REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 22/1/16

CASE NO: 42232/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

22·1·2016 .....

DATE SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	APPLICANT
And	
GODFREY DLAMINI	1ST RESPONDENT
NONDUMISO JUDITH DLAMINI	2ND RESPONDENT

JUDGMENT

MSIMEKI, J

[1] For convenience, I shall refer to the parties as plaintiff, first and second defendants.

INTRODUCTION

[2] Plaintiff instituted action against first and second defendants for payment of the sum of R1 789 740.09; interest thereon at the rate of 9.25% per annum from 27 May 2015 to date of payment; costs of suit as between attorney and client and an order declaring the immovable property in issue specifically executable and that a writ of execution be issued as envisaged in terms of rule 46(1)(a) of the Uniform Rules of Court. Defendants entered their appearance to defend the action which was followed by an application for summary judgment which is opposed by the defendants.

[3] Plaintiff was represented by Advocate H J Basson (Ms Basson) while defendants were represented by Mr R Zimerman, an attorney from Johannesburg, when the matter was argued.

[4] On 30 October 2015 KGANYAGO AJ condoned the late delivery of the plaintiff's application for summary judgment. The application was not opposed.

[5] The application for summary judgment served before me on 13 January 2016.

[6] Defendants, on 16 September 2015, filed their opposing affidavit and raised points *in limine*. Only one point *in limine* relating to the commissioning of the oath pertaining to the affidavit supporting the application for summary judgment was argued as the others were, in my view, correctly abandoned.

[7] Defendants contended that the affidavit in support of the application for summary judgment deposed to by Sohini Rubyksoon was fatally defective as it, according to them, failed to comply with the requirements for a certified affidavit as provided for in Government Gazette of 23 April 1982.

[8] It was their contention that the commissioner of oaths failed to reflect that the deponent had said: "I swear that the contents of this declaration are true, so help me God."

[9] The commissioner of oaths was said to have failed to ask one of the three important questions in terms of regulation 2(1)(a), (b) and (c) of the regulations. These questions are:

(a) Whether the deponent knew and understood the contents of the declaration. It was conceded in their heads of argument that this question was asked.

(b) Whether the deponent had any objection to taking the prescribed oath. This question, according to the defendants, was not asked.

(c) Whether the deponent considered the prescribed oath to be binding on his conscience. The further concession is that this was done.

[10] The commissioner of oath's failure to ask the second question to the deponent, according to them, meant that there was no affidavit under oath

before the court and that the application for summary judgment on this basis alone ought to be dismissed with costs. Ms Basson disagreed with the contention.

[11] Regulation 1(1) governs the manner in which the oath is to be administered by the commissioner of oaths who has to ask the deponent to say: "I swear that the contents of this affidavit are true so help me God."

Regulation 2(1) prescribes the questions which the deponent must answer which are referred to above. Regulation 2(2) requires the deponent to state that he/she knows and understands the contents of the declaration and that he/she does not have any objection to taking the oath which he/she considers binding on his/her conscience. This is then followed by the administering of the oath by the commissioner of oaths as prescribed by regulation 1(1).

[12] Regulation 4(1) deals with the certificate of the commissioner of oaths which should disclose below the signature or mark of the deponent that the deponent has acknowledged that he/she knows and understands the contents of the declaration (affidavit) and also stating the manner, place and date of taking the declaration.

[13] The respondents seem to say that the questions posed in regulation 2(1) as well as the oath referred to in regulation 1(1) have to be repeated verbatim. Ms Basson disagrees and states as her reason the fact that the

purpose of the commissioner's certificate is to certify that the relevant regulations have been complied with. I agree.

[14] Mr Zimerman submitted that the question whether the deponent had an objection to taking the prescribed oath had not been asked. Again Ms Basson disagreed.

The commissioner of oath's certificate states:

> "I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT AND FINDS SAME BINDING ON HER CONSCIENCE WHICH WAS SIGNED AND SWORN TO BEFORE ME AT JOHANNESBURG ON THE 13TH DAY OF JULY 2015."

The commissioner of oaths NICOLAAS CLAASEN has duly signed below the certificate.

[15] Ms Basson submitted that the commissioner of oath's certificate meets the requirements as set out in the regulations particularly regulation 4(1). A close and proper reading of the certificate confirms this. The declaration was signed and sworn to before the commissioner of oaths. It clearly shows that the oath was taken. It is conceded that the question whether the deponent considered the prescribed oath to be binding on his conscience was asked. This presupposes that the question whether the

deponent had any objection to taking the prescribed oath must have been asked. "Sworn to" shows that the swearing was done. The defendants' contention in my view has no merit.

[16] It is important to note that the requirements as contained in regulations 1, 2, 3 and 4 of Government Notice R1258 of 21 July 1972 as amended and as published in terms of section 10(1) of the Justice of the Peace and Commissioners of Oaths Act 16 of 1963 are not peremptory but merely directory. (See in this regard *S v Msibi* 1974 (4) SA 821 (T) at 821H; *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391(T) at 396H-397A. Van Loggerenberg, Erasmus Superior Court Practice Vol 2, page 1 D3-2 and *S v Kahn* 1963 (A) SA 897 (A) at 900C.

[17] The certificate of the commissioner of oaths, in my view, in light of what the law espouses above, indeed complies with regulations 1 to 4. The defendants' contention in their point *in limine* deserves to be rejected and the point *in limine* dismissed and it is so rejected and the point *in limine*, so dismissed.

[18] Defendants' defences to the main cause of action is based on reckless credit; securitisation and inability to pay.

RECKLESS CREDIT

[19] Defendants' contention is that the agreement between the parties constitutes reckless credit as plaintiff did not do a credit assessment when the loan was granted. The agreement, according to them, became subject

to the National Credit Act 34 of 2005 ("the NCA") as further advances and withdrawals, according to them, were allowed by plaintiff.

[20] Ms Basson submitted that the contention that no credit assessment was done by plaintiff loses sight of the fact that the provisions of sections 80, 81 and 83 which deal with the issue only came into operation and effect on 1 June 2007 while the agreement was concluded before this date. The mortgage bond was also registered before the provisions came into force. Defendants, in paragraph 8 of their opposing affidavit, also admit this. Section 4(2) of schedule 3 of the NCA in no uncertain terms states that chapter 4 part D applies to pre-existing agreements only to the extent that it does not concern reckless credit. Credit assessment does not apply to this matter.

[21] Ms Basson submitted that the contention that further advances and withdrawals were allowed and thereby making the agreement between the parties subject to the NCA is without merit. She basis her submission on the provisions of rule 32(3)(b) which provides that:

> "(3) Upon the hearing of an application for summary judgment the defendant may –
>
> (a) ...
>
> (b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceeding the

> day on which the application is to be heard or with the leave of the court by oral evidence of himself or of any other person who can sear positively to the fact that he has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor." (My emphasis)

[22] The defendants need to disclose fully the "nature" and "grounds" of their defence and "the material facts" they rely upon therefor. [*PCL Consulting (Pty) Ltd t/a Phillips Consulting SA V Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 73B-C; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T) and *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T).

The "nature" of the defence relates to the character or kind of the defence (Van Loggerenberg, Erasmus Superior Court Practice, vol 2, page D1-415). "Grounds" relates to the facts upon which the defence is based [*Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) at 249G-250F and *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 and *Breitenbach v Fiat SA (Edms) Bpk (supra)* at 228.]

The material facts, sufficiently disclosed, must be such that they persuade the court to find that what the defendants allege, if proved at the trial, will constitute a defence to the plaintiff's claim. [*Herb Dyers (Pty) Ltd v Mahomed* (*supra*); *Premier Finance Corporation (Pty) Ltd v Rotainers*

(Pty) Ltd 1975 (1) SA 79 (W) and *Bank of Lisbon v Botes* 1978 (4) SA 724 (W)]

[23] Ms Basson correctly submitted that defendants failed to show the advances or withdrawals that were made. This is also not pleaded. Plaintiff refers only to the agreement which was concluded during March 2007. Defendants also fail to show when the advances and withdrawals as well as the amounts were made. No amount has been shown to have been advanced. Instead, paragraph 8 of defendants' opposing affidavit puts the issue to rest by stating that:

> "... however, I am advised that thereafter the applicant allowed further advances and withdrawals in respect of the loan." (My emphasis)

This, at best, amounts to hearsay as defendants have annexed no documentation to support the statement. Those that advised defendants have also not been disclosed.

[24] The principles enunciated in *Breitenbach v Fiat SA* (*supra*) do not permit bald, vague or sketchy defences. An allegation that one is over indebted or that there has been reckless credit will not, without substantiation, amount to a *bona fide* defence [*SA Taxi Securitisation (Pty) Ltd v Mbatha* and two similar cases 2011 (1) SA 310 (GSJ) at 315E-G]

[25] Indeed, defendants produced bald, vague and sketchy allegations which were not validly substantiated. No evidence has been produced to prove the allegations. This defence should fail.

SECURITISATION

[26] Defendants contended that the agreement had been securitised leaving plaintiff with no *locus standi* to institute the proceedings.

What is again strange is that defendants, in paragraph 11 of their opposing affidavit, state:

> "... I do not have details of whether in fact this alleged loan agreement was in fact securitised." (My emphasis)

This statement, in so many words, destroys the defendants' defence. Defendants in their opposing affidavit reserved their right to supplement their affidavit if they obtained evidence to support their allegation. This never happened.

[27] Ms Basson submitted that it would have been easy to determine if securitisation had taken place as the procedure is well set out in section 16 of the Deeds Registries Act 47 of 1937 read with sections 3(1)(f) and 54 of the Act.

[28] The Registrar of Deeds endorses transfer of rights in and to a mortgage bond. The transfer is endorsed on the original mortgage bond. Cession of such rights also takes place by endorsement on the relevant mortgage bond. Annexure "B" to the summons which is the relevant mortgage bond in this matter has no such endorsement.

ROBERTSON J in *Standard Bank of South Africa Limited v Border* (2105/2014) [2015] ZAECGHC 14 (11 February 2015) deals with the process of securitisation.

In paragraph 29 the court said:

> "The defendant merely believed that it had and his belief amounted to no more than speculation. The court eventually concluded that facts that were set out by the defendant had not supported the defence of securitisation. (My emphasis)

I specifically asked Mr Zimerman, in light of evidence at the court's disposal, whether securitisation had taken place in this matter, he answered that he did not know.

Mr Zimerman submitted that Banks needed to disclose whether securitisation had taken place or not. He, however, conceded that there was no law forcing the Banks to so disclose. Faced with the problem, he submitted that all they needed to prove was suspicion. Asked if suspicion would constitute a defence he correctly

conceded that it would not. Mr Zimerman then asked for leave to investigate if such securitisation had in fact taken place. His final plea was that the court ought not to immediately declare the property executable in the event that it decided to grant summary judgment. The investigation that Mr Zimerman refers to should have been done a long time ago.

[29] The fact of the matter is that defendants merely alleged that securitisation had taken place without evidence to support the allegation. Defendants could very easily have established with the Deeds office if securitisation had taken place. This appears not to have been done. Defendants, as correctly submitted by Ms Basson, are merely speculating when they say that the debt might have been securitised. Plaintiff's case rests on the mortgage bond which shows no securitisation of the debt. Defendants themselves do not have details of whether the agreement was in fact securitised. This defence as well stands to be dismissed.

INABILITY TO PAY

[30] First defendant is said to have been involved in a motor vehicle collision and therefore unable to work.

Defendants allege that they have had to rent out the property to others who give them rental income on which they depend for their living. It is noteworthy that the defence should be valid in law and not one based on an unenforceable right or inability to pay (Van Loggerenberg, Erasmus Superior Court Practice, Vol 2, page D1-413.)

[31] It must be borne in mind that defendants do not deny the existence of the agreement or their indebtedness to plaintiff. The defences raised by them cannot be said to be *bona fide* defences. The application for summary judgment, as a result, should succeed.

[32] I, in the result, grant an order as follows:

1. An order is granted in terms of prayers (a), (b), (c) and (d) of application for summary judgment dated 3 August 2015.

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	13 January 2016
For the Applicant:	Adv H J Basson
Instructed by:	Stupel & Berman Inc
For the Respondents:	Adv R Zimerman
Instructed by:	Taitz & Skinne
Date of Judgment:	22 January 2016