IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 2024/13

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

CEMARA CONTESSA BAADJIES Defendant

Court: GRIESEL J

Heard: 21 August 2013

Delivered: 27 August 2013

JUDGMENT

GRIESEL J:

[1] In this application for summary judgment the plaintiff claims payment from the defendant in a sum of R219 686.21 together with interest; an order declaring the mortgaged property (situated in the Nelson Mandela Metropolitan Municipality Division of Port Elizabeth, Eastern Cape Province) specially executable; an order authorising the plaintiff to execute against the said property as envisaged in Uniform Rule 46(1)(a)(ii); and costs on an attorney and client scale.

[2] The plaintiff's head office is in Johannesburg. The loan agreement giving rise to the present claim was entered into between the parties on 17 January 2007 in Port Elizabeth, where the defendant is resident. The loan is secured by a mortgage bond in favour of the plaintiff registered over the defendant's property, situated in Port Elizabeth. The claim represents the outstanding balance on the defendant's loan account with the plaintiff, which is in arrears and is proved by a certificate issued on behalf of the plaintiff.

[3] In its particulars of claim the plaintiff alleged that this court has the necessary jurisdiction in this matter by reason of the fact that 'the mortgage bond was duly registered in the Deeds Office Cape Town, as was required by law'.

[4] After service of summons on her, the defendant gave notice of her intention to defend the action, which led to the plaintiff launching the present application for summary judgment. In her opposing affidavit in the summary judgment proceedings, the defendant took issue with the plaintiff's allegations as to jurisdiction, claiming that the ground upon which the plaintiff relies for jurisdiction is not a recognised ground as provided for in the Supreme Court Act, 59 of 1959, and that this Court lacks the necessary jurisdiction to hear the matter.

[5] When the matter was called before me on 21 August 2013, there was no appearance on behalf of the defendant, whose attorneys of record appear to have withdrawn prior to the hearing. I have accordingly not received the benefit of considered argument in support of the defendant's stance.

[6] In approaching the question of jurisdiction in the context of the present case, the starting point must be found in the provisions of s 19(1)(a) of the Supreme Court Act, which confers jurisdiction, *inter alia*, '. . . over all persons residing or being in and in relation to *all causes arising* . . . within its area of jurisdiction and all other matters of which it may according to law take cognizance . . .' (emphasis added). It is trite that a cause based on contract 'arises' where (a) the contract was entered into; or (b) the contract is or was to be performed, wholly or in part; or (c) the particular breach of contract upon which the plaintiff relies, was committed. The plaintiff has a choice of instituting action in any of these places. [1]

[7] In the context of the present matter, Ms *Liebenberg,* who appeared on behalf of the plaintiff, submitted that in interpreting 'all causes arising', regard should be had to the *ratio jurisdictionis* recognised by the common law, namely performance, or part performance, of a contract.[2] Part of the cause of action arose within the jurisdiction of this court, so it was submitted, as the mortgage bond in question was registered in the Deeds Office, Cape Town, as was required by law, and while the *situs* of the property is not within the territorial jurisdiction of this court, this court is able to enforce its judgment by virtue of the fact that the immovable property is registered in the Deeds Office, Cape Town.

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[1] DR Harms *Civil Procedure in the Superior Courts* para A4.14 and the authorities cited therein (Service Issue 46, Sept 2012).
[2] Cf *Roberts Construction Co Ltd v Willcox Bros. (Pty) Limited* 1962 (4) SA 326 (A) at 331H.

[8] In support of this submission, counsel referred to the judgment of Van Oosten J in *Geyser v Nedbank Ltd: In re: Nedbank Ltd v Geyser*,[3] where it was held:

'But the property, quite apart from its executability, has relevance for purposes of founding jurisdiction. It undoubtedly played an integral if not vital part in the loan transaction which as indicated earlier constituted the basis for the bank's cause of action. It was obviously on the strength of the security of a first mortgage bond that the loan was granted to the applicant. This factor, Goldstein J held, was of no moment as, so the learned Judge reasoned, "in fact, if it wished, the first respondent could have advanced the money without registering the bond at all". I am unable to agree. Fact of the matter is that security was required by the bank and it was provided. Whether the bank could have granted the loan without any form of security, in my view, is of no relevance. It is accordingly my finding that the *situs* of the hypothecated property constitutes a jurisdictional connecting factor giving rise to the jurisdiction of this Court.'

[9] Although this judgment is clearly distinguishable on the facts, inasmuch as the property in question in *Geyser* was in fact situated within the area of jurisdiction of the court dealing with the matter, I agree that, as in that case, the property in this case likewise 'played an integral if not vital part in the loan transaction'. Thus, it appears from the mortgage bond in this case that the loan was granted by the plaintiff 'provided *inter alia* that this Mortgage Bond is registered' and in the plaintiff's particulars of claim it is pleaded that the loan was approved 'subject to the registration of a mortgage bond'.

[3] 2006 (5) SA 355 (W) para 11 at 361G–362A.

[10] In order to give effect to this material requirement, it was necessary for the defendant to effect registration of the mortgage bond in the Deeds Office Cape Town and, to that extent, I consider that part of the contract had to be performed within the area of jurisdiction of this court, thereby conferring the necessary jurisdiction on this court to determine the plaintiff's claim sounding in money. That being so, it follows that this court is also empowered to issue an ancillary order declaring the mortgaged property specially executable.[4]

[11] I am in any event satisfied that there is a further reason why this court has jurisdiction to decide the present claim. This relates to the fact that the plaintiff's cause of action herein is not based solely on the loan agreement concluded in Port Elizabeth, but also on the mortgage bond registered as security for such loan. In this regard, it is trite that a 'mortgage bond is of a dual nature in that it usually serves both as a record of the principal obligation and its terms and of the mortgage relationship in its contractual and hypothecary aspects'.[5] It is also customary in conveyancing practice to incorporate in the bond an unqualified admission of liability by the mortgagor.[6] Where this is the position, a court is entitled to hear an action for provisional sentence based on the mortgage bond. I cannot imagine that anybody could question the jurisdiction of the court in whose area the mortgage bond is registered. The question is whether it makes any difference in principle that the plaintiff has chosen to pursue an ordinary claim based on a

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[4] *Ivoral Properties (Pty) Limited v Sheriff, Cape Town & others* 2005 (6) SA 96 (C) paras 50-53.
[5] *Mortgage and Pledge* in 17 *Lawsa* (2ed) para 329.
[6] *Ibid*.

combined summons, instead of provisional sentence. In my view, the answer must be clearly be no.

[12] For these reasons, I conclude that this court does enjoy the necessary jurisdiction, concurrently with the Eastern Cape court, to hear the present application for summary judgment.

[13] Apart from the issue of jurisdiction, the defendant has failed to disclose any other *bona fide* defence to the plaintiff's action, with the result that the plaintiff is entitled to summary judgment as claimed in the summons.

[14] In the circumstances, summary judgment is granted in favour of the plaintiff as follows:

(a) Payment of the sum of R219 686.21;

(b) Interest on the aforesaid amount at the rate of 9.30% *per annum* calculated and capitalised monthly in arrears from 1 December 2012 to date of payment, both days inclusive;

(c) An order declaring –

> **ERF 605 Bloemendal**
> **in the Nelson Mandela Metropolitan Municipality**
> **Division of Port Elizabeth**
> **Province of Eastern Cape**
> **in extent 137 (One Hundred And Thirty Seven) square metres**
> **Held by Deed of Transfer No T031462/2007,**

specially executable;

(d) An order authorising the plaintiff to execute against the said property as envisaged in Rule 46(1)(a)(ii) of the Uniform Rules;

(e) Costs of suit as between attorney and client.

B M GRIESEL
Judge of the High Court