IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 4370/2022P

In the matter between:

ABSA HOME LOANS FUARANTEE COMPANY (RF) PROPRIETARY LIMITED — **First Applicant**

ABSA BANK LIMITED — **Second Applicant**

and

RAGUNATHAN ARUNASELEN GOVENDER
(In his capacity as Trustee of the STANLEY AND GONUM FAMILY TRUST: IT NO.2125/2004) — **First Respondent**

GONASAGRIEE GOVENDER N.O
(In his capacity as Trustee of the STANLEY AND GONUM FAMILY TRUST: IT NO.2125/2004) — **Second Respondent**

JAGATHAMBAL PILLAY N.O
(In his capacity as Trustee of the STANLEY AND GONUM FAMILY TRUST: IT NO.2125/2004) — **Third Respondent**

RAGUNATHAN ARUNASELEN GOVENDER — **Fifth Respondent**
(ID NO: 5[...])

GONASAGRIEE GOVENDER
(ID NO: 6[...])

ORDER

1. Judgment is hereby granted in favour of the first applicant against first, second and third respondents, alternatively, judgment is hereby granted in favour of the second applicant against the first, second, third, fourth and fifth respondents, jointly and severally, the one paying the other to be absolved, for:

a. Payment of the sum of R4 621 004.28 (limited to the sum of R4 275 000.00 in respect of the fourth and fifth respondents);

b. Interest on the sum of R4 621 004.28 calculated at 7.50% per annum, calculated and capitalised monthly in arrears from 15 March 2022 to date of payment, both days included.

c. Cost of suit on the attorney and client scale.

2. In favour of first applicant, the immovable property more fully described as:

A Unit consisting of:'

(a) Section number 804 shown and more fully described on sectional title plan SS 102/2010 in the Scheme known as Crystal Towers in respect of the land and building or buildings situated at Montague Gardens in the City of Cape town, of which section the floor area according to the said sectional plan is 122 square metres in extent; and

(b) An undivided share in and to the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan

Held by Deed of Transfer ST 1354/2018,

Subject to such conditions as set out in the aforesaid title deed

And more especially subject to the restriction against alienation without the written consent of the Century City Property Owners Association NPC, registration No. 1997/001905/08 and subject to the restriction against transfer of property without the written consent of the Crystal Towers Property Owners' Association (the property) is hereby declared specially executable.

JUDGMENT Delivered:

Mngadi J

[1] The two applicants alternatively seeks judgment against 1st, 2nd, 3rd, 4th and fifth respondents jointly and several one paying the other to be absolved for

(a) Payment of R4621 004.28 - limited to R4275 000.00 in respect of the 4th ad 5th respondents, plus interest and costs.

(b) Declaration as especially executable an immovable property unit consisting of a section and an undivided shared held under deed of transfer ST 1354/2018 situated in the City of Cape town.

[2] The first applicant is Absa Home Loans Guarantee Company (Pty) Ltd a company incorporated and registered in accordance with the law. The second applicant is Absa Bank Limited a company and a bank registered in terms of the law.

[3] The first respondent is Ragunathan Arunaselen Govender N.O, the second respondent is Gonasagriee Govender N.O and the third respondent is Jagathambal Pillay N.O. These three (3) respondents are cited in their capacities as trustees of Stanley and Gonum Family Trust (IT2124/2004). (the Trust). The 4th respondent is Ragunathan Arunaselen Govender an adult businessman. The fifth respondent is Gonasagriee Govender an adult person.

[4] The basis of the claim is as set out in the applicants founding affidavit with annexures is summarised in the 'common cause facts' in the applicants' heads of argument, namely;

1. On 30 November 2017 the second applicant and the Trust concluded a written mortgage loan agreement (mortgage loan agreement);

2. By way of and in terms of the mortgage loan agreement, the Trust agreed to provide to the second applicant a written indemnity in terms of which the Trust indemnified the first applicant against any claim made by the second applicant under and by virtue of a guarantee provided by the first applicant to the second applicant in regard to all amounts due by the Trust to the second applicant.

3. In pursuance of and as security for the monies that were loaned and advanced by the second applicant to the Trust and by way of and in terms of the mortgage loan agreement, the Trust passed a covering sectional indemnity bond in favour of the first applicant.

4. In terms of the provisions of the written mortgage loan agreement, read together with the indemnity and the sectional indemnity bond, in the event of the Trust acting in breach of its obligations, namely; by inter alia failing to make payment of the requisite monthly instalments, then and in that event the applicants would be entitled to inter alia claim repayment of the full outstanding balance and secure an order declaring the mortgaged property specially executable.

5. The Trust acted in breach of his obligations in terms of the loan agreement by failing to pay the requisite monthly instalments.

6. Notwithstanding the applicants delivering default notices to the Trust requesting it to remedy its breach of inter alia the mortgage loan agreement, the Trust failed to remedy its breach of inter alia the loan agreement and mortgage bond.

7. The fourth and fifth respondents executed the written deeds of suretyship on behalf of the Trust and in favour of the second applicant in terms of which inter alia *the fourth and fifth respondents bound themselves as sureties and co-principal debtors jointly and severally for the Trust's indebtedness to the second applicant in the limited amount of R4 275 000. 00 together with interest and costs.*

[5] The respondents filed an answering affidavit resisting the claim on various grounds. The various grounds were belatedly before the hearing abandoned and the place thereof in the heads of argument and in argument the respondents' counsel raised the following legal points. Firstly, the first and second applicants have impermissibly sought judgment jointly and that seeking a judgment between first and second applicants in a joint manner is impermissible. Secondly, it is contended, the first applicant has failed to plead a cause of action and is accordingly not entitled to the relief sought under the indemnity and indemnity bond. First applicant's claim is founded on a guarantee, but it has failed to plead the terms of the guarantee and to annex a copy of the guarantee.

[6] The relief sought in the notice of motion is set out as follows:

1. Judgment is hereby granted in favour of the first applicant, alternatively the second applicant against the first, second, third, fourth and fifth respondents, jointly and severally, the one paying the other to be absolved, for:

a. Payment of the sum of R4 621 004.28 (limited to the sum of R4 275 000.00 in respect of the fourth and fifth respondents);

b. Interest on the sum of R4 621 004.28 calculated at 7.50% per annum, calculated and capitalised monthly in arrears from 15 March 2022 to date of payment, both days included.

c. Cost of suit on the attorney and client scale

2. The immovable property more fully described as:

A Unit consisting of:'

(a) Section number 804 shown and more fully described on sectional title plan SS 102/2010 in the Scheme known as Crystal Towers in respect of the land and building or buildings situated at MONTAGUE Gardens in the CITY OF Cape Town, of which section the floor area according to the said sectional plan is 122 square metres in extent; and

(b) An undivided share in and to the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan

Held by Deed of Transfer ST 1354/2018 ... is hereby declared specially executable.

[7] The applicants' counsel during the hearing submitted that the relief in prayer 2 can only be granted in favour of the first applicant in whose favour the mortgage bond was registered. The averments in the founding affidavits read with annexures make it clear the fourth and fifth respondents executed the deed of suretyship in favour of the second applicant. As a result, only the second applicant is entitled to the relief against the fourth and fifth respondents. The relief sought must clarify that the first applicant is only entitled to the relief against first, second and third respondents.

[8] The respondents expanding on the first point argued point out that throughout the founding affidavit the applicants have specifically sought judgment collectively (jointly) as between themselves, and that the founding affidavit refers to granting judgments in favour of the applicants; that the respondents are indebted to the applicants; the Trust is indebted to the second applicant under the mortgage loan agreement, and therefore to the first applicant under the indemnity ; that the applicants seek an order declaring the immovable property specially executable ; and that the amounts owed by the Trust to the applicants under the mortgage loan agreements, is secured by the registration of an indemnity Bond. Counsel referred to Mossop J remarks in *Absa Bank and Another v Naidoo* (2570/2021P) [2022] ZAKZPHC 71 (15 November 2022) para 17.

Counsel argued further that although relief in the notice of motion is in the alternative that renders that relief to be in conflict with or not supported by the averments

[9] It is trite that the relief sought is set out in the notice of motion not in the founding affidavit. The question is whether the averment's made in the founding affidavit read with annexures (if any) make out the case sought in the relief. The argument is contrived, meritless and unsustainable. has no substance.

[10] In the second point, the respondents point out that the relationship between the parties is regulated by a package of agreements which are interrelated. One of those agreements is the guarantee. The respondents contend that the failure by the applicants to allege the full terms of the guarantee and to attach the guarantee to the founding affidavit renders the applicants' papers fail to disclose a cause of action. The respondents in support of their argument refer to *Changing Tides 17 (Pty) Ltd N.O. v Congwane* (2015/94919)[2016] ZAGPJHC 128 (30 May 2016) wherein Spilg J held that entitlement to call up the indemnity was dependent upon the calling up of the guarantee and, therefore, the failure to allege full terms of the guarantee results in a failure to disclose cause of action based on the indemnity.

[11] The applicants in the founding affidavit stated that judgment was sought against the respondents based on the mortgage loan agreement, the indemnity, the indemnity bond and the Deeds of Suretyship. The applicants as part of their averments in the founding affidavit stated: *'Pursuant to the second applicant and the Trust concluding the mortgage loan agreement. the Trust executing the Indemnity, the first applicant furnished the second applicant with a written guarantee in terms of which, inter alia, the first applicant guaranteed the due and punctual payment of all sums which were then and which may subsequently become due by the Trust to the second applicant pursuant to the loan agreement.'* The guarantee is between the first and the second applicants. It is not for the benefit of the Trust. It creates no additional obligations on the Trust. It becomes liable to be called up in breach by the Trust of its obligations in terms of the other agreements. In my view, it is not essential to the case of the Applicants against the respondents to plead the terms of the guarantee. The applicants fully pleaded the breach by the Trust and the issuing of default notices.

[12] The Trust is liable in terms of the indemnity due to its breach of the mortgage loan agreement which also results in the guarantee be liable to called up. The Trust is not faced with multiple debts. Its failure to pay the debt exposes it to claims under different instruments for the same debt. The respondents on receipt of the papers were entitled to call upon the respondents to furnish a copy of the guarantee, if it was essential for their defence. But were content for the first time in the heads of argument to raise issue of the failure to plead full terms of the guarantee or to attach copy of the guarantee as defeating applicants claim based on the indemnity.

[13] The applicants have established that they are entitled to judgment as follows:

1. Judgment is hereby granted in favour of the first applicant against first, second and third respondents, alternatively judgment is hereby granted in favour of the second applicant against the first, second, third, fourth and fifth respondents, jointly and severally, the one paying the other to be absolved, for:

a. Payment of the sum of R4 621 004.28 (limited to the sum of R4 275 000.00 in respect of the fourth and fifth respondents);

b. Interest on the sum of R4 621 004.28 calculated at 7.50% per annum, calculated and capitalised monthly in arrears from 15 March 2022 to date of payment, both days included.

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(c) Section number 804 shown and more fully described on sectional title plan SS 102/2010 in the Scheme known as Crystal Towers in respect of the land and building or buildings situated at Montague Gardens in the City of Cape town, of which section the floor area according to the said sectional plan is 122 square metres in extent; and

(d) An undivided share in and to the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan

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Mngadi J

APPEARANCES

Case Number 4370/2022P

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Heard on: 29 July 2024

Judgment delivered on: 02 August 2024