IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO
Case No: 2030/2024

In the matter between:

ABSA HOME LOANS GUARANTEE COMPANY (RF) PTY LTD 1st Applicant

ABSA BANK LIMITED 2nd Applicant

And

SIBAMU BUILDING CONTRACTORS (PTY) LTD 1st Respondent

LEKGOTLA ELISHA SIBANYONI 2nd Respondent

HILDA KETLOGELWE SIBANYONI 3rd Respondent

JUDGMENT BY: MHLAMBI, J

HEARD ON: 07 NOVEMBER 2024

DELIVERED ON: 28 FEBRUARY 2025

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[1] This is an application for summary judgment in terms of which the applicant seeks the following relief:

"1. Payment of the sum of ***R 1 121 881.38 (ONE MILLION ONE HUNDRED AND TWENTY-ONE THOUSAND EIGHT HUNDRED AND EIGTHY ONE RANDS AND THIRTY-EIGHT CENTS)*** *(the 2nd and 3rd Defendants limited to the amount of* ***R 912 000.00 (NINE HUNDRED AND TWELVE THOUSAND RANDS).***

2. *Interest on the amount in 1 above at the rate of 10.50% per annum calculated and capitalized monthly In arrears from 11 MARCH 2023 to date of payment, both dates inclusive,*

3. *An Order declaring the following immovable property specially executable:*

   ERF 9[…] BETHLEHEM (EXTENSION 8)

   DISTRICT BETHLEHEM

   PROVINCE FREE STATE

   IN EXTENT; 1487 (ONE THOUSAND FOUR HUNDRED AND EIGHTY

   SEVEN) SQUARE METRES

   HELD BY DEED OF TRANSFER T14[…]

   SUBJECT TO ALL THE TERMS AND CONDITIONS CONTAINED

   THEREIN

4. *That the Registrar of the above Honourable Court be authorised to issue a writ of execution in respect of the immovable property referred to above, in order to give effect to the order granted in terms of prayer 3 above.*

5 *That no reserve price is set, alternatively a reserve price is set by Court.*

6. *That in the event that a reserve price is not attained, and subject to Rule 46A(9)(d) and (e), the Plaintiff may approach the Honourable Court on these papers, duly supplemented, to reconsider reserve price in terms of Rule 46A(9)(c)*

7. *That in the event that personal service is not attained, condonation in terms of Rule 46A(3)(d) Is granted.*

8. *Costs of suit on attorney and client scale.*

9. *Further and/or alternative relief."*

[2] The defendants opposed the application and raised two preliminary points and a plea on the merits.

[3] The first preliminary point is that the deponent of the affidavit supporting the summary judgment proceedings was not deposed by the person who could swear positively to the facts verifying the cause of action and the amounts claimed. The second applicant's representative was Peters, whereas the second applicant's senior legal advisor in the home loans recoveries division deposed to the affidavit supporting the summary judgment.

[4] The nature of the deponent's office in itself did not suggest that she would in the ordinary cause of her duties acquire personal knowledge of the defendant's financial standing with the bank. It was unclear from the deponent's affidavit what the duties or status of the senior legal advisor in the home loans recoveries division of the second applicant were. It was inconceivable how the deponent would have personal knowledge of the facts giving rise to the applicants' cause of action. Mercy Tshegofatso Pooe's affidavit did not comply with the requirements and the application should, on that basis, be dismissed with costs.

[5] The second preliminary point is *lis alibi pendens.* The applicant claimed similar relief as in the present matter under case number 1416/2021, which was withdrawn on 04 July 2024, when the applicant served the current application for summary judgment.

[6] The applicant was not entitled to the relief sought in this matter as the notices sent out in terms of section 129 were irregular or premature as there was a pending matter before this court on the same cause of action. The respondents defended the matter under case number 1416/2021 and the matter should therefore be dismissed with costs.

[7] On the merits, it was admitted that the first respondent entered into a mortgage loan agreement with the second applicant and subsequently an insurance agreement with the first applicant to which the second and third respondents became core-debtors in solidum in favour of the applicant. The second respondent stated in the affidavit that he could not confirm if the agreement upon which the applicants now sued was the agreement entered into by the first respondent and the applicants; as the respondents were never given the agreement to keep copies of after they had signed it. It was difficult to confirm the veracity and/or authenticity of the agreement annexed by the applicants. The second respondent stated further that the property the applicants sought to execute on was his primary residence, where he resided with his wife and children. Should the applicants execute on the property, they did not have an alternative address where they would reside. The second and third respondents bound themselves as surety and core-principal debtor for the payment by the first respondent to the first applicant for monies lent and advanced. Their liability was limited to the amount of R 912 000.00.

[8] According to the applicants, the special plea of *lis pendens* was without merit. The applicants contended that the summons under case number 2693/2023 was withdrawn, and the action under case number 1416/2021 was withdrawn as the cause of action had fallen away.

[9] The respondents admitted to the conclusion of the relevant agreements, and their plea was essentially a bare denial as they failed to proffer any triable issue regarding any positive facts that were averred. According to the respondents, a triable issue or *bona fide* defence would only exist about the terms of the agreement or loan agreement if the defendants contested the terms and conditions of the underlying agreements. The defendants therefore failed to disclose any *bona fide* defence or raise any triable issue fit for trial.

[10] Uniform Rule 32(3) provides that a defendant may satisfy the court by affidavit that the defendant has a *bona fide* defence to the action. Such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon. In *Tumileng Trading CC v National Security and Fire,*[1] it was stated that a court seized with a summary judgment application is not charged with determining the substantive merits of a defence, nor with determining its prospects of success. It is concerned only with assessing whether the pleaded defence is genuinely advanced, as opposed to a sham put up for obtaining delay. The respondents did not deny that they were in arrears with their payments, it was submitted in argument. The question arises, what is the respondent's defence on the merits as it is not evident from their papers.

[11] In *Rees and Another v Investec Bank Limited*[2], it was said that the deponent employee of the bank, which averred facts obtained in the ordinary course of his or her duties as an employee of the bank, did not need to meet the strict requirements about personal knowledge of every fact. I am satisfied that the respondents did not disclose a bona fide defence nor raise a triable issue fit for trial. The application for summary judgment must, therefore, succeed.

[12] It is trite that the successful party is entitled to the costs.

[13] In the result, I grant the following order:

<u>Order:</u>

1. Summary judgment is granted for the payment of the sum of R 1 121 881.38 (one million, one hundred and twenty-one thousand, eight hundred and

[1] 2020 JOL 417 44 WCC; 2020 (6) SA 624 WCC.
[2] 2014 (4) SA 220 (SCA).

eighty-one rands and thirty-eight cents), (the second and third defendants limited to the amount of R 912 000.00)

2. Interest on the amount in 1 above at a rate of 10.5% per annum calculated and capitalised monthly in arrears from 11 March 2023 to date of payment, both dates inclusive.

3. Costs of suit on an attorney-client scale.

MHLAMBI, J

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