



Republic of South Africa
Republiek Van Suid Afrika

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT**

Case number: 27647/2010

SB GUARANTEE CO. (Pty) Ltd

Plaintiff

And

THE TRUSTEES FOR THE TIME BEING
OF JHB TRUST

Defendant

Judgment Delivered on 14 December 2011

Saba AJ

[1] This is an application for summary judgment. Plaintiff seeks payment of R 1 353 168, 00 being the balance of the principal debt in respect of monies lent and advanced under a mortgage agreement, and an order declaring the property executable, costs plus interest. The defendant opposes the application on a number of grounds.

[2] Standard Bank of South Africa (**the bank**) lent and advanced monies to the defendant under a mortgage agreement. The mortgage bond was passed by the defendant in favour of the bank and registered in the Deeds Registry at Cape Town on 19 September 2006. A copy of the bond is annexed to the papers.

[3] The application for summary judgment is supported by an affidavit by Anthony Lorean Kennedy (**Kennedy**), verifying the cause of action. Kennedy is a manager in the plaintiff's national home loans credit control department. The relevant part of his affidavit is as follows:

"3. I am employed by plaintiff in its home loans credit control department and in particular the section dealing with monitoring of bond repayments and the failure to make such repayments. I have access to the records of the defendant's home loan account with the plaintiff and have in fact fully acquainted myself therewith".

[4] An affidavit by Basil Louis Borain (**Borain**), a manager in plaintiff's legal, personal and Business Banking Credit Department is also attached to the application. Borain states the following at paragraph 2 of this affidavit:

"Prior to the institution of these proceedings:

2.1 The defendant/s had been in default (as contemplated by section 130 of the National Credit Act, 34 of 2005 ("the NCA") in respect of obligations under the relevant Home Loan Credit Agreement with the plaintiff for a period of twenty (20) business days (or more)

2.2 A notice in terms of Section 129 (1) of the NCA had been forwarded to the Defendant/s on 13 September 2010 and at least ten (10) days had elapsed since the plaintiff delivered the said notice.

2.3 The defendant/s had not responded to the notice.

[5] In his affidavit resisting summary judgment, Johannes Hendrick Burger (**Burger**), a trustee of the JHB Trust raises points in limine and thereafter deals with the merits. These are the points in limine raised:

"6.1 The plaintiff claims that the alleged amount is due and owing pursuant to a certain sectional covering mortgage bond number B97134/2006, according to paragraph 1 of the summons and alleges its cause of action being the sectional mortgage bond.

6.2 Thus the plaintiff is alleging a claim based on a liquid document

6.3 The defendants are prejudiced in preparing and disclosing their defence by the incomplete document.

6.4 Notwithstanding the fact that the plaintiff pleads (sic) in their particulars of claim and makes the averment on the face of the bond document, the

defendant deny giving authority as pleaded by the pleaded by the plaintiff”.

[6] Counsel for the plaintiff submitted that the defendant acknowledges the existence and the registration of the bond, as well as the amount involved. I agree with this submission because Burger states the following at paragraph 7.3 of his affidavit:

*“I deem it of utmost importance to disclose to the above Honourable Court that although the bond has been registered to the JHB Trust, the purpose of the bond was to secure a loan of R1, 353,737.50 (one million three hundred and fifty three thousand seven hundred and **seventy three** rand fifty cent) sic, in order for the developers of the “Andrew King scheme” to deliver to the defendants a completed sectional title unit on a date of registration”.*

[7] Counsel for the defendant raised further points in limine for the first time in his heads of argument. He contended that this application does not comply with the provisions of rule 32 because Kennedy and Borain cannot swear positively to the facts verifying the cause of action. He bases this contention on the fact that they do not have regard to the records of Standard Bank. He further submitted that this defect is fatal. Counsel further contended that the particulars of the cession agreement raised in the summons have not been pleaded.

[8] Counsel for the plaintiff referred this court to **Joob Joob Investments v Stocks Mavundla Zek Joint Venture** 2009 (5) SCA 1at 12 C-D where the following is stated:

“ Having regard to its purpose and application, summary judgment proceedings only hold terrors and are ‘drastic’ for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance By Corbett JA in Maharaj case at 425G-426E”.

[9] In **Maharaj v Barclays National Bank Ltd** 1976 (1) A 418 at 423B-424D, Corbett JA (as he then was) said the following:

“Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge.....The mere assertion by a

deponent that "he can swear positively to the facts" (an assertion which merely reproduces the wording of the rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words".

[10] In this application, the plaintiff is cited as SB Guarantee Company (Pty) Limited. It is common cause that the bond and the loan secured were ceded by the bank to the plaintiff on 25 July 2007. In the summons it is stated that the bank retained responsibility on the plaintiff's behalf for the administration and management of the defendant's loan. The responsibilities that were retained by the bank are not mentioned. What is now confusing is the fact that the bank is not a party to these proceedings and it is not clear why it is the plaintiff which is suing the defendant if the bank retained responsibility for the administration of the loan to the defendant.

[11] It is so that the loan agreement under which the plaintiff sues is annexed to this application, but, in the light of the allegation that the bond and the loan were ceded to plaintiff, I am therefore of view that the cession agreement should also have been annexed.

[12] Borain states that he is a manager in the plaintiff's legal business but the party cited as the plaintiff in his affidavit is Standard Bank. It is therefore not clear whether he is a manager in Standard Bank or in SB Guarantee Co. (Pty) Ltd.

[13] The section 129 notice sent to the defendant on 30 August 2010 was from Standard Bank. This gives one an impression that it is Standard Bank which monitored the payments of the loan accounts, a fact which coincides with the information that is contained in the summons.

[14] Kennedy who claims to be responsible for the actual monitoring of bond repayments does not state that he is employed by Standard Bank in his affidavit. The party cited in his affidavit is the plaintiff. If he is employed by the plaintiff and the management of the defendant's loan is administered by the

bank, he can therefore not swear positively to the facts. In the circumstances, I find that this point in limine was well taken. In view of my conclusion, it is not necessary to deal with the merits of the application before me.

[15] In the result, I make the following order:

15.1 The application for summary judgment is refused

15.2 The defendants are granted leave to defend the action

15.3 The costs of the application are to be costs in the cause.



SABA AJ