

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 2023-033643**

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 30 September 2024

SIGNATURE OF JUDGE:

A black rectangular box redacting the signature of the judge.

In the matter between:

**FIRSTRAND BANK LIMITED**

Plaintiff

and

**PALESA PATIENCE TSEHLO**

Defendant

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## JUDGMENT

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**Woodrow, AJ:**

**Introduction:**

[1] The plaintiff seeks summary judgment against the defendant for payment of the amount of R146,527.37, interest on the aforesaid amount at a rate of 10.32% per annum, calculated and capitalised monthly in arrears from 31 January 2023 to date of payment, both days inclusive, an order declaring certain mortgaged immovable property specially executable, and costs on an attorney and client scale.<sup>1</sup>

[2] In seeking to declare the mortgaged immovable property specially executable, the plaintiff has also filed an application under a notice titled "*Notice of Application in terms of Uniform Rule 46(1) & 46A(8)*" (the "**Rule 46 application**").

[3] The defendant acts in person and is not represented.

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<sup>1</sup> Summarized and paraphrased by me.

**The exchange of pleadings and court process:**

- [4] On 21 April 2023, combined summons was served on the defendant personally.
- [5] On 26 April 2023, the defendant delivered her notice of intention to defend the action.
- [6] On 19 May 2023, the defendant delivered her plea together with a claim in reconvention.
- [7] On 9 June 2023, the plaintiff delivered its application for summary judgment.
- [8] On 14 June 2023, the defendant delivered a notice of intention to oppose the application for summary judgment.
- [9] On 5 July 2023 (after hours), the defendant delivered her answering affidavit in the summary judgment proceedings.
- [10] On 7 July 2023, the plaintiff delivered its 'Rule 46 application'.

**The claim of the plaintiff:**

[11] In essence, the plaintiff pleads the following in its particulars of claim: <sup>2</sup>

- a. On about 22 February 2008, the Firstrand Finance Company Limited (“**FFC**”) and the defendant concluded a written Home Loan Agreement<sup>3</sup> (the “**FFC Home Loan Agreement**”) in terms of which monies were loaned and advanced to the defendant.<sup>4</sup> In the same paragraph the plaintiff pleads: “*A copy of the Mortgage Bond Agreement (**Mortgage Bond: B017262/2008**), securing the abovementioned Home Loan Agreement is attached hereto marked as **Annexure "A"** and should as all other Annexures be read as part of the Combined Summons.*”
- b. In terms of the FFC Home Loan Agreement, and “... *the subsequent Mortgage Bond Agreement ... securing the [FFC] Home Loan Agreement,...*”, the capital Home Loan amount was R234,441.94, finance charges were calculated in terms of clause 2.5 of the FFC Home Loan Agreement, which at the time of the conclusion of the agreement was 12%, the term of the FFC Home Loan Agreement would be for a period of 240 months, and the initial total inclusive minimum monthly repayment was in the sum of R1,905.74.

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<sup>2</sup> Summarized and paraphrased by me (except where expressly quoted).

<sup>3</sup> X to the particulars of claim, CL A41 – A58

<sup>4</sup> Particulars of claim, par 4, CL A6

- c. In paragraph 5.2 of the particulars of claim, the plaintiff pleads that on or about 15 January 2010, FFC then “... *ceded all its rights, title and interest in terms of the abovementioned Mortgage Bond Agreement ... to the Plaintiff, which cession was duly registered alternatively noted by the **Registrar of Deeds — Johannesburg** by way of **Endorsement: BC1614/2010**, which endorsement has been noted on **Page 4** of the Mortgage Bond Agreement attached hereto marked as **Annexure “A”**”.*
- d. In terms of the Mortgage Bond the defendant hypothecated the immovable property described as “*Erf 14922 Protea Glen Extension 16...*” (the “**immovable property**”).
- e. In terms of the written FFC Home Loan Agreement, the defendant agreed and consented: that if a payment is not made on due date, the full amount becomes immediately due and payable; that “... *thereupon the Plaintiff shall be entitled to institute proceedings for the recovery of all such amounts and for a Court Order declaring the hypothecated Immovable Property specially executable*”;<sup>5</sup> the FFC Home Loan Agreement is governed by the National Credit Act; a Certificate signed by a Manager of the Plaintiff would constitute *prima facie* proof of the

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<sup>5</sup> My emphasis. This is incorrect as FFC and not the plaintiff was a party to the FFC Home Loan Agreement.

amount owed, a copy of which the plaintiff attaches marked “**B**”; to pay costs on the attorney and client scale.

- f. The plaintiff pleads that the “... *Defendant has failed to repay the instalments on the due date as agreed upon and is presently in arrears.*”
- g. The plaintiff pleads various “... *facts and allegations ... relevant to the Plaintiff’s action against the Defendant ...*”, pleaded, it appears, to support a case declaring the immovable property executable. (As set out later herein, various allegations herein are incorrect and do not accord with the case of the plaintiff itself.)
- h. Thereafter, the plaintiff pleads its alleged compliance with the National Credit Act.
- i. Finally, the plaintiff pleads that: “*As at **14<sup>th</sup> day of February 2023**, the Defendant was indebted to the Plaintiff in the sum of **R146 527.37** plus Interest on the sum of **R146 527.37** at a rate of **10.32% per annum**, calculated and capitalized monthly in arrears from the **31<sup>st</sup> day of January 2023** to date of payment, both dates inclusive. A copy of the Certificate of Balance is attached hereto marked as **Annexure “B”.***”

[12] It appears to me, although I do not know whether this is so, that the particulars of claim have been drafted utilizing some or other template. This would explain

the various patent errors made in the particulars of claim. The manner in which the claim has been pleaded has a material bearing on the outcome of this matter.

[13] I highlight that an essential part of the plaintiff's claim is that the plaintiff took cession of certain rights, title and interest from FFC. From that pleaded by the plaintiff, it is not clear precisely what rights, title and interest the plaintiff alleges it took cession of. No cession agreement is pleaded, and, insofar as this exists, no written agreement of cession is attached to the particulars of claim.

[14] The plaintiff's case is not that it loaned money to the defendant, and its case is not that it concluded the FFC Home Loan Agreement with the defendant (although its pleading, and certain statements made under oath on behalf of the plaintiff, is contradictory in this regard).

### **The defendant's opposition to the application for summary judgment**

[15] The defendant raised a range of 'defences' to the application for summary judgment, and a claim in reconvention. In my view, subject to my further finding below, such defences do not raise a triable issue, and a number of such defences are in fact non-sensical. With respect to the defendant, it is also extremely difficult to understand parts of her affidavit – and parts thereof are simply non-sensical – for example she makes statements such as: "*I concede to the allegation. The APPLICANT is put to the proof thereof.*" I need not dwell on all of the 'defences' raised by the defendant in the summary judgment

application. Had the plaintiff presented a proper case, I would not have upheld the defences raised by the defendant.

[16] However, the allegation of a cession by FFC to the plaintiff of “...*all its rights, title and interest in terms of the abovementioned Mortgage Bond Agreement* ...” (particulars of claim, paragraph 5.2) is denied by the defendant<sup>6</sup> (plea, paragraph 6). Further, the defendant challenges the *locus standi* of the plaintiff – and whilst the further pleaded bases for such challenge, in my view, do not have merit, the defendant positively pleads that the plaintiff “... *does not have locus standi to bring this matter to the Honourable Court*”. Accordingly, the defendant has placed the cession and the *locus standi* of the plaintiff in dispute.

[17] The assertion by the representative of the plaintiff in the affidavit in support of summary judgment that the cession by FFC to the plaintiff “... *does not seem to be disputed by the Defendant and accordingly stands as common cause between the parties* ...” is accordingly not correct. The cession is expressly denied. The plaintiff has accordingly not taken up the opportunity to set out “... *the facts upon which the plaintiff’s claim is based* ...” nor to “... *explain briefly why the defence as pleaded does not raise any issue for trial* ...”<sup>7</sup> with reference to the dispute raised in respect of the cession.

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<sup>6</sup> I am alive to the fact that the content of the plea that follows such denial makes little sense. However, such non-sensical positive averments on the part of the plaintiff do not detract from the pleaded denial of the alleged cession.

<sup>7</sup> Rule 32(2)(b)



## The application

[18] The purpose of summary judgment is to enable a plaintiff with a clear case to obtain a swift judgment against a defendant with no real defence to the claim. It is a procedure intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs endeavouring to enforce their rights.<sup>8</sup>

[19] The rationale for summary judgment proceedings (referred to in the preceding paragraph herein) has been described as “*impeccable*”. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court.<sup>9</sup>

[20] The grant of the remedy is based upon the supposition that (a) the plaintiff's claim is unimpeachable and (b) that the defendant's defence is bogus or bad in law.<sup>10</sup>

[21] On the papers before me, it is not possible to conclude that the plaintiff's claim is unimpeachable. The plaintiff has relied upon an alleged cession, which has been expressly placed in dispute and denied. The plaintiff has failed to plead any contract of cession and has failed to attach any such agreement (if this

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<sup>8</sup> **Majola v Nitro Securitisation 1 (Pty) Ltd** 2012 (1) SA 226 (SCA) par [25]

<sup>9</sup> **Joob Joob Inv (Pty) Ltd v Stocks Mavundla Zek Joint Venture** 2009 (5) SA 1 (SCA) 11G

<sup>10</sup> **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) 423A

exists). In aggravation, there are various allegations made on behalf of the plaintiff, some on oath, that in fact conflict with the case of the plaintiff. The plaintiff has rendered its own claim impeachable.

[22] In the unreported decision of **First Rand Bank Limited v Trustees for the Time Being of the Goran Family Trust and Others**,<sup>11</sup> the court held as follows:<sup>12</sup>

[12] It is trite that a party relying on a cession must allege and prove the contract of cession.<sup>13</sup>

[13] First Rand has not pertinently pleaded the cession, nor has it provided proof of the contract of cession. What First Rand relies on, is the consequence of the cession, namely the endorsement of the mortgage bond, a public document. There is no evidence apparent in the affidavits filed of, record of a regular and valid cession, as required, to sustain a cause of action reliant on a cession.<sup>14</sup>

[23] In order to ascertain whether the plaintiff has pleaded a cause of action that is complete and sound, I must examine the combined summons. Absent essential allegations, it fails to disclose a cause of action and that is the end

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<sup>11</sup> **First Rand Bank Limited v Trustees for the Time Being of the Goran Family Trust and Others** (24597/2017) [2019] ZAGPJHC 364 (23 August 2019) (saflii.org)

<sup>12</sup> At par [12] – [13]. The original footnotes are retained, but the numbering differs.

<sup>13</sup> **Leaf NO v Dettmann** 1964(2) SA 252 (A); and **Johnson v INC General Insurance Ltd** 1983(1) SA 318 (A)

<sup>14</sup> **Hippo Quarries Tvl (Pty) Ltd v Eardley** 1992(1) SA 867 (A) 873

of the matter.<sup>15</sup> Where a pleading is found to be excipiable, summary judgment cannot be granted.<sup>16</sup>

[24] The plaintiff has failed to attach a copy of the cession agreement. It has failed to plead the terms of the alleged cession agreement. Furthermore, from that pleaded (paragraph 5.2 of the particulars of claim, quoted to the extent relevant above), it is not possible to determine what alleged right, title or interest the plaintiff contends was so ceded, whether the right, title and interest in the Mortgage Bond, or in the FFC Home Loan Agreement, or in both, or otherwise.

[25] The plaintiff has not assisted its own case. There are various allegations pleaded in the particulars of claim, and various statements made under oath on affidavit, that are plainly incorrect, certain of which have a direct bearing on the disputed cession. For example, and simply to illustrate, I quote a few examples (there being various inconsistencies and contradictions):<sup>17</sup>

a. The plaintiff pleads that: “*The Defendant applied for a Home Loan from the Plaintiff ...*” (particulars of claim, paragraph 9.2). This is

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<sup>15</sup> **Gunn NNO v Victory Upholsterers (Pty) Ltd** 1976 (1) SA 127 (D) 131

<sup>16</sup> **Weavind & Weavind Incorporated v Manley N.O** (A213/18) 2019 ZAGPPHC 1030 (6 December 2019) par [23]; **Dowson & Dobson Industrial Ltd v Van der Werf and others** 1981 (4) SA 417 (C)

<sup>17</sup> The highlighting using underlining is my own.

incorrect – the FFC Home Loan Agreement is between FFC and the defendant.

- b. The plaintiff pleads that: “*The indebtedness of the Defendant to the Plaintiff was secured by a Mortgage Bond Agreement (Mortgage Bond: B01726212008), registered in favor of the Plaintiff in terms of which the Defendant is liable to the Plaintiff.*” (particulars of claim, paragraph 9.3). This is incorrect – the mortgage bond is registered in favour of FFC.
  
- c. The plaintiff pleads that: “*The Defendant consciously and with the intention of securing the monies loaned and advanced by the Plaintiff to the Defendant, mortgaged the Immovable Property as described in Paragraph 6 supra to the Plaintiff ...*” (particulars of claim, paragraph 9.6) and “*The original capital Home Loan amount which the Plaintiff loaned and advanced in favor of the Defendant, was in the amount of **R234 441.94** ...*”. (particulars of claim, paragraph 9.7). These allegations are incorrect.
  
- d. In the Rule 46 application, the representative of the plaintiff states under oath *inter alia* that the FFC Home Loan Agreement was “... entered into by the Applicant [plaintiff] and the Respondent [defendant] on or about 22 February 2008 ...”;<sup>18</sup> that on or about 15 January 2010, “... the Applicant [plaintiff] ceded all its rights, title and

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<sup>18</sup> Rule 46 application, par 13. See also par 24 thereof.

*interest of the above-mentioned Mortgage Bond Agreement ... to the Plaintiff...*,<sup>19</sup> that “As security for the aforementioned mortgage loan, the immovable property was specifically hypothecated in favour of the Applicant [plaintiff].”,<sup>20</sup> and the mortgage bond was registered in favour of the plaintiff;<sup>21</sup> that the “... current monthly instalment amount is R 28 859.57...”<sup>22</sup> *et cetera*.

[26] In bringing the summary judgment application, the representative of the plaintiff on oath confirms the conflicting pleading set out in the particulars of claim.

[27] In the unreported judgment of **Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments**<sup>23</sup> the court held as follows:<sup>24</sup>

[36] ... Here, not only has the applicant failed to attach the cession agreement to its particulars of claim and to plead the details thereof, as required by rule 18(6), but it has also failed to plead fulfilment of the conditions. Such averments constitute the facts necessary for the applicant

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<sup>19</sup> Rule 46 application, par 14.

<sup>20</sup> Rule 46 application, par 15. See also par 24 thereof.

<sup>21</sup> Rule 46 application, par 16.

<sup>22</sup> Rule 46 application, par 18.

<sup>23</sup> **Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments** (1206/2022; 1511/2022) [2023] ZAECMKHC 65 (23 May 2023) (saflii.org)

<sup>24</sup> At par [36] – [37]. The original footnotes are retained, but the numbering differs.

to prove before judgment can be granted in its favour. They constitute an integral component of the applicant's cause of action.

[37] The courts have previously held that where a plaintiff fails to verify his or her cause of action with clarity and exactitude, it is defective and his or her claim must fail.<sup>25</sup> In the present matter, the respondent has argued that the applicant's particulars of claim are excipiable. The court is inclined to agree. The shortcomings in the applicant's claim, as identified by the respondent, give rise to the question of whether the applicant has the necessary *locus standi* to pursue the claim set out in its particulars. This is a triable issue.

[28] As matters currently stand, the case as pleaded by the plaintiff, does not allow for summary judgment to be granted. Leave to defend must be granted.

[29] This ought to be the end of the matter, except for the issue of costs. However, before dealing with costs and setting out the order that I intend to grant, there is an aspect that arises from the 'Rule 46 application' that I intend to address.

[30] In argument for the plaintiff, and when asked by the court whether there was an affidavit filed by the plaintiff in support of the valuations of the immovable property (a sworn valuation as to market value), it was submitted that it is not the practice of this Division (referring to the Pretoria seat of the Gauteng Division, as opposed to the Johannesburg seat), to require a sworn valuation as to market value. Insofar as the submission may have entailed an argument that *stare decisis* does not apply as between the local seat and the main seat

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<sup>25</sup> **Visser v De la Ray** 1980 (3) SA 147 (T) at 150.

of the Gauteng Division, this is not correct.<sup>26</sup> Further, the decisions of the Gauteng Division that are relevant in this regard (certain of which I refer to briefly below) are not based solely on ‘practice’ but constitute substantive decisions as to the law.

[31] In **Nedbank Ltd v Mzizi and Related Cases**,<sup>27</sup> the court held as follows:<sup>28</sup>

[20] To my mind, an internal bank valuation is not sufficient in and of itself to establish a reserve value unless it contains or is accompanied by evidence of independent verification as to value. Thus, either independent valuations should be obtained or further information as to value should be used, in addition to the bank's valuation, to satisfy the court as to the appropriate reserve value. In all instances, the valuation should be proven by an affidavit of a person who has actually conducted the valuation him- or herself and who is properly qualified in this respect.

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<sup>26</sup> **Van Der Westhuizen v Road Accident Fund** (21947/2022) [2024] ZAGPPHC 742 (29 July 2024) (saflii.org) par [11]. The uniform exercise of such alleged ‘practice’ does also not appear to be correct: cf. **Actom Electrical Products v Matlala** (42355/2020) [2024] ZAGPPHC 75 (29 January 2024) par [26]

<sup>27</sup> **Nedbank Ltd v Mzizi and Related Cases** 2021 (4) SA 297 (GJ) par [20]

<sup>28</sup> The highlighting using underlining is my own.

- [32] In the unreported judgment of **SB Guarantee Company (Pty) Ltd v De Sousa**,<sup>29</sup> the court emphasised *inter alia* the need for a proper and reliable sworn valuation as to market value.<sup>30</sup>
- [33] The shortcomings in the ‘valuations’ placed before the court *in casu* demonstrate the need for proper and reliable valuations confirmed under oath. The plaintiff relies on two unsworn valuations – one attached to its particulars of claim marked “D” and one attached to its “Supplementary Affidavit - Updated Figures” marked “SHC4”.
- [34] The ‘valuation’ attached to the particulars of claim (marked “D”) which purports to have valued the immovable property on 19 February 2023 contains various contradictions and inconsistencies. I deal with only certain aspects in order to illustrate.

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<sup>29</sup> **SB Guarantee Company (Pty) Ltd v De Sousa** (2023/035447) [2024] ZAGPJHC 459 (6 May 2024) (saflii.org)

<sup>30</sup> In paragraph 11 of this judgment reference is made to the full court decision of **Absa Bank Ltd v Mokebe & Related Cases** 2018 (6) SA 492 (GJ) par 57 which reads as follows: *“The courts’ power and duty to impose a reserve price is founded, inter alia, in s 26(3) of the Constitution. The process of granting judgment against the homeowner is the first step that may lead to his or her eviction from the property. Thus a court is to consider all the relevant factors when declaring a property specially executable at the behest of a bondholder. It is thus incumbent upon the bank or bondholder to place ‘all relevant circumstances’ before the court when it seeks an order for execution. This, in our view, includes a proper valuation of the property (under oath) ...”* (highlighting using underlining is my own) (footnotes omitted)



- a. Under the heading “Access” the following is recorded:

Access Gained? Yes...

ACCESS GAINED, AND A FULL INTERNAL INSPECTION WAS UNDERTAKEN.

- b. Immediately thereafter, under the heading “*Valuation Remarks*”, the following directly contradictory remarks are made:

No access has been gained into the Subject Property, as such an external inspection and valuation has been conducted.

Valuer has failed to reach client on the mobile number provided =  
...

...

No access possible into property and an external valuation is conducted as requested. The external valuation is based on estimates and measuring tool. ...

- c. If access was not gained, then it is very difficult to understand how the valuator was able to provide an opinion regarding the internal fixtures and fittings, which the valuer in facts does describing items such as “*Kitchen Units*”, “*Stove*” and “*Sanitary Fittings*” *et cetera* ... as “*Acceptable*”.

- d. The statement under the heading “*Valuation Remarks*” as follows also appears to be wrong if the allegations in the particulars of claim regarding the conclusion of the FFC Home Loan Agreement

concluded in 2010 are correct: *“Note that this property was previously purchased for R65 000 on 21 February 2021”*.

[35] The updated valuation report, (attached to the “Supplementary Affidavit - Updated Figures” marked SHC4) relies in part on the aforesaid prior valuation report and provides *inter alia* as follows: *“No access possible into this secure estate and an external valuation is conducted as requested. The external valuation is based on the information, sizes, accommodation, condition, etc. obtained from the previous valuation and any possible improvements or additions made to the property since the previous valuation are excluded.”*<sup>31</sup>

[36] Neither report/‘valuation’ is confirmed by any form of affidavit, and the approach of the plaintiff in this regard does not conform with the decisions that I have referred to above.

[37] The final aspect for determination is costs. In my view, the plaintiff ought not to have launched the application for summary judgment on the papers that it has placed before the court. The rule 46 application is further deficient for the reasons referred to above. There is however no point in granting costs against the plaintiff as the defendant represents herself in person. In my view, having considered the circumstances of the matter, an order that there shall be no order as to costs, and that the costs of the application for summary judgment

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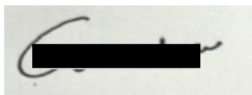
<sup>31</sup> The highlighting using underlining is my own.

and the costs of the rule 46 application to date hereof are not to be costs in the cause,<sup>32</sup> is appropriate in the circumstances.

## ORDER

[38] Accordingly, I make the following order:

1. The plaintiff's application for summary judgment is refused.
2. The defendant is granted leave to defend the action.
3. There is no order as to costs. The costs of the application for summary judgment, and the costs of the rule 46 application to date hereof, are not to be costs in the cause.



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**WOODROW AJ**

**ACTING JUDGE OF THE HIGH COURT**

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<sup>32</sup> This additional part of the cost order appears to me to be necessary as the plaintiff has loaded "*legal fee[s]*" onto the most recent homeloan statement placed before the court (SHC2) in support of an updated certificate of balance (SHC3).

*This Judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 30<sup>TH</sup> day of September 2024.*

**Appearances:**

Counsel for the Plaintiff: R Peterson

instructed by: Glover Kannieppan Incorporated

Defendant in person

Date of Hearing: 6 August 2024

Date of Judgment: 30 September 2024