanding balance is or should be. Her’s was not the case of a debtor who contended that the certificate of balance was inaccurate in that payments she made were not taken into account. There is no averment in her answering affidavit that the applicant did not give her due credit for all her payments or some of them.

[31] It is well to remember that Mr. Strydom, the applicant's attorney, *ex abundanti cautela* sent notice in terms of sec 129 National Credit Act 34/2005 directly to the second respondent's *domicilium citandi et executandi* by mail – vide para 7.17.12 founding affidavit. The notice dated 10 February 2014 stipulated the outstanding balance. The document or statement of account dated 1 February 2014 reflecting the arithmetic calculations thereof was attached – vide anx np9. Moreover, a copy of the notice was later served on the second respondent's attorneys Mrs. Couzym Hertzog & Horak by the sheriff for the Bronkkerspruit district. Mr. Bruyns, the 2nd respondent's attorney, subsequently acknowledged receipt thereof.

[32] I pause to make an important comment. Neither the 2nd respondent nor her attorney ever queried the balance of the debt as specified in the notice in terms of sec 129 *supra*. Instead the 2nd respondent made fruitless attempts to privately sell the encumbered farm in order to pay her debt, then undisputed. In my view all those actions of the 2nd respondent strongly militated against her allegation that an enormous factual dispute exists and that the amount of the applicant's claim was in dispute. The lady struck me as very untruthful, ungrateful and inconsiderate person. She failed to impress me at all.

[33] It is clearly evident that the loan agreement, the mortgage bond, the breach of the loan agreement and the inability of the respondents to remedy the breach by at least paying the areas are common cause. All these are material facts. The 2nd respondent has no defence to the applicants claim. In the

circumstances the 2nd respondent's resistance is hard to comprehend.

[34] I would, therefore, dismiss the 2nd respondent's contention that an enormous dispute of fact exists as regards the material facts on which the applicant's cause of action is based. On the papers no really genuine an unambiguous dispute of fact which renders the application incapable of fair and just adjudication was shown to exist.

[35] It is appropriate to conclude the matter by quoting the following apposite passage from Wightman *supra* at paragraph 13:

> "A real genuine and *bona* fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed that fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say generally because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a care or general denial as

against a real attempt to grapple with all relevant factual allegations made by another party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles and answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the courts takes a robust view of the matter."

[36] As regards the rest of the fanciful defences raised by the 2nd respondent, I deem it unnecessary to deal with them. It is sufficient to say I considered each one of them but I could find no genuine substance in anyone of them. In doing so I am fortified by the stance adopted by counsel for the 2nd respondent. He hardly mentioned, let alone deal with, the rest of the 2nd respondents various defences in his written heads of argument or oral argument. That alone said a lot as to what he thought about such defences. There was simply no substance in anyone of them.

I am inclined to dismiss all of them.

[37] Accordingly I make the following order:

37.1 The respondents are jointly and severally directed to pay an amount of R779 913.23 to the applicant.

37.2 The respondents are directed to pay interest on the aforesaid capital amount *a tempore morae* at the rate of 14,75% per annum until the date of final payment.

37.3 The respondents' property known as portion of the Farm Vergenoeg 491, District Viljoenskroon, Province Free State size 85,6532 hectares held in terms of title deed number 154/2006 is hereby declared to be specially executable.

37.4 The applicant is authorized to perfect the special notorial bond number BN 173/2006 by taking all the moveable assets specified therein and to liquidate them.

37.5 The costs of this application shall be paid by the respondents, on the scale as between attorney and client, jointly and severally the one paying the other to be absolved.

M.H. RAMPAI, J

On behalf of applicant: Adv. S. Tsangarakis
Instructed by:
EG Cooper Majiedt Inc.
BLOEMFONTEIN

On behalf of 1st respondent: No appearance

On behalf of 2nd respondent: Adv. J.J.F. Hefer
Instructed by:
Etienne Visser Attorneys
BLOEMFONTEIN

/PC