REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 17330/2012

In the matter between:

ABSA BANK LIMITED Plaintiff

and

MARIUS JULIUS TERBLANCHE First Defendant

RETHA TERBLANCHE Second Defendant

JUDGMENT DELIVERED ON 30 NOVEMBER 2012

DAVIS AJ

Introduction

[1] In this application for summary judgment the plaintiff claims payment from the first and second defendants, jointly and severally, of an amount of R905 823.91 in respect of moneys loaned and advanced to defendants against the security of three mortgage bonds registered over Erf 1166 Swellendam ("the property"). Plaintiff also seeks an order declaring the property executable. The defendants, who are married to each other out of community of property, reside at the property.

[2] In their affidavit resisting summary judgment the defendants raised three defences, the first of which had fallen away by the time the matter was heard.[1] I shall, for the sake of convenience, refer to the remaining defences as "the agency defence" and "the securitization defence". What must be determined for present purposes is whether the nature and grounds of, and the material facts underlying, the agency and securitization defences have been sufficiently disclosed, and whether the defences so disclosed appear to be both *bona fide* and good in law.[2]

[3] The defendants stated in their affidavit that the defences relied upon *'to a large extent are inimical* (sic) [presumably meaning identical] *to other matters where the same defences are raised and are still to be determined by the Constitutional Court'* and are thus *'still subject to adjudication'*. The defendants' counsel, Mr Zazeraj, indicated to me during oral argument and in his written heads, that the agency and securitization defences are similar to those relied upon by a certain Mr Michael Tellinger ("Tellinger") in his case against Standard Bank.

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[1] The defendants claimed *lis pendens* on the basis that plaintiff had sued them for the same debt under case no 9834/2012. Before the application was heard the plaintiff filed a notice of withdrawal of the action instituted under case no 9834/2012.

[2] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para [32]; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 A - E

[4] According to Mr Zazeraj, the Tellinger matter is awaiting adjudication before the Constitutional Court, with the result that these defences are therefore *sub judicae*. I have made enquiries, however, and have ascertained that the Constitutional Court on 30 May 2012 dismissed an application for leave to appeal brought by Tellinger against the Standard Bank of South Africa, The South African Reserve Bank and The Minister of Finance.[3] The relevant order of the Constitutional Court states as follows:

'The Constitutional Court has considered the application for leave to appeal and has concluded that the application should be dismissed as there are no prospects of success.'

[5] So much for the Tellinger case. There is, therefore, no issue which is *sub judicae* and this Court may properly proceed to decide this matter on the basis of the allegations contained in the defendants' opposing affidavit.

The agency defence

[6] The defendants allege in paragraphs 13 of their opposing affidavit that the agreements relied on by the plaintiff (i.e. the loan and mortgage bonds) are invalid because:

> *'13.1 The Plaintiff was not the institution that advanced the monies to the First Defendant and myself;*
>
> *13.2 The Banks Act (Act 94 of 1990) precludes the Plaintiff from utilizing its clients* (sic) *deposits for loans and are furthermore restricted* (sic) *as to how its allocates capital and reserve funds;*

[3] Case No CCT 28/12

13.3 The monies advanced by the Plaintiff to the First Defendant and myself were in fact monies that it loaned from the Reserve Bank in accordance with the Reserve Bank Act (Act 90 of 1989);

13.4 It serves to mention that the Plaintiff received this loan by means of South African Reserve Bank Bonds which closely resemble promissory notes. These transactions are recorded by various debit and credit transactions. These loans are also interest free.

13.5 Accordingly, the Plaintiff advanced the Reserve Banks (sic) money to the First Defendant and ourselves (sic). Thus:

13.5.1 The Plaintiff was never the "owner" *of the money it advanced to ourselves and was instead merely acting as an intermediary/agent in relation to the Reserve Bank. Put differently, it was not the Plaintiff's money to give.*

13.5.2 The Plaintiff failed to disclose these facts to the First Defendant and myself at the time of contracting which is in itself a breach of the Banks Act (Act 94 of 1990) as well as various common law principles.

13.6 In the premises, the agreement relied upon by the Plaintiff was concluded upon unlawful terms and it is not (sic) incumbent upon the owner or the actual lender of the monies advanced to enforce its claim, namely the Reserve Bank.'

[7] It is significant that the defendants do not in fact deny that the plaintiff advanced moneys to them. Nor is there any denial that they acquired the property on the strength of the mortgage loan. The gist of the defendants' complaint is that the plaintiff was not the institution which advanced the monies to them because the monies loaned belonged to the Reserve Bank, that it was the Reserve Bank which loaned the funds to the defendants, and that it is therefore the Reserve Bank, and not the plaintiff, which has the requisite *locus standi* to enforce the claim, because, so it is said, the plaintiff was at all times acting merely as the agent of the Reserve Bank.

[8] The defendants provide no basis or support whatsoever for the bald factual allegations made in paragraphs 13.1 to 13.5 of their affidavit about complex matters of banking which one would not expect to fall within the ambit of the personal knowledge of the average consumer. Without a basis being laid for this specialist knowledge, I cannot but entertain serious doubts whether the defendants have the professed personal knowledge of these facts, and therefore whether the defence is put up in good faith. It seems to me that the defendants have simply latched onto the defences put up in the Tellinger case, without any personal knowledge of or sound foundation for the material facts said to underlie the defence, which appears to be based entirely on speculation. This seems to me, at best, to be opportunism on the part of the defendants.

[9] Moreover, the allegation that it was the Reserve Bank, and not the plaintiff, who loaned moneys to the defendants, flies in the face of the clear wording of the written loan agreement and mortgage bonds attached to the summons. These documents - the contents whereof have not been denied by the defendants - make it quite clear that the lender was the plaintiff.

[10] I further consider that the agency defence rests on several flawed premises and is not good in law, for reasons which I deal with below.

[11] First, it is not correct that the Banks Act 94 of 1990 ("the Banks Act") precludes the plaintiff from utilising its clients' deposits for making loans. As Mr Rabie, who appeared for the plaintiff, correctly pointed out, the business of a bank as defined in the Banks Act specifically includes the use of deposits for the making of loans. The relevant part of the definition of the business of a bank reads as follows:

'the business of a bank' means –

(a) the acceptance of deposits from the general public ...;

(b) ...

(c) the utilisation of money, or of the interest or other income earned on money, accepted by way of a deposit as contemplated in paragraph (a) –

(i) for the granting by any person, acting as lender in such person's own name or through the medium of a trust or a nominee, of loans to other persons;

(ii) for investment by any person, acting as investor in such persons own name or through the medium of a trust or a nominee; or

(iii) for the financing, wholly or to any material extent, by any person of any other business activity conducted by such person in his or her own name or through the medium of a trust or a nominee; (my underlining)

[12] Thus the suggestion that the plaintiff must have utilised monies obtained from the Reserve Bank to make the loan to defendants, because it was precluding from using its clients' deposit to make loans, is unfounded. The definition of the business of a bank makes it clear that the plaintiff was perfectly entitled (subject to any other applicable statutory requirements) to utilise monies received from deposits to grant loans.

[13] Second, even if it could be established that the moneys which plaintiff used to make the advance to defendants did in fact emanate from funds loaned by the Reserve Bank to plaintiff, that would not justify the conclusion a) that the plaintiff was not the owner of the moneys loaned to the defendants and b) that it was merely acting as the agent of the Reserve Bank in advancing the moneys to the defendants. It is trite law that a loan of money, a consumable thing, is classified as a loan for consumption *("mutuum")*, and that the borrower in terms of such a loan becomes the owner of the thing when it is delivered. Where money is loaned, the borrower becomes the owner of the borrowed funds and is obliged to return a sum equivalent in value to the lender.[4] Thus any moneys borrowed by plaintiff from the Reserve Bank would be owned by

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[4] F du Bois et al *Wille's Principles of South African Law (9ed)* pages 948 - 950

plaintiff and quite capable of being loaned by plaintiff to the defendants in its own name, as part of its regular business as a registered bank.

[14] Third, the contention that the plaintiff was acting as agent for the Reserve Bank in making the loan to defendants flies in the face of section 13(c) of the Reserve Bank Act,[5] which expressly precludes the Reserve Bank from lending or advancing money on the security of a mortgage of immovable property.[6] The plaintiff, on the other hand, is a registered credit provider in terms of section 40 of the National Credit Act 34 of 2005 ("the NCA").[7] The effect of such registration is that plaintiff is duly authorised to provide credit and to enter into credit agreements in terms of the NCA, including mortgage loans such as the one in question in this matter. Section 50(1) of the NCA reads as follows:

'A registration issued in terms of this Act is valid throughout the Republic and authorises the registrant to conduct, engage in, or make available the registered activities at any place within the Republic.'

[15] Quite simply, the granting of loans on the security of mortgages over immovable property forms part of the legitimate business of banks which are duly registered credit providers in terms of the NCA. This conduct is not part of the business of the Reserve Bank, and, indeed, the Reserve Bank is expressly precluded from engaging therein. I consider it far-fetched in the extreme to suggest that the Reserve Bank would flout this prohibition, and there is not one iota of evidence on the papers to suggest that it has done so.

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[5] Act 90 of 1989
[6] Except in certain narrowly defined circumstances which are not here relevant.
[7] This appears from the summons and is not denied by the defendants.

The securitisation defence

[16] In paragraphs 14 and 15 of their affidavit the defendants allege as follows:

> '14 *Further and in any event, the Plaintiff, as a commercial bank, participates in the practice of securitization, being a financial practice whereby various types of contractual debts, such as mortgage bonds, are sold as bonds, securities or mortgage obligations to investors.*
>
> 15 *The abovementioned practice is likewise subject to adjudication in the Constitutional Court. If it transpires that this practice occurs, which I verily believe does, it results in the following dichotomy for the Plaintiff:*
>
> 15.1 *The Plaintiff, upon selling the bond and/or debt, loses the right to enforce the claim which it sold;*
>
> 15.2 *The Plaintiff has already received payment for the monies sought in the present action and cannot be paid twice for the same debt as it is attempting to do herein.'*

[17] I have already adverted to the fact that the Constitutional Court evidently rejected the arguments put up in the Tellinger case. As in the case of the agency defence, it seems to me that these allegations concern facts which do not fall within the personal knowledge of the defendants, and amount to nothing but speculation on their part. It is well known that securitization is a highly sophisticated commercial transaction resting on complex agreements, the preparation of which requires specialist legal and financial knowledge. It is highly unlikely, in my view, that such a transaction would be structured in a manner which permanently divests the mortgagee bank of its right to institute legal proceedings against the defaulting mortgagor. Be that as it may, the important point, for present purposes, is that

there is simply no evidence on the papers to suggest that the plaintiff's claim under the loan agreement and mortgage bonds has been ceded to a third party.

[18] But even were it to transpire that the rights under the mortgage bonds had been ceded, I agree with the observation made by Griesel J in *Nedbank Limited v Kilian NO and Others*,[8] that *'should the defendants pay the amount presently claimed by the plaintiff and should the "true" holder of those rights at some stage in the future emerge and claim payment of the same debt from the defendants, they would have a solid defence that the debt had been extinguished.'*

[19] Mr Zazeraj argued that the defendants should not be penalised for mounting a defence based on facts which fall within the exclusive knowledge of the plaintiff and of which they can therefore have no personal knowledge. He argued that they should be allowed to defend the action and to request discovery in order to ascertain whether or not the claims relied upon by the plaintiff have in fact been subject to securitization. I do not agree. Summary judgment, where a plaintiff is otherwise entitled thereto, ought not to be refused merely because the defendant wishes to embark upon a fishing expedition in the hope of coming up with a defence.

[20] To my mind this particular argument, which involves an implicit concession that the defendants do not have knowledge of the material facts said to underlie the defence, merely serves to underscore the fact that the securitization defence was knowingly put without any factual basis therefore, and that the defence cannot therefore be said to be advanced in good faith. I might add, in this regard, that it appears from the plaintiff's particulars of claim that the defendants underwent debt review proceedings in terms of the NCA. One would have expected them to raise these concerns and objections at an earlier stage, if they were genuine.

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[8] Unreported WC Case No 8148/12 (delivered 8 November 2012) at para [8]

[21] I should mention, for the sake of completeness, that defences similar to the agency and securitization defences were advanced and rejected by Louw J in *Absa Bank Ltd v Hill*,[9] by Griesel J in *Nedbank Limited v Killian N.O. and Others*,[10] and by Savage AJ in *Nedbank Limited v Coetzee*.[11]

Other defences

[22] Besides the agency and securitization defences, the defendants also sought to incorporate by reference in their opposing affidavit various other defences which they had raised in opposition to a previous summary judgment application brought against them in case no 9834/12,[12] namely that:

(i) the plaintiff's affidavit in support of its summary judgment application was technically defective;

(ii) the plaintiff had failed to allege whether or not the parties were married in or out of community of property;

(iii) the loan agreement was not annexed to the simple summons.

[23] These defences are, to my mind, patently devoid of any merit. The technically defective affidavit filed in case number 9834/12 is irrelevant in this case where there is no such defect. The allegation pertaining to the parties' matrimonial

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[9] Unreported WC Case No 2588/12 (delivered 22 August 2012)
[10] *Supra* n 7
[11] Unreported WC Case No 6032/2012 (delivered 12 November 2012)
[12] The case which gave rise to the defence of *lis pendens* referred to above (at n 1) and which was withdrawn by plaintiff.

property regime is irrelevant given that they were both party to the loan and mortgage agreements. (In any event, it appears clearly from the mortgage bond annexed to the summons, marked "C", that the defendants are married out of community of property.) Finally, the loan agreement was, in fact, annexed to the summons in this case.

Section 26 of the Constitution and Rule 46

[24] The defendants were legally represented at all material times and were duly notified in the summons of their rights in terms of sections 26(1) and (3) of the Constitution and in terms of rule 46(1)(a)(ii) of the Rules of Court. Having had ample opportunity to do so, they did not allege that execution against the property would infringe their constitutional right to have access to adequate housing.

[25] The defendants have failed to pay the instalments owing on the mortgage bond for a period in excess of eighteen months. The arrears owing are substantial, being in excess of R167 000.00, and the balance outstanding on the bond exceeds R900 000.00. There is no suggestion of any abuse on the part of the plaintiff bank in seeking to execute against the property. Nor would the results be disproportionate in my view. In the circumstances the plaintiff must be allowed to realise its security in terms of the mortgage bond.

Requirements in terms of the National Credit Act

[26] I am satisfied that the plaintiff has duly complied with all obligations resting upon it in terms of the NCA for enforcement of its claim.

Conclusion

[27] For the reasons given I do not consider that the defendants have disclosed a *bona fide* defence to the plaintiff's claim. The plaintiff is therefore entitled to summary judgment as prayed.

[28] Summary judgment is accordingly granted as follows:

(a) Against the first and second defendants jointly and severally, the one paying, the other to be absolved, for:

(i) Payment of the amount of R905 823.91;

(ii) Interest on the said amount of R905 823.91 at the rate of 13.10% per annum, calculated on daily balances and capitalised monthly, from 30 March 2012 until to date of payment;

(iii) Costs of suit on the scale as between attorney and client, as taxed or agreed.

(b) An order declaring

Erf 1166 Swellendam, situate in the SWELLENDAM Municipality and Division, Province Western Cape, in extent 582 square metres and held by Deed of Transfer T 68513/2005,

to be specially executable.

DMDavis

D M DAVIS
Acting Judge of the High Court