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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2014/24489

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

.....
DATE

.....
SIGNATURE

In the matter between:

ABSA BANK LTD

Plaintiff

And

ERF 5.... S..... EXTENSION 1 CC

First Defendant

PRINSLOO VAUGHAN

Second Defendant

PRINSLOO SIMONE NOCOLETTE

Third Defendant

J U D G M E N T

MAKUME, J:

[1] In this matter the plaintiff applies for summary judgment and seeks the following orders against the first, second and third defendants namely:

1.1 Payment of the sum of R624 217,18.

1.2 That the first defendant's immovable property described as certain Erf 5..... S..... Extension 1, Township Registration Division IQ The Province of Gauteng measuring 832 square metres held under Deed of Transfer No T..... be declared specially executable (the property).

1.3 Costs on the attorney and client scale.

[2] The amount claimed was lent and advanced to the first defendant and secured by a mortgage bond over the first defendant's property. It is common cause that on 5 October 2009 and at Randburg the second and third defendants bound themselves as sureties and co-principal debtors with the first defendant.

[3] The plaintiff's case is that the first defendant failed to effect payment of the loan agreement instalments as and when same became payable and thus breached the loan agreement necessitating the plaintiff to commence this action.

[4] The application for summary judgment is accompanied by an affidavit sworn to by one Sabashnee Naidoo who says that he is a manager in the

Home Loans Recoveries Secured Collections Department of the plaintiff and has direct control over the plaintiff's files, computer records and computer records pertaining to the loan agreement between the plaintiff and the first defendant in respect of the property.

[5] Mr Naidoo says further that he swears positively to the facts set out in the plaintiff's summons and confirms that the first defendant is indebted to the plaintiff in the sum of R624 217,18 and that the defendants have no *bona fide* defence.

[6] To resist a summary judgment a defendant is amongst others required to set out in an affidavit that he has a *bona fide* defence. In the matter of *Oosrandse Bantoesake Administrasieraad v Santam Versekeringmaatskappy* 1978 (1) SA 164 (W) at 171H it was stated that not a great deal is required of a defendant but that he must lay enough before the court to persuade it that it has a genuine desire and intention of adducing at the trial evidence of facts which if true would constitute a valid defence. In order to achieve that degree of persuasiveness the defendant must do more than assert an intention to establish a defence by evidence at the trial. The defendant must place on affidavit enough of his evidence to convince the court that the necessary testimony is available to him and if acceptable it will constitute a defence.

[7] The affidavit filed by the third defendant on behalf of all three defendants is voluminous and deals with all sorts of irrelevant issues. The defendant's heads of argument are no different. It is not denied that a loan

agreement was entered into neither is it placed in issue that the defendants defaulted on the agreed monthly payments and thus breached the agreement.

[8] It is common knowledge that the original loan agreement was not attached to the summons nor to the application for summary judgment as it has been destroyed in a fire. The defendant has spent pages and pages in his answering affidavit on this aspect and concludes that the fact that the original loan agreement is not available disentitles the plaintiff to obtain summary judgment against the defendant.

[9] The defendant in support of this argument refers to a decision of this Court by Sutherland J in the matter of *Absa Bank Ltd v Grobbelaar* Case No 2014/877. The defendant quotes paragraphs [17], [18] and part of paragraph [19] and argues that summary judgment should not be granted. It is clear that the defendant decided to quote only those paragraphs which when read without the rest of that judgment would appear to support his argument. To illustrate this I propose to quote paragraph [19] of that judgment in full it reads as follows:

“[19] In my view it would be inappropriate to pre-judge the merits of the defendants’ allegations and the plaintiff should extricate itself from its regrettable predicament on trial not by way of summary judgment. This finding should not be construed to mean that I take the view that merely because the foundational document is unattached to a claim whether by summons or by application that summary judgment is not feasible. The decision in each case will be determined by the import of the allegations made by a defendant to question the version of the plaintiff about the terms of the agreement alleged by the plaintiff where such challenges are susceptible to rebuttal on the papers or are demonstrated not to be bona fide the remedy of summary judgment remains available.”

[10] It is the underlined portions of paragraph [19] of the judgment by Sutherland J that the defendant decided to leave out. It is clear that defendant wants to read into that judgment as though failure to attach the agreement is fatal when in fact Sutherland J says otherwise.

[11] Sutherland J quotes at length from a judgment by Rogers J in the matter of *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 WCC. In that judgment Rogers J at paragraph [9] says the following:

“The Rules of Court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements of a cause of action nor in general are they concerned with the substantive law of evidence. There is no rule of substantive law to the effect that a party to a written agreement is precluded from enforcing it merely because the contract has been destroyed or lost.”

[12] The plaintiff has attached a copy of the mortgage bond which is detailed and refers to the property. In the particulars of claim the terms of the mortgage loan are comprehensive pleaded and I am accordingly satisfied that the absence of a signed loan agreement does not make the plaintiff's case defective.

[13] As I have indicated the defendants in their answering affidavit do not dispute that the money was lent and advanced to the first defendant close corporation and that second and third defendants signed as sureties in respect of the loan agreement.

[14] The opposing affidavit is full of unfounded and baseless issues aimed at clouding the fact that the loan amount is now due and is payable by all three defendants by virtue of their breach of contract. The defendants do not say in which manner they disagree with the terms of the loan as read with the online computer records. The fact that secondary evidence had been relied upon by the plaintiff does not preclude the plaintiff from enforcing the mortgage loan agreement simply because it had been destroyed. The matter of *Absa Bank v Zalvest (supra)* is authority on this aspect.

[15] In this matter the summons includes a notice to defendants about their section 26 constitutional rights. The defendants have placed nothing before this Court as to why execution against the property should not be allowed.

[16] There is nothing in the defendants resisting affidavit which makes out a *bona fide* defence to the plaintiff's claim and accordingly and in my view the plaintiff's application for summary judgment is granted and the following order is made:

16.1 The first, second and third defendants are ordered to pay plaintiff the sum of R624 217,18.

16.2 It is further ordered that E..... 5..... S..... Extension 1
Registration Division IQ The Province of Gauteng measuring

832 square metres held under Deed of Transfer No
T..... is declared specifically executable.

16.3 The Registrar is authorised to issue a writ of execution in
respect of the property referred to in 16.2 above.

16.4 Costs on attorney and client scale.

DATED at JOHANNESBURG on this 9th day of MARCH 2015.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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