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REPUBLIC OF SOUTH AFRICA



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

Case number: 17496/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

.....

DATE

SIGNATURE

In the matter between:

**THE STANDARD BANK OF
SOUTH AFRICA LIMITED**

Registration number 1962/000738/06

PLAINTIFF

and

BRILLIANT CAR SALES CC

Registration number 1996/006921/23

FIRST DEFENDANT

ADAM ABOO OSMAN

SECOND DEFENDANT

FEROZA ABOO OSMAN

THIRD DEFENDANT

JUDGMENT

MOTHA, J:

Introduction

- 1) On 16 October 2006, the plaintiff and the first defendant entered into a written loan agreement in terms whereof the plaintiff lent and advanced the sum of R631 900.00 to the first defendant. As security for the repayment of the loan, a sectional continuing covering mortgage bond SB209593/2006 was registered in favour of the plaintiff. The question that is front and centre in this case is whether the second defendant's business friend paid the sum of R650 000.00 in full and final settlement of the loan, on 17 September 2014. The plaintiff disputes ever receiving a dime from the defendants after 15 July 2008.

The parties

- 2) The plaintiff is the Standard Bank of South Africa Limited, a company with limited liability, incorporated in accordance with the Company Laws of the Republic of South Africa and registered as a Bank in terms of Banks Act No.94 of 1990; and Credit Provider as envisaged under section 40 of the National Credit Act No 34 of 2005.
- 3) The first defendant is Brilliant Car Sales CC, a Close Corporation registered and incorporated in accordance with the Close Corporation Act of the Republic of South Africa.

- 4) The Second and Third defendants are Adam Aboo Osman and Feroza Aboo Osman, the adult male and female, respectively, who are married to each other in Community of Property.

The pleaded facts in brief

Plaintiff

- 5) The plaintiff's pleaded case is that the first defendant entered into a written loan agreement with it, under Account number 3[...]. On 9 October 2006, the second and third respondents bound themselves as sureties for the repayment of the loan, when due. It is common cause that in terms of the agreement the plaintiff lent and advanced to the first Defendant the sum of R631 900.00. As security for the repayment of the loan, as already stated, a Sectional Continuing Covering Mortgage Bond was registered in favour of the plaintiff, for the sum of R624 0720.00 together with an additional amount of R156 018.00.
- 6) Furthermore, in terms of the agreement, the first defendant hypothecated to the plaintiff the immovable property described as:
- (a) Section No. 22 as shown and more fully described on the Sectional Plan No. SS1205/2006 in the scheme known as Hill Top in respect of the land and building or buildings situated at Celtisdal Extension 20 Township, Local Authority: City of Tshwane Metropolitan Municipality, of which the floor area, according to the said Sectional Plan is 93 square meters in extent; and
- (b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on said Sectional Plan.

Held by Deed of Transfer No ST 168497/2006

- 7) The nub of the plaintiff's case is that the first respondent breached the loan agreement by not adhering to the repayments. In consequence, the defendants owed the sum of R1 240 515.39 together with interest at a rate of 8.60% per annum. It is common cause that the requirements of the National Credit Act, such as complying with section 129 letter, have been met.

Defendants

- 8) The substratum of the defendants' plea is that due to health reasons, the second defendant's last payment was on 15 July 2008. Nevertheless, Mr Ebrahim Goolam Mahomed Amod (Mr. Amod) paid the full outstanding amount in cash, on 17 September 2014. The amount paid in full and final settlement of the loan was the sum R650 000.00. Therefore, the defendants are no longer indebted to the plaintiff. Subsequently to this payment, the defendants' pleaded that the plaintiff, by post, dispatched a letter to them acknowledging payment.

The evidence

Evidence for the plaintiff

- 9) The plaintiff called two witnesses to the stand. First to testify was Ms. Wall, a Legal Manager employed by the plaintiff for the last five years. Then it was Ms. Davids, a subpoenaed witness who used to work for the plaintiff. Referring to a fake liquidation court order - which is most worrying as it reflected that the order was granted by Madam Justice Jansen Van Nieuwenhuizen AJ, on 9 September 2014 – which the defendant confirmed was fake, Wall testified that the first defendant was not liquidated and still owed the plaintiff.
- 10) Having confirmed that the parties entered into a loan agreement, and the first defendant breached the agreement, Wall testified that the defendant's last

payment towards the loan, in the sum of R 7768.40, was on 15 July 2008 as reflected in the statements annexed to the particulars of claim. Therefore, she testified, the plaintiff issued summons seeking an order declaring specially executable Section No 22 on Sectional Plan SS1205/2006 in the scheme called Hill Top; in respect of the land and buildings situated at Celtisdal Extension 20 Township, Local Authority: City Of Tshwane Metropolitan Municipality with 93 square metre per Sectional Plan, held by Deed of Transfer No ST168497/2006.

- 11) She testified that at the time when the summons was issued the amount outstanding was R1240 515.39, as per the certificate of balance. From 15 July 2008 there were several payments which were reversed until 15 July 2011, when activities on the account ceased. As at 2024 April 23, the account was in arrears in the sum of R2131 925.77.
- 12) Under cross-examination, she conceded that she did not know much about the matter because she had not yet joined the plaintiff when the litigation started. She was just familiar with the process. Asked about her assertion that the defendants do not reside in the property, she stated that she obtained that information from the legal representatives. She said the bank uses the information from evaluators to determine if people reside in their houses. She conceded that on the available evaluation it was possible that the defendants stayed there.
- 13) When dealing with the letter which was alleged to have been authored by the plaintiff, she disputed that the letter was sent by Standard bank, not least the amount owing was far higher at that time was R1 029 104. 26, and not the R650 000.00. She insisted that R650 000.00 would never have been given as a full and final settlement amount. Moreover, she testified that it was not common practice for the Bank correspondence to “pp” letters, as was done in this letter.
- 14) Responding to the questions from the court, she pointed out that in the affidavit Ebrahim Goolan Mahomed Amod said he “went to the bank and

spoke to David Harber and requested a settlement amount.” He wrote “I thereafter made a cash payment of R650 000.00 in full on 17 September 2014.” This, she testified, was not possible for Mr Amod to be provided with a settlement amount because the bank would not give out customers’ information to third parties. That person, she continued, would have to be in possession of a Power of Attorney. She testified that after conducting a global search on her computer, Standard Bank did not have an employee called Mr David Harber. I found her to be an honest and a credible witness who conceded whenever the moment called for it.

15) The second witness for the plaintiff was Ms Bridget Davids who left the Bank in 2016. She testified that she worked at Credit and Recovery Department for over 10 years. She was confronted with a letter, allegedly signed by her. Firstly, she testified that she was in the administration space and not authorised to sign off home loan letters about payment in full. Secondly, she questioned the authenticity of the letter by pointing out that Standard bank letter did not write in caps in the middle of a sentence, nor would it have been written in the language and tone such as: “We confirm THAT THE Amount owing in THE Above account has been paid in full on 17 September 2014”. Thirdly, she denied knowledge of the signature on the document, however, confirmed that typed on the document were her name, telephone, fax numbers and URL she used when she was still employed by the plaintiff.

16) Finally, she stated that the “pp” would not have been in front but behind the signature. Corroborating the evidence of Ms. Wall, she testified that due to the requirements of FICA¹, she would not have given information of a customer to another person without a Power of Attorney. Additionally, she testified that she

¹ The **Financial Intelligence Centre Act 38 of 2001** (“FICA”), came into operation on 1 February 2002. In terms of section 28 of FICA:

“28 Cash transactions above prescribed limit

An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount-(a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or

(b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.

[Date of commencement of s. 28: 4 October 2010.]”

would never have written the letter until the account was, to quote her, “Zerorised,” because in administration, they could not write off any amounts. Since the matter was already in the recovery department, she mentioned that the attorneys would have been the ones communicating with the customer or his attorneys.

- 17) Under cross-examination, she maintained that the Bank would not give out a settlement figure on the spot. The payment of R650 000.00 in cash would have been flagged due to FICA requirements, she insisted. She conceded that the letter might have been sent without her knowing. When asked by the court about “pp” letters, she contradicted Ms. Wall and testified that her department allowed “pp” letters. However, as already stated, she pointed out that the “pp” would be in front and not at the back of the signature, unlike in the letter presented in the proceedings. I found her to be a self-assured witness, who had no axe to grind. She was forthright and willing to explain her answers. Her testimony, in my view, was credible and plausible. Even when there were contradictions, they were not material or numerous. Overall, her testimony had a ring of truth and reliability.

Evidence for the defendants

- 18) The defendants did not call any witness in pursuit of its counterclaim. Eventually, counsel for the defendants conceded that there was no evidence before this court in support of the counterclaim. Accordingly, the counterclaim stood to be dismissed. Mr Amod was the only witness who testified for the defendants. It is noteworthy that he was first called by the plaintiff who made him available to the defendants. From the word go, he informed the court that he had gone into a diabetic coma, and following his admission into hospital for four weeks with kidneys and heart problems, his memory was not the best. Having mentioned that he and the second defendant moved in the same social and religious circles, he testified that he had business transactions involving sale of motor vehicles with the second defendant.

- 19) In August 2014, he owed the second defendant an amount of approximately R800,000.00. He approached the second defendant with a view to paying him his money. Since the second defendant was not well, he testified, the second defendant asked him to deposit the money into a Standard Bank account on his behalf. On 17 September 2014, having been provided with the home loan account number, he went into Standard Bank in Centurion to make the payment.
- 20) At the branch, he met a bank employee called David Harber and asked him to ascertain the amount owing on the account. After half an hour, David Harber came back and told him to pay R650 000.00. He then completed a deposit slip and deposited the sum of R650,000.00 in cash. He was not requested to produce any Power of Attorney. He testified that he did not know what he was paying. All he did was to pay into the account provided to him by the second defendant. The balance of the money he delivered to the defendant at his home. He also mentioned that he once worked for Standard Bank in the 80s, from 1985 to 1987.
- 21) Under cross-examination, when he was confronted with the fact that the bank would not give the settlement amount on the same day, he answered that he did not ask for a settlement amount. He testified that as businesspeople from time to time they run overdrafts. He said he could have been paying off the balance of the overdraft. He was not aware of what he was paying off or what the account was for. In answer to the question of whether he could dispute that the defendants owed more than one million rands at that time, he answered that he was not qualified to answer that.
- 22) When confronted with the bank statement which did not reflect the alleged deposit of R650 000.00, he testified that he was not qualified to answer that. Asked if he could dispute that the amount never reflected in the bank statement, he said that he was not qualified to dispute that. Unexpectedly and rather startlingly, he testified that it was very easy to type up a bank statement (create a fake one), people have done it. It has been done if one gets a bank letterhead one can type it, he continued. At this stage counsel for the plaintiff

asked him if it was not easy to type up a deposit slip or a letter confirming that an account has been closed or a liquidation order. He answered that there was no bank stamp on the statements.

- 23) The court asked him to clear the obvious contradiction in his affidavit wherein he wrote that he had requested a settlement amount, and his testimony in court to the effect that he never requested a settlement amount. He ascribed the contradictions to the health problems of being forgetful. In the affidavit he was clear that he was making a bond payment, yet in court he was uncertain whether he was paying an overdraft or a car installment. To this question, he, again, referred to his health and memory challenges. Confronted with the letter, allegedly authored by Ms Davids, which did not have a court stamp, he testified that as a lay person that would have been acceptable.

Findings

- 24) I found his testimony full of contradictions and at times tangential. He could not explain the serious discrepancies between his affidavit, which is the backbone of the defendants' plea, and his testimony in court. The crux of the defendants' defense is that the account was paid in full. Now if the account was not paid in full the entire edifice of the defendants' case crumbles.
- 25) At the end of the day the defendants failed to challenge the testimony of Wall and Davids. Wall's testimony that the defendants owed the plaintiff above a million remained unchallenged. As already stated, Davids' testimony was sound and beyond reproach. Her testimony, which was well-motivated, that the letter from the bank would not have the discrepancies she pointed out, remains uncontested. Contrasting all that with the concerning testimony of the defendants' only witness, especially in the light of a fake court order, I am persuaded that, on a balance of probabilities, the plaintiff has succeeded in proving its case.

26) There just is no evidence before this court rebutting the evidence of the plaintiff, nor supporting the defendant's plea and counterclaim, which came a cropper. In *Galante v Dickson*² the court held:

“In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross examination.”

27) Following the testimony of the version of events from the plaintiff's witnesses, especially Davids, I expected the second defendant, who was present in court, to take the stand and adduce evidence in rebuttal. The only plausible version before this court is that the defendants failed to settle the account. On a balance of probabilities, and in the light of the uncontroverted evidence of Davids, this court accepts that no payment was made into account no 3[...]. What I find to be most concerning in this matter is the ease with which forgery seems to be perpetrated. First, it was the forged court order. Second, it is the forged deposit slip. Third, it is the forged letter from the bank. Finally, it is the forged payments which had to be reversed several times. Undoubtably, this matter leaves a sour taste in one's mouth. If this rampant forgery is not nipped in the bud, we are on a slippery slope that will not only endanger the financial stability of Banks in SA but also will lead to the loss of livelihoods and eventually our lives, as witnessed in Spaza shops in Soweto.

28) At this stage it is apt to mention that Rule 46A does not apply retrospectively, as confirmed in the matters of *Williams and Another v Standard Bank of South Africa Ltd and Another*.³ Accordingly, there is no need to set a reserved price for the property.

Costs

² 1950(2) SA 460 (A)

³ 2019 ZAGPPHC 363(3 May 2019)

29) It is trite that costs follow the results. I do not see a reason to depart from that well-trodden path. In terms of clause 22.2.8, the parties agreed that costs are to be on the attorney and client scale.

Order

1. The defendant is ordered to pay the sum of R1 240 515.39 and interest at the rate of 8.6% with effect from 09 February 2017 to date of payment, both days inclusive.
2. That the immovable property described as:

Section No 22

Sectional plan No SS1205/2006

CELTISDAL Extension 20 Township

City Of Tshwane Metropolitan Municipality

Sectional Plan 93 Square Meters

Deed of Transfer No ST 168497/2006 ("the immovable property") is declared specially executable for the aforesaid amounts.

3. It is ordered that a writ of execution be issued in terms of Rule 46 as read with Rule 46(A) for the attachment of the immovable property.
4. The Defendants' counterclaim is dismissed.
5. The Defendants are jointly and severally liable for the costs of suit on the attorney and client scale, including the costs of counsel on scale B.

M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 6 and 7 June 2024 & 18 September 2024

Date of judgement: 20 November 2024

APPEARANCES:

For the Plaintiff Adv A Saldulker instructed by Van Hulsteyns Attorneys

For the Defendants Adv M Ayob Instructed by Aboo Attorneys