REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 20/31598

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE	SIGNATURE

In the matter between:

ABSA BANK LIMITED Applicant

and

TSHEPANG WALTER MOKOTEDI Respondent

JUDGMENT

Badenhorst AJ:

[1] This is an application for summary judgement.

[2] The relevant parts of the applicant's particulars of claim read as follows:

“4. On or about 20 JULY 2007 the Plaintiff (represented by a duly authorised official) and the Defendant (acting personally) concluded a written Home Loan Agreement ("the loan agreement"). The Plaintiff is currently unable to locate the original loan agreement or copies thereof and is accordingly unable to annex a copy. The comprehensive detail sheet recording the details of the mortgage loan agreement captured on the Plaintiffs electronic data base is annexed hereto marked annexure "A" .

5. Pursuant to the loan agreement the debt was secured by registering a continuing covering bond under Mortgage Bond No.S[…] annexed hereto as Annexure "B", on the 01 OCTOBER 2007, for the sum of R359 741.00 (Three Hundred and Fifty Nine Thousand Seven Hundred and Forty One Rand) and additional sum of R71 948.20 (Seventy One Thousand Nine Hundred and Forty Eight Rand).

[The terms of the agreement and plaintiff’s standard terms of mortgage are then repeated and referenced.]

8. In breach of the provisions of the bond as read with the loan agreement, the Defendant failed to pay all monthly instalments on due date and was approximately 9.2 months in arrears as at 26 AUGUST 2020 in an amount of R30185.07.

9. By reason of the Defendant's default and failure to pay the monthly instalments, the full balance owing under the bond and the loan agreement is now due, owing and payable.

10. As at 23 JULY 2020 the Defendant was indebted to Plaintiff in the sum of R236 484.30 at an interest at the rate of 6.20% per annum capitalised monthly from 24 JULY 2020 to date of payment as per the certificate of balance is annexed marked "D".”

[The National Credit Act, 34 of 2005 is admittedly applicable. For that reason, plaintiff pleads what are claimed to be the relevant factors to be taken into consideration in deciding whether an order declaring the bonded property executable.]

[3] Respondent’s plea is, in essence, a bald denial. It is denied that a loan agreement was concluded, and it is denied that any property was hypothecated, and the continuing covering mortgage bond is pleaded to be void.

[4] The pivotal averments in applicant's affidavit in support of the application for summary judgment are the following:

> "9. The Applicant's claim is based upon the following facts and legal principles:
>
> 9.1 The Applicant and the Respondent entered into a written home loan agreement, whereby the Applicant lent and advanced money to the Respondent subject to the terms and conditions of the agreement;
>
> 9.2 The Respondent is the registered owner of the immovable property described in the summons;
>
> 9.3 The Applicant is the registered holder of a mortgage bond over the Respondent's immovable property described in the summons;
>
> 9.4 The Respondent breached the terms of the credit agreement by failing to make payment of the required monthly instalments;
>
> 9.5 The Applicant is as a result of the Respondent's breach (as contemplated in clause 8 of the mortgage bond) entitled to claim payment of the full outstanding balance, as well as an order declaring the immovable property specially executable;…"

[5] In the opposing affidavit, the respondent essentially repeats the bald denials made in the plea in most instances. I repeat the following paragraphs answering pertinently to the principal averments quoted above which contain an important admission (of the covering mortgage bond):

> "Ad Paragraph 9.1
>
> 19. The contents of this paragraph are denied. The Applicant and the Respondent have not entered into any loan agreement.
>
> Ad Paragraph 9.2 (registered owner of immovable property)
>
> 20. <u>The contents of this paragraph are admitted</u>.
>
> Ad Paragraph 9.3 (registered holder of a mortgage bond)
>
> 21. <u>The contents of this paragraph are admitted</u>. The mortgage bond registered in favour of the Applicant does not secure any valid and enforceable debt. The mortgage bond registered in favour of the Applicant is therefore invalid in so far as there is no legal causa for the mortgage bond to

be registered. The registration of the mortgage bond in itself does not give rise to a valid enforceable debt

Ad Paragraph 9.4

22. The contents of this paragraph are denied. The Respondent has not breached the terms of any agreement between him and the Applicant. There is no agreement between the Applicant and the Respondent.

Ad Paragraph 9.5

23. The contents of this paragraph are denied. The Respondent has not breached the terms of any agreement between him and the Applicant. The mortgage bond registered in favour of the Applicant does not secure any valid and enforceable debt. The mortgage bond registered in favour of the Applicant is therefore invalid in so far as there is no legal causa for the mortgage bond to be registered. The registration of the mortgage bond does not give rise to a valid enforceable debt." [underlined]

[6] The contention that applicant's failure (or inability) to produce the original agreement renders the claim deficient is devoid of substance. The applicant explains that the original document cannot be found and offers what are likely to be compelling contemporaneous documents (the Comprehensive Details Sheet and the <u>admitted</u> Covering bond) that corroborate the fact that an agreement existed.

[7] The test to be applied at this stage of the proceedings is explained as follows in Erasmus:[1]

"The defendant is not at this stage required to persuade the court of the correctness of the facts stated by him or, where the facts are disputed, that there is a preponderance of probabilities in his favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide. In order to enable the court to do this, the court must be apprised of the facts upon which the defendant relies with sufficient

[1] Superior Court Practice RS 23, 2024, D1 Rule 32-63.

particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant."

[8] The fundamental question is in essence whether the respondent has put up a *bona fide* defence.

[9] The respondent admits two critical facts namely that he is the registered owner of the property and that the covering bond (as described in the particulars of claim) was duly registered over the property. The bond speaks for itself – I repeat the crucial passages therein:

"I, the undersigned, CINDY ARDENE VINE

the duly authorised agent of:

TSHEPANG WALTER MOKOTEDI

Identity Number 7[…]

Unmarried •

(hereinafter referred to as 'the Mortgagor') under and by virtue of a Special Power of Attorney granted at JOHANNESBURG on 20 July 2007

do hereby declare the Mortgagor to be lawfully indebted and bound to

ABSA BANK LIMITED

Registration Number 1986/004794/06

(hereinafter referred to as "the Mortgagee") in the amount of R359,741.00 (THREE HUNDRED . AND FIFTY NINE THOUSAND SEVEN HUNDRED AND FORTY ONE RAND)

or any lesser amount ·that may from time to time be owing ("the capital amount") and

R71 948,20 ·(SEVENTY ONE THOUSAND NINE HUNDRED AND FORTY EIGHT RAND TWENTY CENTS) being the additional amount referred to in the conditions annexed, arising from any cause whatsoever, together with interest on the capital amount, and as security . r the above, the Mortgagor hereby binds as a FIRST MORTGAGE, subject to the conditions set out in the annexure to this bond:…"

The relevant part of the Annexure reads as follows:

"ANNEXURE

ACKNOWLEDGEMENT OF DEBT

The Appearer acknowledged and declared his principal, the Mortgagor; to be truly and lawfully held and firmly bound unto and in favour of ASSA BANK LIMITED (Registration Number 1986/004794/06) ("the Bank"} and the security conferred by the mortgage bond to which this 'Annexure is attached ("the Bond"), to be in the sum of R359,741.00 (THREE HUNDRED AND FIFTY NINE THOUSAND SEVEN HUNDRED AND FORTY ONE RAND) or any lesser amount that may from time to time be owing ("the capital amount"), arising from any cause whatsoever, together with interest on the capital amount."

[10] The details of the indebtedness which is the *causa* of the covering bond (admitted by the respondent) are precisely the same as those which are reflected in the "Comprehensive Details" of the loan (allegedly) advanced to the respondent in terms of which the claim is made.

[11] The respondent's bald denial of the loan agreement is flatly contradicted by his admission of the covering bond, which secures the indebtedness arising from that loan.

[12] I refer to Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at paragraph [13] where the following is said about bald denials on affidavit:

"[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 the 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 bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other 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 an 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 court takes a robust view of the matter."

[13] I find the respondent's admission of the covering bond (which contains manifest confirmation of the loan indebtedeness) coupled with his bald denial of any loan indebtedness to be irreconcilable. That finding leaves me unable to conclude that a *bona fide* defence has been shown by the respondent.

[14] On the application of the test for summary judgment, the application must succeed.

[15] I accordingly grant summary judgment in terms of the Order attached hereto, marked "X".

BADENHORST AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

For applicant:	Adv. AP Ellis, instructed by Strauss Daly Inc
For respondent:	Adv. CS Baloyi, instructed by MPM Lawyers