

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 29963/2015

DATE: 14 MARCH 2016

In the matter between:

ABSA BANK LIMITED

Plaintiff

And

DOCTOR NDLONDLO MSIBI

Defendant

JUDGEMENT

FRANCIS J

1... The plaintiff instituted an action against the defendant arising out of a mortgage loan agreement that was entered between the parties. The plaintiff contends that the defendant has breached the agreement by having failed to make regular payments. It sought the following relief against the defendant:

1.1 Payment of the amount of R523 433.91 together with the interest at the rate of 7.7% per annum on the aforesaid amount;

1.2 An order that the property, being [Erf 1..... P..... V..... R..... Ext 2 Township], Registration Division J.R., Gauteng Province held by the defendant under Deed of Transfer No. [T.....], be declared executable;

1. 3 An order in terms of Rule 46 for the issuing of a warrant of execution against the immovable property to obtain an attachment over the property and an ultimate sale in execution; and 1A Costs of suit on a scale as between attorney and client.

2. After the defendant had entered an appearance to defend, the plaintiff brought an application for summary judgment against the defendant for the relief set out above. The plaintiff contends that the defendant does not have a *bona fide* defence to the claim and that an appearance to defend has been entered into solely for the purposes of delay.

3. The defendant denied that it has entered an appearance defend solely for the purposes of delay. He stated in his affidavit resisting summary judgment that he had applied for and received a housing loan for R450 000.00 from the plaintiff during 2007. In the same year, he had also applied for and was granted a second housing loan for R300 000.00 from the plaintiff. The initial repayments on the loans were drawn through a debit order on his bank account. The plaintiff unilaterally took back R160 000.00 out of his bank account on 18 July 2007 of the second loan amount without advising him on what basis it do so. With effect from June 2008 the plaintiff wrongfully started deducting an amount of approximately R1 200.00 per month out of his bank account, without his permission or authorisation. When he made enquiries about the reason for the deductions, he was told that the amounts were for insurance on his motor vehicle. Those acts of the plaintiff according to the defendant were in breach of the agreements and led to a total breakdown of the relationship between the

parties. He then decided to close the bank account that he held with the plaintiff since large sums of monies had been drawn against the account by the plaintiff without his consent.

4. The defendant stated that the plaintiff breached the second loan agreement by

unilaterally withdrawing the amount of R160 000.00 from the amount of R300 000.00 it had advanced to him, out of his bank account without his permission and/or authorisation. The conduct of the plaintiff aforesaid, affected the terms and conditions of the loan agreement and cannot rely on an agreement that it breached. The amount of the instalments payment on the loan agreement was charged by the recalling of the funds which had been advanced to him. From 1st March 2008 to 28 February 2009, the plaintiff added an amount of R174 188.00 to his loan account as 'advances'. This amount was a part-payment of the R300 000.00 loan amount, but the plaintiff only advanced it a year after the mortgage bond was registered. The defendant attached a copy of a statement that was issued on 28 February 2009, which shows 'advances*' in the amount of R174 188.00 on his loan account, marked as annexure 'DNM1'. He denied that he was indebted to the plaintiff as set out in the particulars of claim and said that the plaintiff has included amounts on the claim that he is not liable for. He further attached a copy of the statement of the loan account dated 31 May 2008 as annexure 'DNM2' where the total loan amount was given as R749 999.00. On annexure DNM1, the total loan amount has decreased to R598 839.00 due to the wrongful deduction made by the plaintiff from his bank account.

5. It is trite that a defendant who wishes to oppose and application for summary judgment, must fully disclose the nature and the grounds of his defence and satisfy the court that there is a *bona fide* defence to the plaintiff's claim. The defendant's opposing affidavit is not to be assessed with the precision of a plea and a less technical interpretation is to be applied to the opposing affidavit than to a pleading. The defendant is also not obliged to disclose all of his defences in the opposing affidavit. The court must ascertain from the content of the affidavit itself what the defendant actually intended to say. He must

disclose the grounds upon which he disputes the plaintiffs claim with reference to the material facts underlying the disputes raised.

6. It was contended on behalf of the plaintiff that the defendant has failed to set out facts that shows that he had a *bona fide* defence. It was further contended that the^m defendant's opposing affidavit was vague, sketchy and laconic.
7. It is clear from the facts stated in the defendant's affidavit resisting summary judgment that one of the defences raised by the defendant is that the plaintiff has breached the loan agreement that was entered between the parties. Facts are given in support of this contention. It is not my task at this stage to examine this in great detail and all that I am required to do is to ask whether on the facts presented that the defendant has disclosed that he has an arguable defence and that leave should be granted. The defendant has not filed a simple denial but went further and has set out his defence.
8. There are a number of discrepancies in the particulars of claim about what the arrear amount is that the defendant was in arrears with. For example in paragraph 15.5 it is stated that the defendant remained in arrears with his obligation and the total arrears (on 28 April 2015) was R20 780.72 for 3.952 months. The statement as at 1 April 2015 reflects that the balance was R26 080.71 which is the same amount that is reflected in the section 129 letter dated 2 April 2015.
9. The defendant stated that the plaintiff has breached the loan agreement. He referred to two statements that show different amounts. The first statement is dated 31 May 2008 and shows the total loan amount as R749 999.00. The statement dated 28 February 2009 shows the loan amount as R598 839.00 and the balance as at 28 February 2009 is R594 624.89. He has also denied that he is indebted to the plaintiff in the amount claimed.

10. After a careful consideration of the particulars of claim, and the affidavit resisting summary judgment, I am satisfied that the defendant has an arguable defence and that he should be granted leave to defend. His defence will then properly adjudicated in a trial in due course.

11. In the circumstances I make the following order:

11.1 The defendant is granted leave to defend the action.

11.2 Costs are costs in the main action.

FRANCIS J
JUDGE OF HIGH COURT GAUTENG LOCAL DIVISION
FOR PLAINTIFF: M JACOBS INSTRUCTED BY NASIMA
KHAN INC
FOR DEFENDANT CM RAMAKGAPHOLA INSTRUCTED BY
KP SEABI & ASSOCIATES

DATE OF HEARING: 12 FEBRUARY 2016

DATE OF JUDGMENT: 14 MARCH 2016