

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 4922/2011

In the matter between:

ABSA BANK LIMITED

Applicant

v

PETRUS JACOBUS UYS

Respondent

JUDGMENT HANDED DOWN ON THURSDAY, 19 MAY 2011

CLEAVER J

[1] My attention has been drawn to two typographical errors in the judgment which I handed down on 16 March 2011. In para [1] there is a mistaken reference to summary judgment and in the second line of paragraph [3] the words '*in the loan agreement*' were inserted in error.

[2] I have accordingly, in terms of Rule 42(1)(b) corrected the two paragraphs as per the corrected judgment herewith.



R B CLEAVER

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CORRECTED JUDGMENT HANDED DOWN ON WEDNESDAY, 16 MARCH 2011

CLEAVER J

[1] This is an application in which the applicant seeks a provisional order to perfect a notarial bond passed by the respondent in favour of the applicant over the all the respondent's moveable property.

[2] The respondent's defence takes the form of a point of law raised in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court which is set out in the following terms:

- "1. The applicant in its application claims the perfection of a notarial bond;*
- 2. The bond serves as security for certain credit facilities provided by the applicant to the respondent and an entity referred to as Accom Trade 131 CC.*
- 3. When the provisions of the notarial bond are considered with the provisions of the credit facilities the transaction amounts to a 'secured loan' as defined in section 1 of the National Credit Act, 34 of 2005 (NCA);*
- 4. A secured loan is in turn included in the definition of a credit agreement found in section 8 of the NCA;*
- 5. In the circumstances the applicant's application amounts to legal action for the enforcement of a credit agreement as contemplated in section 129 & 130 of the NCA;*

6. *The applicant has however failed to allege in its founding papers that the required procedures as set out in section 129 and 130 have been met and has therefore failed to make out a proper case for the relief it seeks;*
7. *As a result the respondent requests that the application be dismissed with costs."*

[3] The judgment in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*¹ is relied upon by the respondent. In that judgment the court held that since the notarial bond provided security for the respondent's indebtedness under a loan agreement with the bank, the loan agreement and the notarial bond together constituted a secured loan as defined in the National Credit Act, No 34 of 2005 ("NCA").

[4] The founding papers reveal that the respondent is indebted to the applicant in three amounts.

R572 313,83 in respect of a cheque account;

R137 008,69 in respect of a term loan account; and

R2 540 53,02 in respect of a suretyship signed by the respondent for Accom Trade 131 CC.

[5] It is common cause that the issue of the papers was not preceded by the delivery of a notice in terms of section 129 of the NCA to the respondent. Indeed the papers are silent as to the NCA.

[6] Counsel for the applicant submitted that the judgment in *Prochaska* is clearly wrong and should not be followed by me. He submitted that in deciding whether or not the notarial bond constituted a secured loan as defined in the NCA, regard should be had only to the bond from which the following must appear:

¹ 2009 (2) SA 512 (DCLD)

1. That monies have been advanced by the applicant to the respondent.
2. That a pledge or session of the title of moveable property has been established; and
3. That such pledge or session is to serve as security for all amounts due under the bond.

In short, counsel submitted that a notarial bond can never be said to be a secured loan as defined as it does not constitute a pledge as understood in legal terminology. Furthermore, he pointed out, the applicant does not claim payment of money from the respondent but merely seeks an order to perfect his security.

[7] In the circumstances of the present case, I do not consider it necessary to decide whether or not *Prochaska* was wrongly decided.

[8] The indebtedness due by the respondent to the applicant in respect of his cheque account and the term loan account relates to transactions which are subject to the NCA. However, his indebtedness in respect of his suretyship is not subject to the NCA. For the suretyship to be subject to the NCA it must be in respect of a principal debt which is subject to the NCA. Since the principal debtor is a juristic person to whom the NCA does not apply, the suretyship is also not subject to the NCA.²

[9] Although the notarial bond secures debts which are subject to the NCA, the greatest part by far of the respondent's indebtedness (some R2.5 million), is not in respect of a transaction which is subject to the NCA and in respect of that debt, no notice in terms of section 129 of the NCA was required.

² *Nedbank v Wizard Holdings (Pty) Ltd and others* 2010 (5) SA 523 (GSJ) at para 9; *Geodis Wilson SA (Pty) Ltd v ACA (Pty) Ltd & others* [2010] JOL 25956 (GSJ) at paras 21 and 22; *Structured Mezzanine Investments (Pty) Ltd v Davids & others* [2010] JOL 26097 (WCC) at para 16 and *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and another* 2009 (3) SA 384 (T) at para 18.

- [10] In the circumstances the application must succeed and the following order will issue:
1. The non-compliance by the applicant with any time limits imposed by the court rules is condoned and short notice of the hearing of this application to the respondent is condoned.
 2. The notarial bond no BN30961/2006 held by the applicant is perfected and for such purposes the respondent is ordered to point out and hand over to the sheriff all his moveable goods held at
 - 2.1 the farm Sandplaas, Hermon, Malmesbury District;
 - 2.2 his home at 63 Eighteenth Avenue, Boston, Bellville;
 - 2.3 any other place.
 3. The goods so pointed out or found by the sheriff shall be attached by the sheriff who shall hand possession of such goods to the applicant to hold such goods as security for payment of all monies due and payable by the respondent including interest, cost and expenses.
 4. The grant of this order will not prejudice any real rights that the creditors of the respondent may have;
 5. A rule nisi is hereby issued in terms whereof the respondent and all other interested parties are called upon to show cause before this Honourable Court at 10h00 on Wednesday, 13 April 2011 why
 - 5.1 The order referred to in paragraphs 1 to 4 above should not be made final;
 - 5.2 The applicant should not be authorised to deal with the goods as provided for in the bond and in particular:
 - 5.2.1 to dispose of the goods or any part thereof, with or without recourse to further legal process by public auction or by private treaty or otherwise in the applicant's sole discretion and on such terms and conditions as the

applicant in its sole discretion may deem fit and to convey good value and free and valid title to the purchaser or transferee thereof;

5.2.2 to accept payment of the proceeds of such goods and to utilise it in part payment of the amounts owing to the applicant;

5.2.3 the respondent should not be ordered to pay the cost of this application on a scale as between attorney and client as agreed to in para 10.1.3 of the bond.

6. A copy of this order, the notice of motion and the affidavits attached thereto be served on the respondent at the farm Sandplaas, Hermon, Malmesbury District or at 63 18th Avenue, Boston, Bellville.
7. The sheriff be authorised to act upon receipt of a fax or a copy of this order.



R B CLEAVER