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

Case No: A331/2017
Reportable: No
Of interest to other Judges: No
Revised: No
SIGNATURE
Date: 28 June 2024

In the matter between:

AUBREY SCHNEIDER First Appellant

STEPHEN ZAGEY Second Appellant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

JUDGEMENT

MOOKI J (Kubushi J and Kooverjie J concurring)

1 The appellants appeal to the Full Bench having been granted leave by Madam Justice Mngqibisa-Thusi ("the High Court"). There is one issue on appeal, namely whether the appellants' defence of prescription in summary judgement proceedings is meritorious.

2 The issue of prescription turns on whether the debt for which the appellants stood surety is secured by a mortgage bond. The High Court found that the applicable period of prescription was thirty years because a mortgage bond was involved. The High Court also found that the debt had not prescribed because summons were served within three years of the Bank making a demand on the appellants.

3 The dispute arises from summary judgement proceedings. The Bank and Simcha Properties 10 CC ("Simcha") concluded a home loan agreement on 10 March 2006. The appellants bound themselves as sureties and co-principal debtors pursuant to a suretyship agreement concluded on the same date.

4 Simcha defaulted in making payments under the loan agreement in 2011. Simcha was later placed under voluntary liquidation on 16 October 2012. The Bank lodged a claim and received a dividend of R130,000.00.

5 The Bank served the appellants with notices of default on 19 September 2014, demanding payment of the shortfall in the amount owing by Simcha. The appellants did not pay. The Bank then issued a summons on 1 February 2016. The appellants were served with the summons on 10 February 2016.

6 The Bank pleaded the home loan agreement and default by Simcha under that agreement. The Bank also pleaded the suretyship agreement and that the appellants were liable to the Bank under that agreement.

7 The Bank then sought summary judgement. The appellants filed an affidavit opposing summary judgement. They raised several defences, including prescription.

8 The appellants essentially contended that their indebtedness had prescribed because they were served with summons more than three

years after Simcha defaulted in its payments to the Bank; alternatively, more than three years after Simcha went into liquidation.

9 The High Court granted summary judgment on 15 December 2016. The High Court held that "In the particulars of claim the [Bank] alluded to the fact that the loan amount was secured by a mortgage bond."[1] The High Court then held that the debt related to a mortgage bond, which meant that the prescription period was thirty years.[2]

10 The High Court also held that prescription began to run in relation to the appellants only after the Bank made a demand of the appellants as sureties on 19 September 2014. That meant that the three-year period of prescription had not lapsed when the Bank served summons on 10 February 2016.

11 Counsel for both parties, in the appeal, emphasised that the summary judgement proceedings had to have been considered pursuant to the old Rule 32.

12 Mr Mahon SC, appearing for the appellants, submitted that the High Court had no basis for inferring the existence of a bond in relation to Simcha's indebtedness. He submitted that the Bank did not allege that the debt was secured by a bond or that a bond was registered. He accepted that the parties intended to secure the debt by a bond, but that it could not be inferred that a bond was registered.

13 It was submitted on behalf of the appellants that the affidavit in support of summary judgment did not verify a cause of action based on a bond; that summary judgment is a drastic remedy and that the Bank is required to show that a bond existed.

[1] Judgement, para 9
[2] Judgement, para 30

14 Mr Mahon pointed out that the cause of action in the Botha case[3] was a bond arising from a loan. He pointed out that the Bank, unlike in the Botha case, did not plead a bond for the Bank's relief against the appellants. He further submitted that Annexure C to the particulars of claim was not a permissible basis for concluding that the Bank's indebtedness was secured by a bond. That was because the appellants are not required to examine annexures to the particulars of claim to ascertain whether a bond had been registered. The Bank is required, as in the Botha case, to have expressly pleaded the existence of a bond in relation to the indebtedness.

15 Mr Mahon submitted that the appellants' indebtedness, on the Bank's pleaded case, became due when Simcha missed the first instalment; or on Simcha's liquidation on 19 November 2014. The appellants were served with summons on 10 February 2019, by when their indebtedness had prescribed. The Bank did not plead that the debt was secured by a bond and summons were served more than three years after Simcha's liquidation.

16 Mr Symon SC argued the case for the Bank. He accepted that there is no express reference in the particulars of claim that a bond was registered. The particulars of claim had, however, to be read with the annexures. He submitted that several annexures have indicia supporting the existence of a bond. He referred to a number of documents that form part of the home loan application, including: reference to "property details" as "PTN 222 of Farm B[...] 4[...] K[...] W[...] (TVL)" and reference to "the cost of registering the bond" in the "Disclosure Annexure."

17 Several submissions were made on behalf of the Bank regarding the absence of express reference to a bond. First, the particulars of claim adopted the certificate of balance ("Annexure C"), which mentions a debt due by a mortgagor. Second, the Bank had no need to refer to a bond

[3] Botha v Standard Bank of South Africa Ltd 2019 (6) SA 388 (SCA)

when the Bank issued summons because the property had been sold by then. Third, it was a term of the home loan agreement that Simcha would be liable to make payments only after a bond had been registered. Fourth, the Bank did not anticipate the point on prescription.

18 Mr Symon also submitted that Annexure C confirms that the debt is a mortgage debt, meaning that a mortgage bond must have been registered. A bank manager, in certifying the indebtedness due to the Bank, stated that:

> "… I have examined the records of SBSA relating to the computation of the indebtedness of the mortgagor as claimed amounting to R1 234 260.91 …. I certify that the amount claimed represents the principal debt … owing by the mortgagor to SBSA …"

19 Mr Symon submitted that the indebtedness in the certificate of balance is characterised as pertaining to a mortgage debt.

20 He also submitted that it was a fact that the debt was secured by a bond because the appellants admitted, in their affidavit opposing summary judgment, that a bond was registered.

21 Mr Symon referred to the decision in Moscon Thyme CC v J P Krugerrand Deals CC and Another[4] as support that an averment in an affidavit resisting summary judgment establishes the fact of an issue in dispute; in this case, whether the debt was secured by a bond. He submitted that the averment by the appellants established the fact that a bond was registered.

22 It was submitted that the affidavit resisting summary judgement "filled the gap" and "put the matter beyond doubt" that the property was secured by

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[4] 2014 JDR 0413 GSJ 1. See also the judgement in the application for leave to appeal: J P Krugerrand Deals CC and Another v Moscon Thyme CC 2014 JDR 1063

a bond. It was further submitted that “No allegation needs to be made in the particulars of claim if it is admitted in the affidavit [opposing] summary judgement.”

23 The admission by the appellants was said to have cured the lacuna as to whether the property was secured by a bond. The result being that the prescription period ran for thirty years because the debt was secured by a bond.

24 The Bank pleaded that Simcha’s debt was accelerated and became due on Simcha’s voluntary liquidation. It was submitted that the running of prescription against a principal debtor “would commence the running of prescription against the surety without additional notice to the surety. After all, the sureties (sic) debt is collateral.” It was submitted for the Bank that the giving of notice to sureties was moot because the prescription period was thirty years.

25 The Bank, during oral submissions, supported the finding by the High Court that prescription began to run when the Bank demanded payment on 19 September 2014; meaning that prescription had not run out because the Bank served summons within three years of that date. [5]

Analysis

26 The High Court did not indicate the basis for its finding that the Bank alluded “in the particulars of claim” that the loan was secured by a mortgage bond.[6] There was no analysis of the existence or otherwise of a bond.

27 The finding that the debt was secured by a mortgage is at odds with the High Court’s analysis of the Bank’s pleaded case. The High Court held that “In its particulars of claim, the plaintiff sets out that for its cause of

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[5] The Bank’s written submission do not address the High Court’s finding that prescription started running when the Bank gave notice to sureties.

[6] Judgement, para 8

action it was relying on a home loan and suretyship agreements it concluded with the principal debtor and the defendants….”[7] The High Court also found that “… the particulars of claim set out the basis on which the plaintiff is seeking the relief claimed in that it has pleaded the conclusion of the loan and suretyship agreements , ….”[8]

28 The High Court thus determined that the Bank’s pleaded claim was premised on the home loan and the suretyship agreements.

29 The Bank is correct that a bond becomes the operative agreement, as determined in the Botha case, where a bond was concluded consequent to a loan agreement. The Bank did not, however, plead that a mortgage bond was concluded following the home loan agreement.

30 The authorities show that the existence of a bond was expressly pleaded in disputes where prescription was raised in the context of a loan agreement secured by a bond.[9]

31 I do not agree that the appellants admitted in their affidavit opposing summary judgment that their indebtedness was secured by a bond. It was submitted that the averment in paragraph 10 of their affidavit supported the contention. That paragraph reads as follows:

> As per SZ 2 I have been informed that the property referred to in the Applicant’s summons (and that secured under the home loan agreement upon which the Applicant relies) was sold on auction […].

32 “SZ 2” is part of an exchange of correspondence between attorneys for the parties. Paragraph 1 of the exchange states that “The proceeds from

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[7] Judgement, para 24

[8] Judgement, para 25

[9] See, for example, Botha v Standard Bank of South Africa Ltd 2019 (6) SA 388 (SCA); Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A); Standard Bank of South Africa Limited v Schutte (14675/20) [2022] ZAGPPHC 433 (9 June 2022); and Oliff v Minnie 1953 (1) SA 1 (A)

the sale of the mortgaged property received by our client was R130 000.0; […].

33 Mr Symon submitted that the correspondence shows that there was a mortgage. Mr Mahon objected to the correspondence being admitted into evidence, contending that the statement was hearsay.

34 Paragraph 10 of the answering affidavit is not an admission that the indebtedness was secured by a bond. The express language references the property being "secured under the home loan agreement….". I consider that annexure "SZ 2" does not cure the Bank's failure to plead that the indebtedness was secured by a bond. Summary judgement proceedings do not require speculation.

35 The submission that the affidavit opposing summary judgement "filled the gap" as to whether the indebtedness was secured by a bond substantiates my view that the Bank's pleaded case does not demonstrate that the indebtedness was secured by a bond. There would otherwise be no gap to fill.

36 "[…] The grant of [summary judgement] is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law….".[10] The High Court ought to have granted leave to defend. The defence of prescription is *bona fide*. It is an issue that merits consideration in trial proceedings. The appeal ought to succeed.

37 I agree with Mr Symon that the court reserve the issue of costs should the appeal succeed. This is to allow the Bank, if so minded, to make appropriate submissions on costs in trial proceedings.

38 I propose the following order:

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[10] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A), at 423E-H

(1) The appeal succeeds.

(2) The order by the High Court is set-aside.

(3) The appellants are granted leave to defend.

(4) Costs are reserved.

MOOKI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

I agree, and it is so ordered

KUBUSHI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

I agree,

H. KOOVERJIE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

Appearance:

Counsel for the appellants: Mr D Mahon SC

Instructed by:	Andrew Garratt Inc
Counsel for the respondent:	Mr S Symon SC
Instructed by:	Van Hulsteyns
Attorneys	
Date heard:	12 June 2024
Date of Judgment:	28 June 2024