

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

CASE NUMBER:

2588/2012

5 DATE:

22 AUGUST 2012

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

10 **RICHARD JAMES HILL**

Respondent

J U D G M E N T

15 **LOUW, J:**

The plaintiff in this matter, by summons served on 29 February 2012, sued the defendant for payment of approximately R1 500 000,00 arising from a mortgage loan advanced to the
20 defendant on security of a mortgage over Erf 630 Dwarskersbos ("the property"). In addition the plaintiff seeks an order declaring the property specially executable.

At the time the defendant was, on the plaintiff's case, in
25 arrears for approximately 17 months in respect of his monthly

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mortgage instalments, in the total amount of R226 355,98. The bond contains an acceleration clause. There is also a certificate clause, dealing with the amount of the debt. Plaintiff relies on a certificate granted in terms of that particular clause, which is annexed to the summons.

The defendant entered appearance to defend in person on 4 March 2012 and the plaintiff thereupon applied for summary judgment. The defendant appointed attorneys to represent him and filed a notice of opposition through the attorneys and also filed an opposing affidavit. The matter first came before this court on 17 May 2012, when it was postponed for hearing today on the semi-urgent roll. The plaintiff today seeks summary judgment in the amount claimed, together with the ancillary orders regarding interest, declaration of executability of the property and cost.

When the matter was called this morning, Mr Jonker appeared on behalf of the plaintiff. There was no appearance by or on behalf of the defendant. The matter then stood down for an investigation to be done to see whether the defendant is present at court. It turns out that the defendant's erstwhile attorneys had withdrawn by way of a notice served on the plaintiff's attorneys on 6 August 2012. Mr Jonker informed me that he had heard that Mr Banderker, who previously appeared

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for the defendant, had no instructions to appear, although he was not able to confirm this personally with Mr Banderker. His attorneys having withdrawn, therefore, no surprise that Mr Banderker was not here to appear on the defedant's behalf
5 this morning.

It further turns out from inquiries made in the Motion Court by the usher of this court, that Mr Hill, the defendant, is not present at that court or in the precincts of this court. His
10 name was, so I am told, called out in the 3rd Division Motion Court and he made no appearance. Mr Van der Merwe, who is the attorney for the plaintiff, made further inquiries and has deposed to an affidavit as to the outcome of these inquiries. I am not going to go into the detail, but it appears from Mr Van
15 der Merwe's affidavit that he had spoken to the defendant's erstwhile attorney, who confirmed that his firm was no longer representing the defendant, but that the defendant is fully aware of the proceedings today and that all his files had been handed over to a new attorney, a Mr Gary Jansen, associated
20 with the firm Arthur Abrahams & Gross Attorneys.

On contacting the latter firm of attorneys, Mr Van der Merwe was informed that Mr Jansen had moved on to another firm of attorneys, Randall Titus Attorneys. Mr Van der Merwe reports
25 that he then spoke to Mr Randall Titus of that firm of attorneys

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who told him that he does act for the defendant in a number of matters and that he is in possession of the defendant's file in the present application for summary judgment, and that he is aware of the matter being on the roll today. He further told

5 Mr Van der Merwe that he has no instructions to appear and to oppose the application for summary judgment, and that he would not be coming on record in respect of this matter.

In the circumstances I was satisfied, despite the fact that the

10 notice of withdrawal of the defendant's erstwhile attorneys was not in proper form, that the information placed before me, establishes that the defendant is aware of the hearing today and that he has entrusted this matter and other matters, to an attorney who has no instructions to oppose the application for

15 summary judgment.

The defendant has raised a number of defences in the opposing affidavit. In doing so, he does not dispute that he signed the underlying loan agreement on the basis of which

20 the bond was registered against the property. He does, however, raise defences which amount to an attack on the banking system as a whole and he contends that the plaintiff bank, as I understand the argument which is set out in the affidavit, was not acting as a principal, but was in fact acting

25 on behalf of undisclosed principals or lenders. And that

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consequently, the way the banking industry in South Africa has structured itself, means that the money lent was not, in fact, the plaintiff's money, but the money of the undisclosed principals who, by the implication, so I understand the
5 contnetion, must be the party or parties who are entitled to claim repayment of any amounts paid out.

For the same reason, it is also contended, the covering bond may not be registered in the name of the plaintiff, as it was not
10 the plaintiff's money that was being advanced because of the way the banking system operates. The bank is seen as no more than an intermediary and, therefore, lacks *locus standi* to sue. Further arguments of a similar nature, which attack the bank's *locus standi* on the basis of general statements
15 regarding the way in which the banking system, in general terms, operates, are also made.

A further defence raised, is that the defendant denies that the amount of the plaintiff's claim is correctly determined or set
20 out. It would require, so it appears to be contended, that the entire claim is to be subjected to a forensic audit to determine the indebtedness of the defendant, if it should exist at all. Finally, a defence was raised, based on the form of the application for summary judgment, in fact the form of the
25 supporting affidavit which was filed on behalf of the plaintiff.

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I have tried to summarise, in broad outline, the defences raised by the defendant, without going into any great detail, since the grounds of defence appear from the opposing affidavit. A further point raised, in the form of a dilatory defence, is that a matter in which similar points are taken, is pending before the Constitutional Court in the matter of Tellingier v Standard Bank. Now I am informed by Mr Jonker from the Bar, that he is aware of a defence raised by a Mr Tellingier in another matter, which he understood came before the Constitutional Court in some form or another, either in the form of an application for direct access or pursuant to a judgment in another division. What he was able to tell me from the Bar, is that the Constitutional Court has disposed of that matter on the basis that it has no prospects of success. He says that he obtained this information from a website which Mr Tellingier apparently runs himself and from various reports Mr Jonker was able to trace through the Internet.

I have considered the defences raised by the defendant in this matter and in my view, they do not make out a *bona fide* defence, in the sense that the facts raised do not support a defence to the merits of the claim. The mortgage bond which is annexed to the simple summons, makes it clear that the defendant has bound himself to repay the amounts set out and

that the property was bonded as security for those amounts and that the entity entitled to the repayment, is the plaintiff bank who is also the bondholder. As far as the amount of the claim is concerned, I am satisfied that the certificate
5 establishes that amount and that in the absence of evidence to the contrary, that certificate must be accepted, on face value, as the evidence upon which this court can determine the amount owed by the defendant.

10 As far as the defence based on the form and contents of the supporting affidavit, I am satisfied that the affidavit, being one that was made on behalf of the bank, which is not a natural person, is in the proper form and legitimately supports the application for summary judgment. The property is the
15 principal place of residence of the defendant. The defendant has, however, not taken issue with the relief sought as far as the declaration of executability is concerned.

As I have said earlier on, the amount in arrears is substantial
20 over R200 000,00 and the period over which the arrears have built up, is likewise substantial, more than a year, almost approaching a year and a half. In the circumstances I am satisfied that the plaintiff is entitled to judgment in the amount claimed and that in this case, there is no basis upon which an
25 order for the property to be declared executable can be

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refused. It follows then that the plaintiff is, in my view, entitled to summary judgment and I consequently make the order as set out in the draft order which was handed up by Mr Jonker. I mark this order X, my initials and today's date. So

5 this is case number 2588/2012.

A handwritten signature in black ink, appearing to be 'J. Louw', written over a horizontal line.

LOUW, J

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