IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 10085/2024P

In the matter between:

BAYAPHAMBILI PROPERTIES 55 (PTY) LTD	**PLAINTIFF**

And

MOHD FARUK SILAT N.O.	**FIRST DEFENDANT**
MEHRAJ BANU MOHAMED FARUK SILAT N.O.	**SECOND DEFENDANT**
IMRAN ABDUL SATTAR SILAT N.O.	**THIRD DEFENDANT**
MOHAMMES HANIF SALAT N.O.	**FOURTH DEFENDANT**
SHABINA SALAT N.O.	**FIFTH DEFENDANT**
SHERBANU MOHAMMED ARIF SILAT N.O	**SIXTH DEFENDANT**

JUDGMENT

<u>P C BEZUIDENHOUT J</u>:

[1] Plaintiff by way of a provisional sentence summons claims against Defendants an amount of R 2 395 000.00 together with interest at the rate of 11,25 per cent per annum from 26 June 2023 and with costs to be on an attorney and client scale. The action has been defended by all six Defendants.

[2] At the commencement Defendants brought an application for condonation due to the late filing of their heads of argument. This was not opposed and condonation was granted.

[3] The basis for Plaintiff's claim is a covering mortgage bond. The mortgage bond was registered on 21 April 2021 wherein Defendants admitted jointly and severally to be liable to Plaintiff in the sum of R3 700 00.00 and had to pay monthly installments of R100 000.00. Defendants are two Trust whose trustees appear from the summons. The Trusts declared themselves to be indebted to the sum of R3 700 000.00 and a further R925 000.00 to cover or secure costs which may be paid by the Trusts.

[4] It is contended by Plaintiff that Defendants paid an amount of R1 305 000.00 and accordingly the balance of R2 395 000.00 has become due. A certificate signed by a director of Plaintiff confirmed on 24 June 2024 that the Trusts bound themselves in the sum of R3 700 000.00 and that the balance owing and payable was R2 395 000.00 together with costs.

[5] In terms of the mortgage bond the two Trusts were the MFS Trust and the Salat Family Trust. The property over which the bond was registered was the remainder of erf 1[...] D[...], registration division FU, Province of KwaZulu-Natal, in extent 605 square metres. The bond provides for a capital amount of R3 700 000.00 arising from goods sold and delivered or monies lent and advanced or a valid cause of action recognised in

law but without limitation any valid contract or transaction creating a debt, and including existing or future debts in general which irrespective of cause thereof is owing by the mortgagees to the mortgagor plus a further sum of R945 000.00 to cover or secure costs and all monies which may be paid by the mortgagees on behalf of the mortgagor or expended in order to protect its security from time to time in terms of the special condition of the bond.

[6] The power of attorney to pass the covering bond was signed by First Defendant on behalf of the MFS Trust and by Fourth Defendant on behalf of the Salat Family Trust.

[7] In their answering affidavit opposing the action First Defendant in his capacity as trustee of the MFS Trust attested to an affidavit. He contends that the affidavit is a response on behalf of all Defendants. A point *in limine* is taken that the mortgage bond is not a liquid document. It is registered as a continuing covering bond and makes provision for future debts to be payable as well. It is contended that the property which belonged to Plaintiff over which the mortgage bond is registered was purchased for setting up headquarters for Copper Chimney a business throughout Durban. The property is in a residential area. It was however, vacant land as Plaintiff had demolished the house. The agreement was to purchase the property for the sum of R4 500 000.00 of which R800 000.00 was paid immediately and the the bond of R3 700 000.00 registered.

[8] It was marketed as being approximately 1 100 square metres but as can be seen from the mortgage bond it is in actual fact only 605 square metres. There were approved plans in respect of the said property by the municipality. Defendants commenced construction on the said property and have spent R5 000 000.00 so far. It was established that a portion of the property which was being utilised was in actual fact owned by the Ethekwini Municipality. The property was no longer registered as commercial as the approval which was given therefore had to be renewed every 18

months which was never done and had consequently lapsed. There are currently penalties payable by Defendants to the Ethekwini Municipality. New plans had to be approved for the building to be constructed. Accordingly Defendants rely on the *actio quanti minoris* alternatively the *exceptio non adimpleti contractus.* Defendants accordingly have a good defence on the merits which Plaintiff was aware of and should not have proceeded by way of provisional sentence.

[9] Plaintiff filed a replying affidavit where in *limine* it sets out that there is objectional matter in the answering affidavit which has to be struck out. Further it disputes that the defence of the action has been lawfully authorised by the two Trusts and that the deponent to the answering affidavit is representative of the two Trusts. He does not allege that he is authorised and is not a trustee of the Salat Family Trust. The opposing affidavit should therefore be struck out.

[10] It is contended that the amount of the debt is ascertained and that it is therefore a liquid document. There is a certificate of balance from a director of Plaintiff. It is contended that a town planner, during 2020, commenced with the rezoning of the said property but his mandate was terminated by Defendants. Defendants were aware when the property was purchased that it was not commercial property and now seeks not to pay less therefore. Defendants were aware that a portion of the land belonged to the municipality and they were also aware of the special consent time periods as appears from an email from Defendants attorney dated 8 December 2020 sent to the town planner. It was denied that Defendants ever paid R800 000.00 and accordingly Plaintiff has made out a case for the granting of provisional sentence. The original mortgage bond was handed in.

[11] It was submitted on behalf of Plaintiff that the entire opposing affidavit and not only specific paragraphs had to be struck out due to lack of capacity. The trustee which is one of the trustees of the first Trust did not indicate that he had the authority to attest

to the affidavit on behalf of the second Trust. The bond on a proper construction thereof together with the certificate of balance is a liquid document. There was no evidence provided of a resolution authorising the deponent to the opposing affidavit to represent the Trusts. It was submitted that although the Full Court of this division has held that a challenge to authority must be raised by way of a Rule 7 notice, the judgment does not apply to a challenge to capacity. It was submitted that the Full Court's decision was incorrect to the extent that it prevents challenges to authority in the papers and that it has not been followed in the Western Cape decision.

[12] Plaintiff further submitted the bond is a liquid document as there is acknowledgement for a fixed amount of R3 700 000.00. Defendants unconditional acknowledgment of indebtedness supported by a certificate of balance liquidates the sum claimed. Defendants claiming a counter claim must show something more than a mere *prima facie* counter claim to stay of provisional sentence. The onus is on Defendants to establish such defence. Defendants failed to discharge the onus resting on them to stay of provisional sentence being granted. The counter claim cannot be decided on an affidavit and in those circumstances cannot prevent the granting of provisional sentence.

[13] It was submitted on behalf of Defendants that there was no proper application to strike out. There is also no description of which paragraphs are being challenged. The suggestion that there was no valid opposition as the deponent to the answering affidavit had not established the authority to oppose the action does not set out the distinction between the admissibility of the evidence and authority. If it was contended that there was no authority to oppose the action then it had to be raised in terms of Rule 7 of the Rules of Court. It was further submitted that the mortgage bond was not linked to any particular cause of action but covered goods sold and delivered, monies lent in advance, further debts etc. It is therefore a bond to cover future debt and security for debt that may become due. It is not a liquid document for the purposes of summary judgment and provisional sentence and it must therefore be dismissed.

[14] It was submitted in the provisional sentence summons Plaintiff does not allege that it complied with its obligations under the agreement in terms of which the indebtedness arose. Plaintiff also did not deal in its argument with the fact that no approved building plans were provided, that parking facilities were misrepresented and that Defendants had to spend R5 000 000.00 building in accordance with plans that were not actually approved and then had to pay penalties of over R1 000 000.00. it is not a counterclaim as Defendants can rely on it as a defence under the *exceptio non adimpleti contractus* as they intend to do and that the *actio quanti minoris* is also an available remedy. It is therefore submitted that the provisional sentence summons was improper, that Defendants have established a defence and that the application for provisional sentence should therefore be refused on scale (B).

[15] Both Plaintiff and Defendants referred me to the decision of Wollach v Barclays National Bank Ltd 1983 (2) SA 543 (A) to support their respective submissions that it is a liquid document and also that it is not a liquid document. On behalf of Plaintiff it was submitted that the decision is support for the contention that there was an existing indebtedness and that the liquidity of the bond was not depended whether at the time of passing of the bond there was an existing indebtedness but rather upon an unqualified acknowledgement of indebtedness in a specified amount. On behalf of Defendants it was submitted that the bond does not expressly cover a particular debt but rather security for debt that may become owing and therefore in terms of the decision in Wollach did not qualify as a liquid document.

[16] On a reading of the Wollach decision it would appear to me that it referred to the practice which had developed that a bond could be proved by a certificate and that the covering bond would then become a liquid document. It however goes further by finding that liquidity cannot be retrospectively conferred by the agreed issue of a certificate. In that case it appeared that the deed of hypothecation did contain an unqualified

admission of liability in a fixed sum but that it also contained a provision in connection with facilities for which it had applied at the respondents bank or in the future might possibly apply for. Therefore the deed of hypothecation could not be regarded as a liquid document.

[17] The mortgage bond although it states that it is for the capital sum of R3 700 000.00 is in respect of on a wide variety of causes for such indebtedness. In paragraph VI on page 4 thereof it sets out:

> "That all future advances, debts or demands (over and above the Capital and interest thereon) which may lawfully be secured and recovered under this Bond in respect of and including any costs, charges, and disbursements in having this Bond prepared and registered, in having any part payment of capital registered and in having this Bond cancelled eventually (all of which services the Mortgagor/s hereby agrees shall be rendered by a Conveyancer nominated by the Mortgagee/s or other holder/s of this Bond), in issuing notices and demand and in suing and taking further legal proceedings for the recovery of any sum of money due under this Bond;"

[18] From this extract it appears that it contemplates future advances, as well as costs charges and disbursements. In Ster Films Beherend (Pty) Ltd v Melana 1977 (3) SA 123 (TPD) at 129 H it was held:

> "I therefore hold that in cases of covering bonds for fluctuating balances providing for a creditors certificate to establish the amount owing thereunder, such certificate in respect of unliquidated damages is insufficient to sustain a claim for provisional sentence."

The costs charges and disbursements are not quantified.

[19] It is therefore on a reading of the bond and especially in light of what is set out in the decision of Wollach that the mortgage bond includes future indebtedness as well and in my view therefore does not qualify as a liquid document for the purpose of provisional sentence even if a certificate of balance is provided.

[20] Having found that it is not a liquid document that is in actual fact the end of the matter as provisional sentence can only be granted on a liquid document. However having found that I will deal very briefly with the other issues raised.

[21] The submission that the affidavit is to be struck out has not been brought by way of application and is merely mentioned in the affidavit and in my view there should have been a substantive application in that regard if that was required. Further Defendants have raised various defences which they can do as to the purchase price due the size of the property which was incorrect, the parking area which was on the property of the municipality, the plans etc. It therefore appears that there are various defences that can be raised by Defendants.

[22] In the case of ANC Mvoti Council v Mvoti Municipality 2010 (3) SA 31 KZP a decision of the Full Court of this division it was held that it was the attorney of the litigant who by signing a notice of motion and issuing application papers signified that the attorney had been authorised to initiate the application on behalf of the named litigant. Whether the litigation had been properly authorised by the artificial person should not be dealt with by means of evidence led in the application. If clarity was required it should be obtained by means of Rule 7(1) since this was a procedure which safeguarded the interests of both parties. In this judgment it followed the decision in Ganes and Another v Telekom Namibia Ltd 2004 (3) SA 615 (SCA). It was submitted that this was not followed in the Western Cape in the decision of Minister of Water and Sanitation v Klason Clackson Power (Pty) Ltd and Another 2024 (5) SA 280 (WCC) (a judgment of a single judge). In paragraph 38 of the said judgment the court held that the judgment in

the ANC Mvoti Council and Others case disregarded the principle that the Rules are not an end to in themselves and that Rule 7(1) does not provide any specific procedure for its implementation. It was held in paragraph 49 that it did not follow the decision in the ANC Mvoti case.

[23] However on my interpretation of the *stari decisis* Rule I am bound by the decision of a Full Court of this division. The Supreme Court of Appeal in the matter of Ganes and Anothe v Telkom Namibia 2004 (3) SA 614 specifically held that:

> "It is irrelevant whether Hunker had been authorised to depose to the founding affidavit. The deponent in affidavit in motion court proceedings need not be authorised by the party concerned and to depose to the affidavit. It is the institution of the proceedings that the prosecution thereof which must be authorised."

I am also bound by this judgment.

The following order is accordingly made:

1. Plaintiff's provisional sentence application is dismissed.
2. Defendants are directed to deliver a plea within twenty days.
3. The matter shall proceed to trial and the provisions of the Uniform Rules as to pleading and the further conduct of trial actions shall *mutatis mutandis* apply as provided for in Rule 8(8).
4. The costs of the provisional sentence application are reserved for determination by the trial court.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON: **20 AUGUST 2025**

JUDGMENT HANDED DOWN ON: **4 SEPTEMBER 2025**

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