IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 22885/2015

Heard on: 31 July 2019

Date of judgment: 19 August 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

In the matter between:

ABSA BANK LTD **Plaintiff**

and

MATODZI SINTHUMULE N.O. **First Defendant**

MATODZI SINTHUMULE **Second Defendant**

JUDGMENT

SWANEPOEL AJ:

[1] Plaintiff initially issued summons against first defendant only, in her capacity as executrix in the estate of the late Matodzi Sinthumule ("the deceased"), claiming:

1.1 Payment of the sum of R 127 877.73;

1.2 Interest on the aforesaid sum at the rate of 8.25% per annum, calculated from 10 October 2014;

1.3 An order that the immovable property situate at Portion 10 of Erf 269 Phillip Nel Park Township, Registration Divisions J.R., The Province of Gauteng, be declared specially executable;

1.4 An order that the property may be sold in terms of section 30 (b) of the Administration of Estates Act, Act 66 of 1965;

1.5 That the Registrar of Court be authorized to issue a writ of execution in respect of the property;

1.6 An order authorizing the Sheriff to execute the writ;

1.7 Costs on the attorney/client scale;

1.8 Further and/or alternative relief.

[2] Subsequently, second defendant was joined as a party to the proceedings, and judgment is now sought against first and second defendants jointly and

severally, the one paying the other to be absolved. Where I refer to "defendants" herein, I refer to second defendant in both her representative capacity as executrix of the deceased estate, and in her personal capacity.

[3] Plaintiff claim is based on two alleged loan agreements entered into during 1998 and 2004/2005 respectively. On 11 June 1998 a mortgage bond was registered over the property as security for the first loan of R 103 098.00 ("the first mortgage bond"). It is common cause that at the stage when the first loan was taken up and the first mortgage bond was registered, the deceased was unmarried. The first loan, and the first mortgage bond are not in dispute.

[4] During 1999 second defendant and the deceased married one another in community of property. Plaintiff belatedly found out about the existence of the marriage, and on 28 September 2015 plaintiff launched an application to join second defendant to the proceedings in her personal capacity. The application was duly granted, and amended particulars of claim were delivered.

[5] The amended particulars of claim persist in the allegation that plaintiff's claim is based upon two loans, one in 1998 which is not disputed, and a second loan agreement between plaintiff and defendants, which was allegedly entered into in 2004 or 2005. Plaintiff alleges that a second mortgage bond was registered over the property on 17 January 2005 in terms of which defendants acknowledged themselves to be indebted to plaintiff in a further sum of R 60 000.00. It is this second loan and mortgage bond which is at the heart of the dispute before me.

[6] It is especially important in this matter to examine the pleadings, in order to determine exactly what case plaintiff was required to prove in respect of the second loan and mortgage bond:

6.1 Plaintiff alleges that during 2004, alternatively 2005, second defendant and the deceased, both acting personally, entered into a written mortgage loan agreement with plaintiff in terms of which an amount of R 60 000.00 was lent and advanced by plaintiff to defendants. Defendants dispute this averment, and have placed plaintiff to the proof thereof. Second defendant specifically denies being a party to the second mortgage agreement.

6.2 Plaintiff avers that the written loan agreement was misplaced and a copy of an allegedly similar agreement was attached to the papers. Defendants do not have knowledge of these averments.

6.3 Pursuant to the second loan agreement, a mortgage bond with bond number B63865/2005 was allegedly registered over the property in favour of plaintiff. Plaintiff annexed to its particulars of claim a power of attorney which had purportedly been signed by second defendant and the deceased on 13 December 2004, which authorized an attorney to register a mortgage bond over the property in favour of plaintiff. The power of attorney was accompanied by a mortgage bond which was executed on 17

January 2005. The alleged terms of the mortgage agreement were comprehensively pleaded in the particulars of claim. Plaintiff was put to the proof of all of these allegations.

6.4 Plaintiff alleges that pursuant to the two loan and mortgage agreements it complied with its obligations and advanced the monies to the deceased and to second defendant. Defendants simply noted this averment.

[7] From the above, it is clear that plaintiff is required to prove that defendants entered into the second loan agreement, and that, pursuant to the loan agreement, defendants signed the power of attorney authorizing the registration of the second mortgage bond.

[8] Plaintiff called four witnesses to testify. Mr. Riyaz testified that he is employed by plaintiff. During 2005 he was head of plaintiff's credit department which gave him access to plaintiff's mortgage loan documents. He said that when a client applied for a loan, the client was obliged to provide its financial and personal information to the bank. Once an application was approved by the plaintiff, instructions were given to the conveyancing attorneys to attend to the signing of the loan agreement and the mortgage documents. The attorneys then attended to the registration of the mortgage bond. Riyaz testified that the attorneys would not register a mortgage bond without instructions from the plaintiff, and plaintiff would in turn not provide such instructions without the defendants having made application for a loan. The

application itself is normally retained by plaintiff for the term of the loan and for an additional period thereafter.

[9] Riyaz testified that in 2009 a fire occurred at one of plaintiff's storage facilities which resulted in many mortgage bond documents being lost. For that reason, plaintiff was unable to produce an original mortgage bond. Plaintiff also did not produce the loan application itself, or any other document that could support its version that defendants had applied for the second loan.

[10] Mr. Riyaz testified that during 2005 a mortgage bond was registered over defendants' property, and in support of his contention he referred to a mortgage bond document dated 17 January 2005 which purports to evidence the registration of a mortgage bond over the property as security for a loan of R 60 000.00. He also referred to the power of attorney which he said had been signed by the deceased and the second defendant on 13 December 2004. Both the power of attorney and the mortgage bond were copies of the alleged original documents.

[11] Ms. Indira Beharie testified that she is employed by plaintiff in its estate department. She is the author of a certificate of balance dated 2 July 2019 which certified that as at that date defendant was indebted to plaintiff in the sum of R 149 953.46. She testified that she had issued the certificate after perusing plaintiff's account records pertaining to defendants' account. It was put to her that defendants denied owing plaintiff any money.

[12] Ms. Brenda Johnson testified that she is a systems manager in plaintiff's employ. She testified that defendants have two different accounts with

plaintiff, the one reflecting the 1998 loan, and the other the 2004/2005 loan. Defendant's counsel put it to Ms. Johnson that defendant knew nothing about the 2005 loan agreement. She could not admit or deny that contention as she does not have personal knowledge of the events of 2004/2005.

[13] Mr. Kabelo Moiloa testified that he is a liaison officer in plaintiff's employ, and he deals with attorneys acting for plaintiff in estate matters. He testified that after the deceased passed away payments continued to be made until the last payment was made on 16 January 2010. Mr. Moiloa testified that some errors had occurred on the two accounts, but had been rectified by contra entries. Mr Moiloa also did not have personal knowledge of the 2004/2005 loan agreement. That concluded the evidence for the plaintiff.

[14] Defendant sought absolution from the instance. The application was refused and I undertook to provide reasons in my judgment. Second defendant then testified.

[15] In her evidence defendant denied signing a loan agreement with plaintiff. She also denied signing the power of attorney to authorize the registration of the mortgage bond. She denied ever having been to attorneys' offices or that she had personally ever borrowed money from plaintiff. She knew about the 1998 loan, but she knew nothing about a 2005 loan. She denied knowing anything about loan repayments that were made after the deceased passed away.

ABSOLUTION AFTER THE PLAINTIFF'S CASE

[16] In considering the application for absolution I was mindful of the fact that in the absence of special considerations (such as that the plaintiff's evidence is inherently unacceptable), I was obliged to accept the truth of the plaintiff's evidence. (**See:** ***Atlantic Continental Assurance Co. of S.A. v Vermaak 1973 (2) SA 525 (ECD) at 527*** **C**) At the close of plaintiff's case there was some evidence before me that plaintiff had lent money to defendants in 2005. Their loan accounts had been debited by R 60 000.00, and they had effected payment on the accounts until 2010. The test for absolution from the instance at the end of the plaintiff's case has been canvassed in numerous authorities. In ***Gascoyne v Paul and Hunter 1917 TPD 170*** it was held that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff.

[17] Given the evidence at the close of plaintiff's case, specifically the evidence that the loan sum had been paid to defendants, I believed that at that stage there was evidence upon which a reasonable court might find for the plaintiff, and consequently I refused absolution from the instance.

[18] The question is now whether plaintiff has now discharged the *onus* to prove, on a balance of probabilities, that defendants entered into a second loan agreement and that they signed the power of attorney authorizing the registration of the mortgage bond. None of plaintiff's witnesses have personal knowledge of the events surrounding the alleged second loan application, nor of the registration of the mortgage bond. They can only give evidence that is circumstantial in nature.

[19] There are in my view a number of questions that arise from plaintiff's evidence. Firstly, if the deceased and second defendant applied for the second loan in 2004, one would have expected plaintiff's computer systems to contain some corroboration, whether it be the application itself, the bond grant letter, or some other document that could support plaintiff's version. The absence of such supporting evidence is in my view cause for concern.

[20] My second concern is the absence of any supporting evidence by the conveyancing attorneys, be it documentary or otherwise, that second defendant and the deceased had signed the loan agreement and the bond registration documents such as the power of attorney.

[21] My third concern relates to plaintiff's two recalculation statements. These calculations are done in order to verify that the plaintiff's accounts are correct. The statements have no evidentiary value in regard to the conclusion of the second loan agreement save that they confirm that in 2005 an amount of R 60 000.00 was debited to defendants' second account. The statements do not prove that the monies were in fact paid to defendants.

[22] My fourth concern is the mortgage bond document itself. Plaintiff submitted that I should accept the contents of the document as having been proved, because it is a public document. It is correct that the contents of a public document are proved on its mere production. A document is a public document when:

22.1 It is made by a public officer in the execution of a public duty;

22.2 It must have been intended for public use;

22.3 The public must have a right of access to it. (

See: *Northern Mounted Rifles v O'Callaghan 1909 TS 174 at 176 to 177; Nolan v Povall and others 1953 (2) SA 202 (S.R.) at 209 E; Matthysen Busvervoer v Plaaslike Padvervoerraad, Kimberley 1987 (4) SA 490 (NKA) at 503 A to G*)

[23] A mortgage bond is a public document which is admissible on mere production by a party to the proceedings. However, when the original document is not produced, the document should comply with the provisions of section 18 (1) of The Civil Proceedings Evidence Act, Act 25 of 1965, which reads as follows:

> *"(1) Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy thereof or extract therefrom proved to be an examined copy or extract or purporting to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, shall be admissible in evidence."*

[24] What then is the status of the copy of this mortgage bond? It has not been proved to be an examined copy and it has not been certified as a true copy of the original. It has the words "For Information Only" inscribed over each page. The copy is therefore not admissible in evidence on its mere production, and I can take no cognizance of the contents thereof. The power

of attorney was drafted by the conveyancing attorneys, and not by a public officer in the execution of a public duty. The power of attorney itself cannot therefore be a public document. If I am wrong in this regard, this particular power of attorney was in any event not signed by the registrar, was not signed and certified as a true copy, and has the words “For information only” written over the contents of the document in large bold script. Its origin is unknown, and in my view it has no evidentiary value at all.

[25] Nothing therefore remains of plaintiff’s case. Its mortgage bond has no evidentiary value, its witnesses cannot testify that defendants took up the second loan from personal knowledge, nor is there any other document evidencing the loan, save for plaintiff’s statement of account which, as I pointed out above, simply show that R 60 000.00 was debited to the account in 2005..

[26] Second defendant denied that she had ever applied for a loan, nor had she, on her version, entered into a loan agreement with plaintiff, and in general her evidence was not discredited. I cannot simply reject her evidence as improbable. However, what is of concern about her evidence is that in pleading to plaintiff’s statement of fact that plaintiff had paid defendants R 60 000.00 pursuant to the second loan agreement, defendant noted the averment without denying the allegation. As the plea stands, defendant admitted having received the money. In her evidence however, she denied having received any money from plaintiff.

[27] It is trite that a defendant, in pleading to a statement of fact made in the particulars of claim must admit the statement, deny it, or confess and avoid. Rule 22 (3) of the Uniform Rules of Court provides that any allegation of fact in the combined summons which is not stated in the plea to be denied or to be admitted shall be deemed to have been admitted. Defendant is bound by her plea, and therefore she must be considered to have admitted that the monies were paid to herself and to the deceased. If that were the case, then it would be extremely strange if there had never been a loan agreement between the parties.

[28] It is also highly unlikely that the bank would instruct its attorneys to register a second mortgage bond unless they had entered into a second loan agreement with defendants.

[29] I am therefore faced with plaintiff's case, which is based on an inadmissible document and is supported by witnesses who can essentially not contribute any evidence of substance. On the other hand, I have the version of the defendant which is unlikely. I cannot decide on the little evidence before me where the truth lies. I do however believe that it is possible that plaintiff may, having reconsidered the matter, be able to adduce other evidence that may sway the case in its favour.

[30] A Court is entitled to grant absolution at the end of the case in cases where the Court cannot determine where the truth lies.

> *"Where there is a direct conflict of testimony between the witnesses for plaintiff and those for defendant, then, before the Court can enter*

judgment for defendant it must be satisfied that the story told by defendant's witnesses is true, and that by plaintiff's witnesses is false."

*(**See: Oliver's Transport v Divisional Council, Worcester 1950 (4) SA 537 [AD] at 543 B**)*

[31] The proper approach to be followed when there are two opposing versions in a matter was set out in **National Employers Mutual General Association v Gany 1931 AD 187** where the Court held:

"*Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version."*

[32] It was pointed out in ***Koster Ko-op Landboumpy v SA Spoorweë en Hawens 1974 (4) SA 420 (W.P.A.)*** (at 426 A) that the *dictum* quoted above does not find application where only some parts of the two versions are mutually destructive, but only in cases where, if the one version is true, it is completely destructive of the other.

[33] In this case we have two incompatible versions. If second defendant's version is correct, there could not have been a loan agreement and plaintiff's version must be untrue. However, there is much to be concerned about in second defendant's version, specifically the failure in her plea to deny that

defendants received the money. Plaintiff was entitled to accept that defendants admitted that they had received the money, and plaintiff would have prepared its case on that basis. If defendants did receive the money, then there must have been an underlying *causa* for the payment. Strictly speaking this is not a matter in which there are two mutually destructive versions where the probabilities do not favour one version above the other. This is rather a matter in which, on the one hand plaintiff has not discharged the *onus*, but on the other hand, defendant's version is highly unlikely. In these circumstances the correct course of action is, in my view, to grant absolution from the instance.

[34] As far as costs are concerned, having found that plaintiff did not discharge the *onus*, it must follow that defendant has been substantially successful in warding off a judgment. Therefore, plaintiff should bear the costs of the action.

[35] In the circumstances I make the following order:

35.1 Absolution from the instance is ordered;

35.2 Plaintiff shall pay defendant's costs of the action.

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J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria