REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/6477

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

GORDON, RIAAN EDWARD Respondent

FELDMAN, NATALIE VERONICA Second Respondent

FELDMAN, RUVIAN RONALD Third Respondent

J U D G M E N T

Summary:

Execution of immovable property – the directives given in *Saunderson*[1] and *Mortinson*[2] are equally applicable to matters brought by way of application

[1] *Standard Bank of South Africa Ltd v Saunderson & Others* 2006 (2) 264 (SCA)

proceedings – consequences of failure to make necessary allegations in founding affidavit – failure to adhere to the *Saunderson* and *Mortinson* directives.

WEPENER, J:

[1] The applicant brought an application against the respondents for payment of the sum of R635 000, interest, costs and an order declaring certain immovable property executable, such property having been mortgaged by the respondents in favour of the applicant. In the founding affidavit the applicant alleges that the respondents entered into the mortgage bond which was duly registered and a copy of the bond is attached. It is then alleged that the respondents acknowledged their indebtedness to the applicant in the sum of R150 000 plus an additional amount of R37 500. It is stated thus:

> *"7. As appears more fully from the said agreements, the Respondent acknowledge their indebtedness to the Applicant in the sum of* ***R150 000.00*** *plus an additional sum of* ***R37 500.00*** *which the Respondents were to repay to the Applicant by way of monthly instalments commencing on the first day of the month within thirty days after the day of the month in which the monies were advanced, namely the first day of the month commencing within thirty days of* ***18 May 2007.****"*
>
> *8. It was a term of the said agreements that:*
>
> *8.1 The Respondents were to pay monthly instalments to the Applicant on or before the first day of each month;*

[2] *Nedbank Limited v Mortinson* 2005 (6) SA 462

8.2 The Respondents were to pay interest as determined from time to time by the Applicant calculated and capitalised monthly in arrears;

8.3 Monthly instalments were to be paid regularly month by month without deduction on demand;

8.4 The full balance outstanding at any particular time would forthwith become due, owing and payable in the event of the Respondents failing to make any payment on due date;

8.5 The Respondents would be obliged to pay costs on the scale as between Attorney and client;

8.6 the Applicant would be entitled to increase or decrease the rate of interest on all amounts in terms of the bond to the rate determined by the Applicant as being payable for the class of bonds into which the bond falls and would be entitled to commensurately increase the monthly instalment from time to time;".

The reference to "*agreements*" is significant. The sub-clauses referred to above do not appear in the mortgage bond document. They are clauses that are typically found in an agreement of loan.

[2] The applicant further alleges that:

"9. Pursuant to the said agreements the Applicant;

9.1 Duly advanced the said monies to the Respondents during 18 May 2007;

9.2 …"

The allegations in paragraph 9 read with its admission in the replying affidavit that there was indeed such an agreement of loan albeit that the applicant annexed an irrelevant document (explained below), leaves no doubt that the cause of action is not based on the mortgage bond but on a loan agreement still to be disclosed.

[3] The mortgage bond being security for a loan, does not set out the terms of a loan nor does it set out the monthly instalments or the dates for repayment of a loan. It only sets out the amount of the security. The document is a second mortgage bond. A proper reference to a loan agreement is absent from the founding affidavit.

[4] In this regard Mr Grove, who appeared for the respondents, argued that there was a failure by the applicant to attach the loan agreement as well as the first mortgage bond and thus the complete agreement between the parties was absent. The respondents in an affidavit stated that:

> "*the applicant has therefore failed to annex the complete contract between the parties as is prescribed by the Rules relating to pleadings and thus the respondents are unable to respond fully to the application*".

[5] The applicant, having elected to institute proceedings by way of application proceedings has to comply with the provisions of Rule 6 regarding the contents of affidavits.

I am of the view that in the event of a party utilising application procedure rather than the usual action procedure in matters such as this, it is required of

the applicant to comply fully with the requirements of the Rules, which have been framed to ensure that issues between the parties are clearly defined and that sufficient particularity is supplied in order to enable the opposite party to respond thereto. There can be no justification for a party to utilise application proceedings and thereby depriving an opposing party access to the full ambit of the case it has to meet. It has long been the general requirement that an applicant is required to set out a case fully in the founding affidavit: *"Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit*", per *Viljoen J* in *Titty's Bar & Bottle Store v ABC Garage & Others* 1974 (4) SA 362 T at 369 A-B

[6] Rule 6(1) reads:

> "*Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.*"

The facts upon which the applicant relies include the loan agreement, the first mortgage bond and the second mortgage bond. In the replying affidavit the applicant purports to attach the loan agreement as well as the first mortgage bond. The applicant states in reply:

> "*24. The second respondent avers that she is unable to answer to the allegations contained within the founding affidavit, due to the loan agreement and first mortgage bond not being attached.*
>
> *25. I apologise for not attaching the required documentation and attach the loan agreement as annexure "I" and the first mortgage bond as annexure "J".*

26. It is to be noted that the allegations contained within the founding affidavit reflect the terms and conditions contained within the loan agreement.

27. Furthermore, I deny that the respondents could not answer the allegations contained in the founding affidavit. The respondents all have true copies of the loan agreement and relevant mortgage bonds in their possession.

28. The respondents accordingly have knowledge of the content of the loan agreement and mortgage bonds.

29. The respondents could therefore not have been prejudiced by the failure of the applicant to attach this documentation.

30. Full legal argument will be addressed on this point at the hearing of this application."

[7] These allegations by the applicant miss important aspects of litigation. They miss the requirement that an applicant is obliged to make its case in the founding affidavit and not in the replying affidavit. It misses the fact that the respondent is entitled to have a case properly pleaded in order to answer it, which includes having sight of the documents relied on by the applicant and it is no answer to allege that the respondents have copies of the documents in their possession.

[8] In addition, and despite to the deponent to the replying affidavit stating that the loan agreement and first mortgage bond being attached to it, that statement is untrue. The document attached is a loan agreement between the applicant and two different parties to the three respondents in this matter. It is a document of some 24 pages. If the loan agreement between the applicant and the respondents is in any way similar to the one attached to the replying affidavit, it is a substantial document that is missing. Indeed, it is a vital

document to support the applicant's cause of action. The mortgage bond alleged to be attached to the replying affidavit as the first mortgage bond is the selfsame second mortgage bond which is attached to the founding affidavit. The applicant has consequently failed to make a proper case in the founding affidavit and failed to disclose a cause of action based on the alleged loan. The applicant's failure is compounded by its reliance on a wholly irrelevant document as well as the selfsame second mortgage bond in reply whilst it admitted its case is based on the loan agreement and that there also exists a first mortgage bond.

[9] It was said in *Klerck N.O. v van Zyl and Maritz* 1989 (4) SA 263 at 275:

> *"A convenient starting point for the consideration of this issue is an analysis of the nature of the real right which is constituted by a mortgage bond. A mortgage bond may be defined as an instrument hypothecating landed property to secure a debt, existing or future.* Lief NO v Dettmann *1964 (2) SA 252 (A) at 259B;* Thienhaus NO v Metje & Ziegler Ltd and Another *1965 (3) SA 25 (A) at 31F. At 259E of the former case the following appears:*
>
> *'The only real rights in favour of the mortgagee created by the registration of a bond are rights in respect of the mortgaged property, eg the right to restrain its alienation and a right to claim a preference in respect of its proceeds on insolvency of the mortgagor. The real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them.'*
>
> *At 264 and 265 it was said that a mortgage bond is an acknowledgment of debt and at the same time an instrument hypothecating landed property and that the object of a mortgage bond is not merely hypothecation, but the settlement of the terms of the obligation it secures. See, too,* Thienhaus' *case* supra *at 38. It follows therefore that the real right created by a mortgage bond is accessory in nature and is dependent for its existence on the existence of the obligation which it secures.*
>
> *If there is no valid principal obligation for the mortgage bond to secure, there can be no valid mortgage bond and no real right of security in the hands of*

the mortgagee. See, too, Kilburn v Estate Kilburn *1931 AD 501 where the following was said at 505 - 6:*

'... (Y)ou cannot have a settlement of a security apart from the thing which is secured, be it a money debt or the performance of an act. The settlement of a security divorced from an obligation which it secures seems to me meaningless....

It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim. Now the Court below has found as a fact that there was no serious promise of £500 and no intention to pay the wife that sum, but that the whole intention of the spouses was that the wife should claim £500 if and when the husband became insolvent. There was therefore no obligation secured by this bond, and therefore in a concursus creditorum the appellant cannot claim on the bond.'

Reference may further be had to Thienhaus' *case* supra *at 32 where, after stating, with reference to* Kilburn's *case* supra*, that it is clear that a mortgage bond as a deed of hypothecation must relate to some obligation, Williamson JA added:*

'If on a concursus creditorum *a mortgagee, or a pledgee fails to establish an enforceable claim which it was intended should be secured by the hypothecation, the bond, or the pledge, as the case may be, falls away.'*

At 43 and 44, in the minority judgment of Wessels JA*, the following passages appear:*

'When the mortgagor causes a mortgage bond to be registered in favour of the mortgagee he does so to give effect to an antecedent agreement between them - which may be either in writing or verbal - in terms of which the former bound himself to grant to the latter, as security for a debt, a real right in the immovable property concerned....

It is of the essence of the real right which is constituted by the registration of a mortgage bond that it should be related to a debt, and the substantial reason why the antecedent agreement must of necessity refer to the debt which it is intended to secure is so that the nature and extent (ie the content) of the real right, which it is intended to constitute by the registration of a mortgage bond, may be exactly determined. It follows from this that the obligation resting upon the debtor is to effect the constitution of a real right in the immovable property

concerned in favour of the creditor in accordance with the definition thereof in the agreement in question.'

Although these last two passages appear in the minority judgment and in a context different from that which obtains in casu*, reference to the principles set out therein is apposite in this judgment. Reference may finally be had to* Wille Mortgage and Pledge 3rd ed *at 4 and* Lubbe on 'Mortgage' *in* Joubert (ed) Law of South Africa *vol 17 para 398, and the authorities there cited."*

[10] Applying these principles to the matter under consideration I am of the view that the terms of the second mortgage bond make it clear that it is not the instrument creating the debt of the respondents. It is a mortgage bond to cover the indebtedness of the respondents arising from money lent or advanced pursuant to an agreement of loan, which is not set out in the mortgage bond. The second mortgage bond is consequently a portion of the security which the applicant holds for some indebtedness of the respondents extraneous the mortgage bond.

[11] Since *v Mortinson* the following rules of practice have been applied in this Court:

"[33.1] In all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:

[33.1.1] The amount of the arrears outstanding as at the date of the application for default judgment.

[33.1.2] Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.

[33.1.3] Whether, to the knowledge of the creditor, the immovable property is occupied or not.

[33.1.4] Whether the immovable property is utilised for residential purposes or commercial purposes.

[33.1.5] *Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not."*

See *Mortinson* at 473 para 33.1.

In *Saunderson* the following order was made in paragraph 27, paragraph 2 of the order:

> *"The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows: ''The defendant's attention is drawn to s 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court."*

The requirements set out in *Mortison* and *Saunderson* have been approved in *Gundwana v Steko Development CC & Others* [2011] JOL 26971 (CC). The reasons for requiring adherence to the *Mortinson* and *Saunderson* directives are equally applicable to matters which are brought by way of application proceedings.

[12] Save for the directive referred to in *Saunderson,* there was no attempt by the applicant to comply with the rules of practice. Having regard to the applicant's failure to plead a proper case in the founding affidavit and its failure to attach and rely on the documents which it should have attached to

the founding affidavit to support a cause of action and its failure to comply with the rules of Court and the rules of practice, the application falls to be dismissed with costs.

The Honourable Judge W L Wepener
Judge of the High Court

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Date of hearing:	15 September 2011
Date of Judgment:	21 September 2011