REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT
(REPUBLIC OF SOUTH AFRICA)

1/11/2013

Case No.: 44505/13

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

1/11/2013
DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED Plaintiff

and

RUDIE HERMANN SCHRAMM Defendant

JUDGMENT

MNGQIBISA-THUSI J:

[1] In its application for summary judgment against the defendant, the plaintiff seeks an order on the following terms:

1.1 payment of the amount of R3 217 523.75;

1.2 interest on the amount of R3 217 523.75 at the rate of 8.5% per annum from 2 July 2013 to date of final payment, such interest to be calculated daily and capitalised monthly in arrears;

1.3 that the property described as Erf 1929 Kosmosdal Extension 30 Township, Registration Division J.R., province of Gauteng (also known as 7 Edinburgh Street, Blue Valley Golf Estate, Kosmosdal, Extension 30, Midrand ("the property"), be declared specially executable

1.4 costs on an attorney and client scale.

[2] In its simple summons, the plaintiff alleges that the amount claimed as well as the interest claimed are based on a loan agreement concluded between the plaintiff and the defendant, which loan was covered by a mortgage bond over the property, registered on 10 August 2006. The plaintiff, in compliance with Rule 17(2)(b) of the Uniform Rules of Court, attached a copy of the registered mortgage bond, the certificate of balance, the section 129(1)(a) of the **National Credit Act** notice and the track and trace slip. Furthermore, plaintiff has pleaded in terms of *Firstrand Bank Ltd v Folscher* and Another 2011 (4) SA 314 (NGP).

[3] In its opposing affidavit, the defendant, over above its defence, raised what it referred to as points of complaint:

3.1 that the plaintiff has failed to comply with Rule 17(2)(b) and Form 9 in that it did not set out in concise terms its cause of action; and

3.2 that the certificate of balance attached to the simple summons was not signed by one of the plaintiff's managers as set out in the mortgage bond.

Non-compliance with rule 17(2)(b) and Form 9

[4] If a plaintiff, in a simple summons, basis its cause of an action on an agreement, such agreement has to be attached to such summons.

[5] It is the defendant's contention that the particulars of claim do not disclose a cause of action nor do they comply with the Rule and the form in that the plaintiff has not attached the loan agreement and has not set out the terms of the agreement. It is the defendant's contention that the way the plaintiff has pleaded the amount claimed and the manner in which the interest was calculated cannot be ascertained without reference to the loan agreement.

[6] In support of its contentions, the defendant referred the court to a number of cases, *inter alia, Volkskas Bank v Wilkinson* 1992(2) SA 388 (C) and *Nedbank v Jacobs* 2008 JDR 0445 (C). In the Volkskas matter the court stated that":

> "It appears to us accordingly that where a plaintiff sues for payment of a loan (or an overdraft) all that a simple summons need contain is a statement setting out the relief claimed and a succinct outline of the cause of action, ie that an agreement of loan (or (overdraft) was concluded between the parties providing for interest on the balance outstanding from time to time at a specified (or ascertainable) rate and which loan (or overdraft) was repayable on demand (or on a fixed or ascertainable date) and which, despite demand (or the arrival of that date), has not been repaid. Where the cause of action is founded on some document, reference thereto should be made in the summons and a copy should be attached to the summons and the original should be handed in at the time when the application for default judgment is made."

[7] In the Nedbank matter, the court held that summary judgment could not be granted where neither the relevant loan agreement nor the mortgage bond had been annexed to the simple summons."

[8] In its summons, the plaintiff set out that for its cause of action it was relying on a loan agreement it concluded with the defendant, set out the amount loaned and the interest charged. Over -above, the plaintiff gave an explanation why

the loan agreement was not attached. According to the plaintiff, the loan agreement was kept at Docufile, a document storing company where a fire broke out and it has been unable to ascertain whether the defendant's loan agreement is part of the documents destroyed in the fire. It is the plaintiff's contention that under the circumstances the mortgage bond was the best evidence it could produce in support of its claim.

[9] I am of the view that the is no basis for the defendant's objection in that the simple summons sets out the basis on which the plaintiff is seeking the relief claimed in that it has pleaded the existence of a loan agreement concluded by the parties, which is not denied by the defendant, has set out the amount claimed and the manner in which the interest can be ascertained. Furthermore, given the explanation given by the plaintiff for its failure to attach the loan agreement it could not be expected of it to produce something it did not have. The plaintiff's situation is distinguishable from a situation where a plaintiff uses a simple summons and does not attach a document evidencing the agreement between the parties. The defendant's objection ought to fail.

Failure to comply with clause 9 of the mortgage bond

[10] Clause 9.1 of the mortgage bond reads as follows:

"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 and 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 manger of the Bank whose appointment and authority to sign such certificate need not be proved."

[11] It is the defendant's contention that the certificate of balance signed by Charon Louise Edmunds ("Ms Edmunds") does not comply with clause 9 of the bond since it is not signed by a manager.

[12] In the certificate of balance Ms Edmunds describes herself as a Specialist, Retail Bank Collections of Absa Bank limited...'. The defendant's objection is misplaced. As correctly pointed out by counsel for the plaintiff, in the affidavit in support of the summary judgment application to which Ms Edmunds depose, she clearly indicates that she is a 'manager and specialist within Retail Bank Collections...".

[13] In his opposing affidavit the defendant admits that he concluded a loan agreement with the plaintiff and that the loan was secured by a mortgage bond over the property. Defendant pleads that the loan account was linked to an account named 'one account' in which he has been making

payments into. It is the defendant's contention that the payments he has been making into the 'one account should have reduced his indebtedness to the defendant. Further that the way the plaintiff has pleaded it is not possible to determine what the arrears are.

[14] What is apparent from the defendant's contention is that he does not deny that he might be in arrears. Clause 9.2 of the mortgage bond provides that the certificate of balance will be proof of the 'of the facts stated therein, unless the Mortgagor is able to prove the facts incorrect.' However, even though the defendant denies the amount claimed and alleges that he has been making payments, he has not provided any proof that the amount claimed is incorrect.

[15] I am satisfied that the defendant does not have a bona fide defence to the plaintiff's claim. Furthermore, taking into account the size of the loan advanced to the defendant, I am satisfied that he has the means to acquire alternative accommodation if the plaintiff decides to execute against the property.

[16] In the premise the following order is made:

[17] Accordingly the following order is made:

Summary judgment is granted against the defendant for:

25.1 Payment by the defendant of the amount of R3 217 523.75;

25.2 Payment of interest on the sum of R3 217 523.75 at the rate of 8.5% per annum from 2 July 2013 to date of final payment, such interest to be calculated daily and capitalised monthly in arrears;

25.3 The property, Erf 1929 Kosmosdal extension 30 Township, Registration Division J.R., Province of Gauteng, is declared executable

25.4 Defendant to pay the costs of the application on an attorney and client scale, such costs to be taxed.

N P MNGQIBISA-THUSI
Judge of the North Gauteng High Court

Appearance:

For the plaintiff: Adv S Maritz
Instructed by: Tim Du Toit & Co Inc.

For the Defendant: Adv N Breytenbach
Instructed by: FJ Jordaan Inc.