IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

9 June 2022 Moonsamy

DATE SIGNATURE

CASE NO: 14675/20

DATE: June 2022

In the matter between:-

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

V

PIETER SCHUTTE Defendant

JUDGMENT

KOOVERJIE J

[1] In this matter the plaintiff seeks summary judgment against the defendant for payment of R591,357.32. The amount is based on the certificate of balance which is attached at page A39 to the summons.

[2] The plaintiff's claim against the defendant is based on a shortfall of a claim arising from a home loan agreement. The claim is further premised on the liability of the co-principal debtors being the defendant and Christo van Schalkwyk who was placed under final sequestration.

[3] The defendant filed a plea in the main action where its defence is based on prescription. The plaintiff claims that his defences in the summary judgment raises no triable issue as the law is settled and the prescription period is for a period of 30 years.

[4] On 13 July 2006 the plaintiff, Christo van Schalkwyk and the defendant concluded a home loan agreement in terms of which Christo van Schalkwyk and the defendant were loaned a total amount of R310,000.00 repayable over 240 months. The loan was to be secured by the mortgage bond. A continuing covering bond was registered over the property in favour of the plaintiff. The co-principal debtor, Mr Christo van Schalkwyk was placed under final sequestration on 21 April 2011.

[5] The property was then sold by the trustees appointed in the insolvent estate of Christo van Schalkwyk and the proceeds thereof were utilized to partially satisfy the plaintiff's claim against the estate. The mortgage bond was subsequently cancelled and the property transferred in the name of the purchaser. There was, however, still a debt remaining on 18 December 2012.

[6] The defendant's plea raised the following defences, namely:

(i) defence of prescription;

(ii) it denied that the claim is based on a home loan agreement insofar as the defendant is concerned;

(iii) the covering mortgage bond was cancelled on 18 December 2012. The fact that the loan was no longer secured by a mortgage bond, the loan remains unsecured. In such an instance, the claim for the outstanding amount has prescribed;

(iv) all the outstanding liabilities towards the plaintiff is settled by the trustees appointed in the insolvent estate of Christo van Schalkwyk and no amount is due and owing;

(v) that the plaintiff charged legal fees onto the account which is denied to be due and owing.

[7] I find it necessary to emphasize that the court will consider the case of the parties as per their pleadings.

[8] In essence, the plaintiff's case is that the defence of prescription has no merit and furthermore, the amount owing is based on the certificate of balance as at August 2019.

PRESCRIPTION

[9] On the defence relating to the prescription, it is settled law that the prescription period is specified on the basis of the type of debt as set out in Section 11 of the Prescription Act. In the case of mortgage bonds, prescription starts to run after a period of 30 years. Our

authorities have clearly pronounced on this point, In the ***Botha v Standard Bank*** decision[1] the court stated:

"Put differently, the home loan was conditional upon the execution of the bond. Once this was done and the loan was advanced, the bond – not the loan agreement – became the operable contract. This was the agreement from which the debt arose and which the bank relied upon to prove its claim against the insolvent estate…"[2]

The classification in terms of the Prescription Act is based on the type of debt, in this instance the mortgage bond.

[10] The law is clear. Section 11(a)(i) of the Prescription Act stipulates that the period of prescription of debt shall be 30 years in respect of any debt secured by a mortgage bond. This is so even if the bond was cancelled. The authorities that were pointed out was ***Oliff v Mini 1953(1) SA 1(A)***. The said principle was endorsed in ***Botha*** matter.

[11] It is not disputed and as pleaded in paragraph 4 to 6 of the particulars of claim, namely that:

(i) On 13 July 2006 the Plaintiff represented by Christo van Schalkwyk, together with the defendant entered into a written agreement in terms of which moneys were lent in advance to Christo van Schalkwyk and the defendant. The loan agreement was attached to the particulars of claim.

(ii) The principal debt was an amount of R310,000.00 and interest was to be charged at the variable interest at 1.6% below prime on the principal debt amount per annum and was therefore subject to change. The prime interest as at date of the agreement was 11%.

(iii) The principal debt with interest was to be repaid over a period of 240 months.

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[1] Antoinette Botha v Standard Bank of South Africa Ltd case (445/2018) [2019] 6 SA 38 SCA. See also paragraphs 10, 18, 23 and 25.

[2] See also paragraph 23 of the Botha matter

(iv) The initial loan repayment would become due 30 days after registration of the bond and will become due on the same day of each month thereafter until the bond was settled in full.

(v) The loan was to be secured by means of a continuing covering mortgage bond under Bond Registration Nr. B111884-2007 hypothecating the property known as Erf 1316, Karen Park, Extension 4, City of Tshwane Metropolitan Municipality, province of Gauteng, measuring 610 (six hundred and ten) m² held by Deed of Transfer 91180/2007 in favour of the plaintiff.

[12] The defendant's reliance on the judgment of ***Miracle Mile Investment 67 (Pty) Ltd & Another v Standard Bank of South Africa 2016 (2) SA 153 GJ*** is misplaced. The SCA in the Botha matter has settled the issue regarding the prescription point.

[13] Furthermore, the SCA upheld the court *a quo's* findings that the cancellation of the bond had no bearing on the prescription period. The defence of prescription is therefore, in my view, not a triable issue.

[14] Counsel for the defendant attempted to explain that one should draw a distinction on the type of bond. It was based on a definite capital amount. The amount due and owing would be R310,000.00 as that was the loan in terms of the mortgage bond. The ***Botha*** decision is clear - the Prescription Act did not distinguish in the type of bond. For the purposes of this application, it is not necessary to determine when the debt became due except to state that it is common cause that the claim became due on 22 April 2011, that is when the co-principal debtor was sequestrated, alternatively when the bond was cancelled on 18 December 2012. Both periods fall within the 30-year prescription period.

[15] Regarding the issue that the mortgage bond was not attached to the pleadings. In my view, two separate contracts are interlinked. The terms of the loan agreement make it artificial to separate the contract of loan from the loan agreement. Once the suspensive condition to the mortgage bond and the special conditions under the loan agreement were fulfilled, there was, in fact, only one agreement[3].

[16] Put differently, the home loan was conditional upon the execution of the bond. Once this was done and the loan was advanced, the bond and not the loan agreement became the operable contract. This was the agreement from which the debt arose and which the bank relied upon to prepare its claim against the insolvent estate.

DISPUTE ON THE AMOUNT

[17] The defendant's claim that the bond was registered only for R310,000.00 and the claim for R591,357.32 is not justified, more particularly in respect of the legal costs that was added thereto.

[18] On the issue of the amount owing, the defendant denied the amount owing and furthermore stated that all outstanding liabilities towards the plaintiff was settled by the trustees appointed in the insolvent estate of Christo van Schalkwyk and therefore no amount is owing.

[19] At paragraph 2 of its opposing affidavit, the defendant pleaded:

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[3] Botha case paragraph 31 and 32

"2. I draw attention thereto that the principal debt was for R310,000.00, this appears from Annexure 'SJ2' attached to the affidavit of the plaintiff and onto this account was loaded:

2.1 Legal costs of R5307.84 on 17 June 2016 and R3241.02 on 21 July 2011;

2.2 Collection of costs.

3. The agreement does not deem the applicant carte blanche to load legal and collection costs onto the account."

[20] The plaintiff concluded that this defence too has no credence in that:

(i) the statements attached to the application makes it clear that the indebtedness was not settled in full;

(ii) moreover, the certificate of balance is binding on the defendant and constitutes *prima facie* proof of the amount of indebtedness.

[21] It was pointed out that the agreement entered into by the parties "Clause 18.1.2 of Part B of the agreement" makes provision for the charging of legal costs. I find it apt to refer to ***Nedbank v Botha and Another – 2016 JOL 36735 FB***, where the court held:

"Where parties agreed in a loan agreement that a certificate of balance is binding on the defendant, then such certificate constitutes prima facie proof of the amount of indebtedness."

In this instance, it was pointed out that the bond made provision that the certificate signed by one of the bank managers whose appointment had not been proven, shall on its mere production, be proof of the amount due and the rate of interest payable.

[23] In this instance, I find that the dispute on the amount of indebtedness also has no merit. In order to come to the assistance of the defendant, it is trite that the onus is on the defendant to demonstrate that it has triable defences and that such defences are *bona fide*.

[23] In this instance, the defendant's defences would not be sustainable at trial. Consequently, the plaintiff has established a valid claim.

[24] Consequently, I make the following order:

1. Summary judgment is granted against the defendant/respondent for payment of the amount of R591,357.32 (five hundred and ninety-one thousand three hundred and fifty seven rand and thirty-two cents).
2. Costs are to be taxed.

H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff:	Adv M Rakgoale
Instructed by:	Vezi & De Beer Incorporated
Counsel for the defendant:	Adv RF de Villiers
Instructed by:	Deneys Zeederberg Attorneys
Date heard:	1 June 2022
Date of Judgment:	9 June 2022