



**Republic of South Africa**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case no: 2397/2013**

In the matter between:

**ABSA BANK LIMITED**

Plaintiff

v

**DUMISANI HANS INCORPORATED**

First Defendant

**DUMISANI HANS**

Second Defendant

Court: Judge J I Cloete

Heard: 2 May 2013

Delivered: 10 May 2013

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**JUDGMENT**

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**CLOETE J:**

- [1] This is an application for summary judgment brought by the plaintiff against the defendants jointly and severally for: (a) payment of the sum of R1 350 336.02 together with interest as pleaded in the summons; (b) an order declaring an

immovable property, being erf 7637, Bellville (*‘the property’*) specially executable; and (c) costs on the scale as between attorney and client.

- [2] The first defendant is sued as the principal debtor and the second defendant is sued in his capacity as surety and co-principal debtor with the first defendant. The defendants do not dispute that the provisions of the National Credit Act 34 of 2005 do not apply; nor do they contend that the property constitutes a “home” or “primary residence” for purposes of s 26(3) of the Constitution or rule 46 of the uniform rules of court.
- [3] The plaintiff relies upon a written mortgage loan agreement which it alleges was concluded during 2006 with the first defendant and pursuant to which it lent and advanced to the first defendant a capital sum of R1.2 million under mortgage loan account no: 8064833148. In its particulars of claim the plaintiff pleaded that the mortgage loan agreement was destroyed in a fire on 28 August 2009 but that it had obtained an unsigned copy thereof which is annexed to the summons. The first prayer in the particulars of claim is for *‘condonation of plaintiff’s failure to comply with rule 18(6) in respect of the mortgage loan agreement’*.
- [4] The plaintiff further pleaded that in terms of the mortgage loan agreement the aforementioned loan was secured by first mortgage bond number B98393/2006 registered over the property *‘during or about 2006 by Philip Louis van der Merwe, the duly authorised agent of the first defendant’* in favour of the plaintiff

for a capital sum of R1.5 million together with an additional sum of R300 000. A copy of the mortgage bond is annexed to the summons.

- [5] The plaintiff also separately pleaded all of the material terms of both the mortgage loan agreement and mortgage bond; the first defendant's breach of the mortgage loan agreement; that the defendants were eight months in arrears with their monthly instalments of R9377.47 and that the arrears totalled R73 484.16; attached a copy of the deed of suretyship relied upon in respect of the second defendant; and similarly pleaded all of the material terms of the deed of suretyship. Finally, it annexed a copy of the certificate of balance referred to in both the mortgage bond and deed of suretyship reflecting the amounts owing. It was agreed in these documents that such certificate would constitute sufficient proof of the amounts owing for purposes of judgment.
- [6] The affidavit filed in support of the application for summary judgment was deposed to by Sabashnee Naidoo who is a manager of the plaintiff in its Home Loans Recoveries Division. She stated that she was duly authorised to make the affidavit on behalf of the plaintiff and that she has knowledge of the facts therein either personally or as a result of her access to all relevant documents and computer data relating to the cause of action against the defendants. Ms Naidoo swore positively to the facts set out in the plaintiff's summons; verified both the cause of action and prayers contained therein; and stated that in her opinion the defendants have no *bona fide* defence to the action and have delivered a notice of intention to defend solely for the purpose of delay.

- [7] Prior to the plaintiff delivering its application for summary judgment the defendants delivered a notice of exception to the plaintiff's particulars of claim on the grounds that they are vague and embarrassing and lack averments necessary to sustain a cause of action. The specific grounds advanced were the following, namely that: (a) the plaintiff had not pleaded who had represented the first defendant in concluding the mortgage loan agreement; (b) the plaintiff, although it alleged that it was represented by a duly authorised employee when concluding the mortgage loan agreement, had failed to identify the employee concerned; and (c) the unsigned copy of the mortgage loan agreement annexed to the plaintiff's summons *'does not give any information about the representation of the parties on signature nor any confirmation that it is a true and unaltered copy of the original'*.
- [8] The second defendant also delivered a special plea on the same date that the defendants delivered their opposing affidavit in the summary judgment application. The allegations in the notice of exception and special plea (which was delivered despite the second defendant nonetheless persisting with the exception) were incorporated by reference in the opposing affidavit. The special plea is to the effect that the plaintiff's claim against the second defendant is unconstitutional in that it *'constitutes an unfair discrimination'* against the second defendant *'who is sued alone whereas it was a special instruction applicable to the Mortgage Loan Account No 8064833148 referred to in paragraph 4.1 of the [plaintiff's] Particulars of Claim that unlimited surety shall be provided by both **D HANS** and **P L VAN DER MERWE**'* and – significantly – that Van der Merwe *'signed the suretyship Agreement as per the said*

*instruction. In this regard I enclose herewith a copy of the instruction to Lodge Bond reflecting the same marked "A".*

[9] Annexure "A" to the special plea is a written instruction furnished by the plaintiff to the first defendant (an attorneys practice) dated 21 June 2006. The mortgage loan account number referred to in the instruction is identical to that relied upon by the plaintiff in its particulars of claim; the mortgagor is the first defendant; the amounts reflected therein are identical to those referred to by the plaintiff; the property over which the mortgage bond was to be registered is identical to the property referred to in the plaintiff's particulars of claim; the transferring attorney is identified as the second defendant; and the sureties and co-principal debtors for the loan are identified as the second defendant and Mr Van der Merwe.

[10] Apart from the incorporation by reference of the allegations contained in the notice of exception and special plea the only defence raised by the defendants in their opposing affidavit (which was deposed to by the second defendant in his personal capacity and on behalf of the first defendant) is the following:

*'The [defendants] dispute the fact that it [sic] ever concluded or authorised any person to sign on its behalf a document that resembles the unsigned Mortgage Loan Agreement marked "A" [annexed to the plaintiff's particulars of claim] upon which the [plaintiff] is basing its claim and accordingly wants the [plaintiff] to prove that the First Defendant concluded the said Mortgage Loan Agreement.'*

[11] In *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (TPD) Colman J on behalf of a full bench set out what is required of a defendant when he elects to

file an opposing affidavit in order to resist a claim for summary judgment. The requirements may be summarised as follows: (a) the defendant must set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do so he can hardly satisfy the court that he has a defence; (b) the defence must be *bona fide* in the sense that it will suffice if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing; (c) the statement of material facts relied upon by the defendant must be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. If the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*; and (d) even if the defendant's affidavit does not measure up fully to these requirements, the court may nonetheless in the exercise of its discretion refuse to grant summary judgment. However the discretion is not to be exercised capriciously so as to deprive a plaintiff of summary judgment when he ought to have that relief. It should also not be exercised against a plaintiff on the basis of mere conjecture or speculation, but on the material before the court [at 227G-229G].

- [12] There are really two issues which need to be determined. The first is whether the application for summary judgment should be considered on the basis that, if I am satisfied that the defendants have not met the threshold set out in the *Breitenbach* case, the condonation sought in the plaintiff's particulars of claim in respect of the mortgage loan agreement will follow, notwithstanding that there is

no formal application for condonation before the court. The second of course is whether the threshold has been met by the defendants.

[13] Rule 27(1) of the uniform rules of court provides that in the absence of agreement between the parties, the court may upon application on notice and on good cause shown make an order extending or abridging any time period prescribed by the rules or order of court. Rule 27(3) on the other hand stipulates that the court may, on good cause shown, condone any non-compliance with the rules. Rule 27(3) thus does not require the party seeking relief to proceed by way of an application on notice as is the case in rule 27(1). The only prerequisite is that good cause must be shown.

[14] During argument the second defendant (who appeared in his personal capacity and on behalf of the first defendant) submitted that it would offend against the “rules of natural justice” for condonation to be granted in the absence of a formal application since this would effectively deprive the defendants of their right to place their case in respect of the condonation before the court.

[15] The defendants have been aware since service of the summons of the plaintiff’s allegations regarding the mortgage loan agreement; and that the plaintiff sought condonation from the outset for its failure to comply with rule 18(6). The defendants furthermore do not dispute any of the plaintiff’s allegations concerning the destruction of the original mortgage loan agreement; nor have they disputed that the plaintiff should not be granted the condonation sought.

- [16] That the defendants were very much alive to the plaintiff's allegations regarding the original mortgage loan agreement is clear from the grounds advanced by them in the notice of exception; and when regard is had to those grounds they constitute technical attacks on the manner in which the plaintiff has pleaded its reliance on the mortgage loan agreement, and not that the plaintiff has failed to show good cause in its particulars of claim for condonation to be granted
- [17] Rule 18(6) stipulates that a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.
- [18] In *Moosa and Others NNO v Hassam and Others NNO* 2010 (2) SA 410 (KZP) which was decided within the context of an application by the defendants to set aside the plaintiff's summons as an irregular step, Swain J had the following to say at paragraphs [20] and [21]:

*[20] It is therefore clear that a party who bases its cause of action upon a written agreement should obtain a true copy of the agreement before advancing its claim. However, this is not to say that a failure to annex a written agreement relied upon may never be condoned in terms of rule 27(3).*

*[21] Good cause would have to be shown why the party concerned is unable, at that stage, to annex a copy of the written agreement relied upon. Relevant considerations would be the steps taken to obtain a copy of the written agreement and the prospects of the written agreement being obtained in the future. That a true copy will be available before the issues arising therefrom have to be determined will be of particular importance in this regard. In addition any prejudice to the opposing party caused by the failure to annex the*



*agreement to the pleading would have to be considered. Of significance in this regard would be whether the pleading concisely and clearly sets out the terms relied upon in the written agreement upon which the cause of action is based, and is not excipiable. The above factors are not exhaustive and each case will have to be decided upon its individual merits.'*

And at paragraph [23]:

*'The respondents did not seek condonation for their failure to annex a true copy of the written agreement and were content to rely on the argument dealt with above. In addition no facts were set out by the respondents to explain their inability to annex a true copy of the written agreement.'*

- [19] In the present matter I am satisfied that the plaintiff has shown good cause for condonation on the basis of the allegations made in its particulars of claim. First, the original mortgage loan agreement was destroyed in a fire. Second, the plaintiff has only managed to obtain an unsigned copy thereof which is annexed to its summons. Third, it is no leap of logic to conclude that in the circumstances the plaintiff is unable to identify which of its duly authorised employees represented the plaintiff, and who represented the first defendant, in the conclusion of the mortgage loan agreement. Fourth, the pleading concisely and clearly sets out the terms relied upon in the written agreement upon which the cause of action is based and is not excipiable. Fifth, the defendants do not allege any prejudice but only demand that the plaintiff "proves" that the first defendant concluded the mortgage loan agreement with the plaintiff. Last, the plaintiff has throughout sought condonation for its failure to comply with rule 18(6) in respect of the mortgage loan agreement. In these circumstances I agree with the submission of Mr Jonker who appeared on behalf of the plaintiff

that the technical defences raised by the defendants are nothing other than opportunistic.

[20] The “defence” raised by the second defendant in his special plea is easily disposed of. In essence he alleges that the plaintiff is unfairly discriminating against him since the latter has only proceeded against him as surety and not against his co-surety Mr van der Merwe as well. The deed of suretyship annexed to the plaintiff’s summons which was signed by the defendant, and which he does not dispute, provides in clause 3 that: (a) where more than one person signs as surety for the obligations of the first defendant in favour of the plaintiff, each such person shall be jointly and severally liable as surety and co-principal debtor for such obligations; and (b) the validity and enforceability of the suretyship shall in no respect be subject to the obtaining of a suretyship from another person, or to the validity of the suretyship of any other surety. Further, it is trite that where co-debtors are jointly and severally liable, the creditor may proceed against the co-debtors individually or jointly at its election.

[21] I am also satisfied that the defendants have failed to meet the test set out in the *Breitenbach* case insofar as their defence on the merits is concerned. That defence is both inherently and seriously unconvincing when viewed against the undisputed similarities – on the defendants’ own version – between the annexure to the second defendant’s special plea and the averments contained in the plaintiff’s particulars of claim as read with the annexures thereto.

[22] Furthermore, the defendants do not dispute the acknowledgment of debt contained in clause 2 of the mortgage bond. They do not dispute that the mortgage bond was registered over the property. They do not take issue with the certificate of balance provided by the plaintiff or deny that, in terms of both clause 9 of the mortgage bond and clause 14 of the deed of suretyship, the certificate constitutes sufficient proof of the amounts owing for purposes of judgment. Finally, it is not incumbent on a plaintiff in summary judgment proceedings to independently prove its case. All that is required is that it must comply with the provisions of rule 32. The plaintiff has done so.

[23] **In the result I make the following order:**

- 1. The plaintiff's failure to comply with rule 18(6) in respect of the mortgage loan agreement being annexure "A" to its particulars of claim is condoned.**
- 2. Summary judgment is granted against the defendants, jointly and severally, the one paying the other to be absolved, as follows:**
  - 2.1 Payment of the amount of R1 350 336.02;**
  - 2.2 Payment of interest on the amount of R1 350 336.02 at the rate of 6.5% per annum as from 16 January 2013 to date of final payment, such interest to be capitalised monthly in advance;**
  - 2.3 An order declaring:**

**ERF7637 BELLVILLE, situate in the City of Cape Town, Cape  
Division, Western Cape Province**

**In extent: 526 SQUARE METRES**

**Held by Deed of Transfer No T74241/2006, to be specially  
executable;**

**2.4 Costs of suit on an attorney and client scale, to be taxed.**

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**J I CLOETE**