REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 33118/2010

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

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In the matter between:

FIRSTRAND BANK LIMITED Applicant

And

MALAN: JEAN-PAUL First Respondent

MALAN: GIPSY Second Respondent

J U D G M E N T

MPHAHLELE, J:

[1] The applicant's claim against the respondents is for payment of the sum of R2 237 606-10 and an order declaring the respondents' immovable property to be specially executable as well as some ancillary relief.

[2] The applicant's claim stems from a loan agreement concluded between the parties as a result of which the respondents acknowledged their indebtedness to the applicant in the sum of R1 174 000-00 plus an additional amount of R235 000-00. This loan was secured by a mortgage bond registered over the respondents' immovable property situated at erf 1…… N…… R….. ext 30 township registration division IQ, province of Gauteng better known as 2…. S….. C…... H….. Road, N…… R… Extension 3…..., Randburg ("the property"). The mortgage bond is registered in both respondents' names who were then married out of community of property.

[3] The loan was to be repaid in 240 monthly instalments commencing within thirty days of 28 September 2005 on or before the first day of each month. 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;

[4] According to the applicant the last payment was made on 01 November 2007 and as at 14 July 2010 (the time this application was issued) the full balance outstanding

was the sum of R2 237 606-10 together with interest thereon at the rate of 10% per annum calculated and capitalised monthly in advance from 30 June 2010. The said amount is due and owing by reason of the respondents' failure to make payment of the instalments.

[5] The applicant obtained a default judgment against both respondents on 22 October 2010. This judgment was subsequently set aside against the first respondent only on 08 February 2012. As a result only the applicant and the first respondent appeared before this court at the hearing of this application. There are two issues before me for determination.

[6] The first issue is whether the first respondent's liability towards the applicant is joint or joint and several with that of the second respondent. The applicant submitted that in terms of the loan agreement only one amount of money was lent to both respondents. The respondents are further defined in the mortgage bond as mortgagor in the singular. So the applicant maintains that the respondents' obligation towards the applicant is indivisible. Therefore the applicant submitted that the respondents are jointly and severally indebted to the applicant.

[7] The first respondent submitted that the applicant has failed to make reference to joint and several indebtedness of the respondents in all its papers. The respondent further submitted that there is nothing in either the loan agreement or the mortgage bond to suggest that the liability of the respondents is joint and several.

[8] The applicant is confined to the cause and nature of its claim as set out in its founding affidavit although sometimes it is permissible to supplement the allegations contained in the founding affidavit. A claim against co-debtors must clearly state whether their liability is joint or joint and several. In the matter of Roelou Barry (Edms) Bpk v Bosch en 'n Ander 1967 (1) SA 54 (C) the headnote reads as follows:- "Where a creditor institutes action against several debtors, who have accepted joint responsibility for the amount, without indicating in his summons or pleadings that he wishes to recover from each a proportionate share of the total amount owing but yet without indicating that the order he wishes the court to make is one in terms of which the debtors will be ordered to pay the amount jointly and severally, then it ought to be accepted that he does not wish to recover from any of the debtors more than just his proportionate share of the debt".

[9] Regarding the issue of joint or joint and several liability De Villiers CJ in De Pass v The Colonial Government (1886) 4 SC 383 at 390 stated that:- "The general principle of our law relating to the liability of co-obligors and the rights of co-obligors is that, unless otherwise agreed upon, the liability is joint, and the rights are held in common. If, therefore, two or more persons incur a joint obligation, the general rule, subject to certain well-known exceptions, as in the case of ordinary partnerships, is that each is liable only for his share and not in solidum"

[10] Joint and several liability can therefore only arise if it is clear that it is the intention of the parties to create it. If nothing to the contrary is provided in the contract and a contract is not a type which automatically leads to joint and several liability, the liability of co-debtors is joint and not joint and several.

[11] In this application the applicant has clearly omitted to state whether its claim against the respondents is joint or otherwise. Further there is no evidence that the respondents agreed to be severally liable for the whole of the debt.

[12] The result is that judgment must be given against each of the respondents for its particular share of the debt under the loan agreement.

[13] The next question is whether the applicant has proven the quantum of its claim. The applicant submitted that it is entitled to rely on the certificate of balance signed by one of its managers as prima facie proof of the amount owing to it by the respondents and that in the absence of sufficient proof in rebuttal, the evidence provided by such a certificate becomes conclusive and/or money taken to be proved. The applicant further submitted that the evidence submitted by the first respondent has failed to disturb the certificate of balance.

[14] The first respondent, on the other hand, submitted that while it is true that a certificate of balance provides prima facie proof of the amount of the indebtedness, which becomes conclusive if the debtor (the first respondent) does not shift or discharge the evidential burden created by the certificate, in casu the applicant's own evidence materially contradicts the certificate. The first respondent made reference to, inter alia, the following contradictory evidence adduced and documents produced by the applicant in its founding affidavit and thereafter:-

14.1 The "outstanding account balance" is stated to be R3 168 860-89 being more than double the unpaid balance of R1 520 326-81 according to the applicant's own statements of account as at 01 November 2007 (when last payment was allegedly made).

14.2 The first respondent further submitted that the applicant has included in its statement of account legal costs in respect of this very matter which are not yet due and payable. The first respondent rejected the applicant's proposal that the amount for legal costs be simply deducted from the amount due. Interest is calculated on the capital inclusive of these legal costs. Therefore the inclusion of the legal costs renders the applicant's interest calculation wrong. I agree with the respondent's submission in this regard.

[15] According to the applicant the last payment was made on 01 November 2007 and I have noted that the balance owing in this matter as at that date was R1 520 326-81. In terms of the applicant's section 129 notice dated 18 April 2013 the account balance is R3 168 860-89. Clearly the amount of R3 168 860-89 is more than double the initial amount of R1 520 326-81. This is in contravention of section 103(5) of the National Credit Act No. 34 of 2005. Section 103(5) provides as follows: "Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under the credit agreement as at the time that the default occurs." The amounts contemplated in section 101(1)(b) to (g) are the initiation fee, service fee, interest, cost of any credit insurance, default administration charges as well as collection costs.

[16] Under the circumstances the certificate of balance cannot be considered as prima facie proof of the amount owing by the respondents to the applicant.

[17] I hereby find that there is a dispute of fact regarding the quantum of the applicant's claim which cannot be resolved on the papers before me. For a just and expeditious decision, I am persuaded to consider favourably the request of both parties that in the event the court finds that there is a dispute of fact regarding the quantum then the issue be referred for oral evidence.

[18] I, therefore, rule as follows:

1. The liability of the respondent towards the applicant is joint.

2. The application is postponed to a date to be arranged by the parties with the Registrar of this court for the hearing of oral evidence.

3. The issue to be resolved by the hearing of oral evidence is the quantum of the applicant's claim owing by the first respondent.

4. Save in the case of any persons who have already deposed to affidavits in these proceedings, no party shall be entitled to call any person as a witness at the aforesaid hearing unless:

4.1. he or she has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or

4.2. the court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of such evidence.

5. Any party may subpoena any person to give evidence at the aforesaid hearing, whether such party has consented to furnish a statement or not.

6. The fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned at the aforesaid hearing.

7. Within 45 days of the making of this order, each of the parties shall make discovery on oath of all documents relating to the issue referred to in 3 above, which documents are or have at any time been in the possession or under the control of such party.

8. Such discovery shall be made in accordance with rule 35 of the Uniform Rules of court and the provisions of that rule with regard to inspection and production of documents discovered shall be operative.

9. The costs will be determined when the issue mentioned in 3 above is decided.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Applicant: Mr. D Van Niekerk

Instructed by: Hammond Pole Majola Attorneys

Counsel for Respondent: Mr. F J Bekker

Instructed by: Bryan Wilken Attorneys

Date of hearing: 16 April 2014

Date of judgment: 28 July 2014