IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 46797/2013

In the matter between : 15/10/2014

STANDARD BANK **PLAINTIFF**

and

WINSTON WAYNE JARDINE **DEFENDANT**

JUDGMENT ON THE PLAINTIFF'S APPLICATION FOR SUMMARY JUDGMENT

1.

This is an opposed summary judgment where the Plaintiff claims summary judgment against the Defendant on a home loan agreement as secured by a continuing covering mortgage bond for payment of R2 840 000.00.

2.

I refer to the parties as the "Plaintiff" and the "Defendant".

3.

The Defendant is unrepresented. He was not present when the matter was called on Monday 6 October 2014. His name was also called out in the passage outside Court. Mr Ellis, for the Plaintiff, argued for approximately 45 minutes and at no time was the Defendant present. I accordingly find that the Defendant was in default of appearance, I, however, still have to consider the defences raised by the Defendant in his opposing affidavit.

See: ***First National Bank of South Africa Ltd v Myburgh and Another*** **2002 (4) SA 176 (CPD) at 179F – H.**

4.

Mr Ellis, who appeared for the Plaintiff, handed up a notice of set down of the application for summary judgment that was served on the Defendant at his address indicated for service of documents and process in these proceedings (see page 151 of the paginated papers). The return of service of the Deputy Sheriff incorrectly refers to the address as the Defendant's *domicilium citandi et executandi*. It clearly is the address that the Defendant indicated as the address where he will accept notice, documents and service of all process in these proceedings. The set down for 6 October 2014 was served on the Defendant at the said address on 1 August 2014. Accordingly the Defendant was properly appraised of the date of hearing.

5.

The Defendant filed the following documents:

5.1 A Rule 23 notice alleging that the particulars of claim attached to the summons are vague and embarrassing;

5.2 A Rule 7 notice attacking the authority of Plaintiff's attorney to act on behalf of the Plaintiff;

5.3 A Rule 30 notice alleging that the summons and particulars of claim are irregular because **Annexure "B"** to the summons consists of only 8 pages that do not follow upon each other and with **Annexure "C"** (on the face of it) absent;

5.4 When the Rule 7 notice was not complied with to the satisfaction of the Defendant he also filed a Rule 30A notice following upon the Rule 7 notice still raising the authority question; and

5.5 An affidavit in terms of Rule 32 in opposition to the summary judgment application restating the complaints referred to above.

6.

The Defendant nowhere directly denies that he entered into the home loan agreement with the Plaintiff. In vague terms he disputes his liability and alleges that there is "no evidence" as to when he fell into arrears. He denies having received the Section 129 notice in terms of the National Credit Act 34 of 2005.

7.

The summons is a simple summons as referred to in Rule 17(1) of the Uniform Rules of Court and for which a Form 9 to the Uniform Rules of Court is utilised. The particularity of a combined summons and particulars of claim are not required. In addition there is authority that a simple summons cannot be attacked by exception as it is not a pleading.

See: ***Icebreakers No 83 (Pty) Ltd v Medicross Healthcare Group (Pty) Ltd*** **2011 (5) SA 130 (KZD) at 131F – H and 134E – G;**

Absa Bank Ltd v Jansen van Rensburg **2013 (5) SA 173 (WCC) at 175G – 176F and 180D.**

However, undoubtedly it can still be an irregular proceeding in view of the defects therein.

8.

On these facts and circumstances it must be determined whether the Defendant is entitled to leave to defend.

9.

As a result of the attack on the authority of the Plaintiff's attorneys, the Plaintiff filed a power of attorney in the court file. However, the power of attorney as filed with the Registrar did not comply with the requirements of Rule 7(4). The resolution allegedly proving the authority of the person signing the power of attorney (a certain Mr Van der Walt), was not produced and shown to the Registrar and there is no notation by the Registrar of that fact on the power of attorney as is required by Rule 7(4).

10.

Mr Ellis argued that the power of attorney is sufficient. I find that it is not. It clearly does not comply with the required steps set forth in Rule 7(4). In the circumstances I approached the matter as a technicality that can easily be rectified. I accordingly stood the matter down to Thursday 9 October 2014 and requested Mr Ellis to produce the required resolution. He on the morning of 9 October 2014 provided me in chambers with a number of documents,

being:

10.1 A resolution passed by the board of directors of the Plaintiff on 15 August 2012;

10.2 Attached to the resolution is a certificate of confirmation wherein the chairman of the board of directors of the Plaintiff certifies who are the executive directors of the Plaintiff;

10.3 Further attached to the resolution is a certificate of authority in terms whereof the chief executive of the board of directors of the Plaintiff certifies that any two of the executive directors listed in that certificate of authority are authorised to act for the Plaintiff with full powers and authority, including the power of delegation as set out in the resolution of 15 August 2012;

10.4 A certificate of authority issued to Mr Mark van der Walt (who signed the power of attorney in these proceedings) signed on the 4th April 2014 by the chief executive of the board of directors of the Plaintiff and accepted by his signature thereto by Mr Van der Walt on the 11th April 2014.

11.

I immediately have to point out that the certificate of authority issued to Mr Van der Walt does not appear to be valid as the last sentence of page 2 of that document states the following: "Certificate of Authority only valid if issued by Group Governance Office and has a valid reference number." There is no indication of any reference number on the two pages of the document, nor is there any indication that it was issued by the Group Governance Office.

12.

The resolution of 15 August 2012 passed by the board of directors of the Plaintiff authorises the chief executive or any executive director of the Plaintiff *inter alia* to sign any power of attorney in favour of the Plaintiff's attorneys or to instruct or authorise the Plaintiff's attorneys to institute or defend litigation in any court or other appropriate forum or to prosecute or oppose any appeal against any judgment affecting the Plaintiff as well as to sign affidavits in relation to legal proceedings (paragraphs 1.7.4 and 1.7.5 thereof). Clause 2 of the resolution authorises the chief executive to sub-delegate and the persons so sub-delegated to again sub-delegate. The resolution does not in any way authorise Mr Van der Walt to act on behalf of the Plaintiff. The certificates of authority attached thereto do not support any authority on the part of Mr Van der Walt.

13.

The certificate of authority purportedly authorising Mr Van der Walt was signed by the chief executive on the 4th April 2014 and accepted by Mr Van der Walt on the 11th April 2014. The certificate of authority purports to have been issued in terms of a resolution of the board of directors of the Plaintiff of 14th August 2013 (see the sentence just above the reference to the date 4 April 2014). It is to be noted that the resolution of the board of directors relevant hereto is dated the 15th August 2012. The certificate of authority purports to be signed by the chief executive but no reference number or indication that it was issued by the Group Governance Office appears anywhere on the document.

14.

None of the Plaintiff's own requirements for validity of the Certificate of Authority has been complied with. In addition the Certificate of Authority refers to a resolution different to the one provided to me as purported proof of Mr Van der Walt's authority. Furthermore, the Certificate of Authority is dated 4 April 2014, approximately 7 months after the power of attorney was signed by Mr Van der Walt purportedly authorising the Plaintiff's attorneys of record to act.

15.

On these documents Mr Van der Walt had no authority on 13 September 2013 to authorise the attorneys to act. In addition, on these documents I also cannot find that there was ratification of Mr Van der Walt's signature of the power of attorney.

16.

I thus find that the attorneys are not authorised to act for the Plaintiff.

17.

Purely on this ground alone leave to defend must be granted.

18.

I however proceed to deal with the defences raised in the various notices and as repeated in the opposing affidavit.

19.

Despite raising the various technical defences as well as filing the opposing affidavit, the Defendant thereafter proceeded to file a plea and a counterclaim.

In those circumstances it seems to me that the exception and the Rule 30 notice fall away as objections to the Plaintiff's claim.

20.

The Defendant's complaint that the summons and particulars of claim as attached thereto are defective in that it did not contain a proper and full **Annexure "B"** (the terms of agreement of the home loan agreement) and **Annexure "C"** (the mortgage bond terms) must be considered. The opposing affidavit as well as the notice in terms of Rule 23 as filed and accordingly as confirmed under oath by the Defendant clearly show that a complete **Annexure "B"** and a complete **Annexure "C"** were not served on the Defendant. In fact it appears that the first 5 pages of **Annexure "B"** and the last 3 pages of **Annexure "C"** were attached to the summons thereby constituting an incomplete **Annexure "B"** and a non-existent **Annexure "C"**. These documents are confusing and certainly do not constitute either the loan agreement or the mortgage bond.

21.

I raised the issue with Mr Ellis. The answer was that the Defendant could have applied for those documents by way of Rule 35(12) and Rule 35(14) notices. He has support for this view from the matter of ***Dass v Lowewest Trading*** **2011 (1) SA 48 (KZD) at 53G – H.**

22.

The Defendant has to answer to the Plaintiff's claim as set forth in the summons and the annexures thereto as confirmed under oath for purposes of the summary judgment proceedings. The Defendant is entitled to take the Plaintiff's claim on face value. There certainly is no onus on the Defendant to rectify defects in the Plaintiff's claim by requesting documents in terms of the two said rules.

23.

To summarise: a summons was served upon the Defendant with confusing attachments that do not constitute the documents that they purport to be as referred to in the particulars of claim as attached to the summons.

24.

I interpose here to point out that the summons and attachments in the court file are what they allege to be, namely a proper **Annexure "B"** being home loan terms and conditions and a proper **Annexure "C"** being the mortgage bond. I, however, have no reason to doubt the veracity of the Defendant's evidence as regards the confusing attachments to the summons served on him.

25.

It is clear from the authorities that purely technical defences ought not to be countenanced where a defendant in fact has no defence. To refuse a plaintiff summary judgment where he is entitled to it, will constitute an injustice to such a plaintiff.

See: ***Breitenbach v Fiat SA (Edms) Bpk*** **1976 (2) SA 226 (T) 229F – H.**

26.

Absolute technical correctness of the plaintiff's pleadings is not a pre-requisite for the granting of summary judgment.

See: ***Standard Bank of South Africa Ltd v Roestof*** **2004 (2) SA 492 (WLD).**

27.

However, the Defendant was served with a summons with confusing and incorrect annexures thereto. It fails to set forth the loan agreement terms with the Defendant's signature appended thereto at the end thereof. It lacks most pages of **Annexure "B"** and **Annexure "C"** In the circumstances it is an utterly confusing set of documents that do not accord with the allegations in the summons. Of particular importance is the fact that the borrower's signature to

the terms and conditions of the home loan agreement, being a vital page to put before the Defendant, was not served on the Defendant.

28.

In these circumstances I cannot assume that, if an **Annexure "B"** and **Annexure "C"** in proper form were served upon the Defendant, that he would not have dealt with his opposing affidavit differently. In this regard I refer to ***Britz v Katzeff*** **1950 (1) SA 584 (CPD)** where Steyn, J says the following at page 585:

"If a declaration is so framed that it is vague and embarrassing, and therefore not in a form that the defendant can plead thereto, it is almost a corollary that he cannot indicate adequately the nature of his defence on the merits. To do so he will have to face clearer averments in the declaration as to what the claim is that he has to meet. If it is vague and embarrassing and bad in law it seems to me that such an exception if not without substance is sufficient ground for the refusal of an application for summary judgment."

29.

Thus this is a case where the Plaintiff's application is defective to the extent that I have to exercise my discretion in favour of the Defendant.

See: ***Arend v Astra Furnishers (Pty) Ltd*** **1974 (1) SA 298 (C) at 305A – H.**

In ***Breitenbach v Fiat SA (Edms) Bpk*** **1976 (2) SA 226 (T)** this discretion was described as follows by Colman, J at 229H:

> *"It seems to me that if, on the material before it, the Court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the Defendant."*

30.

In the circumstances the difficulty with the Plaintiff's authority documentation and the irregular contents of the annexures to the summons as served on the Defendant oblige me to refuse summary judgment. The muddled up documentation certainly is not an insubstantial technicality that ought not to stand in the way of summary judgment. It is not for me to speculate as to what the Defendant's answer would have been if a proper set of documents had been served upon him. He certainly did not have the opportunity to tell the Court whether it in fact is his signature to the terms and conditions and whether he is liable thereon to the Plaintiff or not.

31.

The attack on the claim on grounds of non-compliance with the Section 129 of the National Credit Act 34 of 2005 is without merit. I accept Mr Ellis' argument that even if it is assumed that the Defendant did not get notice thereof when

the Section 129 demand was posted to him, he still received it together with the summons. Many more days than the periods described in Section 129 expired. I accept the reasoning of Van Eeden, AJ in the South Gauteng High Court in the unreported case under case number 1512/2013 of ***SA Taxi Development Finance (Pty) Ltd v M.R. Phalafala*** that Mr Ellis handed up in Court.

32.

Both on grounds of lack of authority and on grounds of the defective set of papers served on the Defendant, I exercise my discretion in favour of the Defendant and grant the Defendant leave to defend.

33.

The following order is made:

33.1 Leave to defend is granted to the Defendant; and

33.2 Costs are costs in the cause.

AJ LOUW
ACTING JUDGE
GAUTENG DIVISION, PRETORIA

15th **OCTOBER 2014**