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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE PROVINCIAL DIVISION, CAPE TOWN)

CASE NO: 1340/2020

DATE: 2020.10.26

In the matter between

ABSA BANK LTD Plaintiff

and

D C PEACOCK & 1 OTHER Defendants

JUDGMENT

DAVIS, J:

This is an application for summary judgment as well as an application in terms of Rule 46A of the Uniform Rules of Court to declare the immovable property of the defendants be specially executable.

The application for summary judgment is opposed and the defendant has filed an answering affidavit. There does not, however, appear to be an affidavit filed by the defendants in

opposition to the application in terms of Rule 46A. In short the central dispute in this case turns on the principels relating to summary judgment.

For many years the practice in the Western Cape High Court has been that opposed applications for summary judgments are argued at the end of the roll in Motion Court. However, in Propell Specialised Finance (Pty) Ltd v Point Bay Body Corporate & Another [2020] ZAWCH Binns-Ward, J held that it would be appropriate for summary judgment applications which are opposed to be heard and determined on a semi-urgent roll.

The learned judge referred to the amended rule 32 of the Uniform Rules of Court and in particular the rule that an application for summary judgment may be brought only after the delivery of defendant's plea. In his view, summary judgment does not carry the degree of expedition which had been contemplated in the original idea of the concept of summary judgment.

Binns-Ward, J pointed to the necessity for the plaintiff now to engage with defendant's plea which means that less use is now being made of the summary judgment procedure and the papers in an opposed summary judgment application are generally far more voluminous than previously had been the case. Therefore the learned judge took the view that it would

now be appropriate for summary judgments to be brought on a semi-urgent basis.

Turning to the amended rule, Rule 32(2)(b) it imposed a duty on the plaintiff to briefly explain why the defence as pleaded does not raise any issue for trial. The authors of Erasmus Superior Court Practice (2nd ed) at D1-406 state that lengthy explanations may frustrate the object of summary judgment envisaged by the rule and may for that reason amount to an abuse of the process as such resulting in an appropriate costs order being made against the plaintiff. They cite as an example the case of a defendant who raises a defence of reckless credit in an action based on a credit agreement falling under the National Credit Act 34 of 2005 and resists an application for summary judgment on the basis of this defence, the plaintiff will, in terms of sub rule 2(b), be entitled to set out facts supported by the necessary documents to briefly explain why the defence as pleaded does not raise any issue for trial.

For a discussion of this particular rule and its implications. See Tumilong Trading CC v National Security & Fire (Pty) Ltd [2020] ZAWCHC 28 particularly at paras 21-23.

But even when one looks at this particular rule a key question remains: is the defence which has been made a *bona fide*

defence tested with regard to the manner in which it has been substantiated in the opposing affidavit.

In this connection Rule 32(3)b provides that the defendant may satisfy the court by affidavit ... or with the leave of the court by oral evidence of such defendant or any other person who can swear positively to the fact that defendant has a *bona fide* defence to the action, such affidavit or evidence shall disclose fully the nature and grounds of defence and the material facts relied thereunder.

To again cite Erasmus at D1409:

"While it is not incumbent upon the defendant to formulate his opposition to the summary judgment application with the precision that would be required in a plea nonetheless when he advances his contention in resistance to the plaintiff's claim he must do so with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which if proved at the trial would constitute a good defence to the action."

Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence and even a tersely stated defence may be a sufficient indication of a *bona fide* defence for the purposes of the Rule.

The authors of Erasmus, *supra* correctly in my view, have taken the view that whilst the rule is poorly drafted and somewhat ambiguous in the purposes that it seeks to serve, there still remains an animating idea of expedition of resolution of the dispute. Thus while many applications may be best determined by a court sitting in a case allocated on a semi-urgent roll where more time would be able to be devoted to a comprehensive analysis of all of the pleadings, there will be cases where a plaintiff which seeks a summary judgment would be entitled to argue that an examination of the papers, even cursorily, reveals that the matter can and should be dealt with expeditiously. In my view, this is one of these cases which will become apparent for the reasons that I shall advance presently.

I turn then to plaintiff's case. Plaintiff has claimed payment of an amount of R2 256 791.26 together with interest of 8% from 16 August 2019 calculated and capitalised monthly in arrears being in respect of monies lent and advanced by plaintiff on a mortgage loan agreement with number [...]49 to first defendant at the latter's special instance and request, the full amount of which plaintiff contends is owing, due and payable.

This agreement was in writing. Nonetheless a copy thereof,

notwithstanding a diligent search according to plaintiff, could not be found. Plaintiff contends that the agreement would have been concluded in accordance with the standard practice that applied at the time in respect of similar agreements and that the standard document employed, and which is annexed to the papers. It contains the terms and conditions that apply to the original agreement. Plaintiff avers that the agreement was for a period of 16 years and 7 months with monthly instalments of R33 813.65.

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The agreement provided for the registration of a mortgage bond in favour of the plaintiff, the terms and conditions whereof apply to the loan.

But the defendant argues as follows: The calculations which the plaintiff has made in substantiation of its claim are incorrect. Defendant goes on to say that the extent of the indebtedness cannot be provided with sufficient particularity so as to justify the fact that the plaintiff has a liquidated claim. In
20 short, a clear dispute exists as to the quantum and thus the merits of the claim. Therefore the matter falls outside of the scope of a summary judgment application.

In particular, defendant refers as well to documents which are attached to the papers and which indicate that there was a

mortgage bond in the amount of R200 000 as opposed to the far larger sum referred to by plaintiff.

So much for the broad dispute. In her answering affidavit in opposition to the summary judgment application the first defendant has, in addition to the point I have summarised raised two *in limine* points, which I am obliged to deal with, being: short service and lack of service on the City of Cape Town; in particular that the City of Cape Town should be joined because it has a material interest in these proceedings particularly given the application to sell the property in execution. I turn to deal with these points.

SHORT SERVICE

The application for summary judgment appears to have been served on 2 October 2020. The application must be delivered (that is served) on the defendant within 15 days after the delivery of the plea. Plaintiff, at best for defendant, served papers two days short of the prescribed period.

Although dealing with a different context, the Constitutional Court in Eke v Parsons 2016(3) SA37(CC) at para 39 accepted that, where the interests of justice dictate, courts may depart from a strict adherence to the rules. In any event it is permissible, in my view, to request condonation of such a technical breach in court (see in particular McGill v Vlakplaats

Brickworkers (Pty) Ltd 1981(1) SA 637(W) at 641).

JOINING THE CITY

Turning to the second of the *in limine* points, that is concerning the City, again this is a very technical argument in that the City of Cape Town is owed less than R2 500 in rates and taxes. The property which is the subject matter of this application is valued at the very least at more than R2.4 million. It cannot be argued that the entire case should be postponed simply because of this particular technical argument and particularly in the light of the merits of the case to which I now turn.

THE MERITS

The merits, I have already set out. The basis of the defendant's claim is that she does not owe more than R240 000. As she states in her affidavit the plaintiff claims the amount of R2 256 791.26 together with interest of 8% from 16 August 2019 calculated month in arrears.

> "As is apparent from the plaintiff's amended particulars of claim dated 6 May 2020 that the plaintiff's claim against me is based on the fact that I purported (sic) entered into a mortgage loan agreement with number [...]49 at my special instance and request. Furthermore, and it is evident from the plaintiff's particulars of claim, that the plaintiff is unable to locate the actual agreement

> entered into between plaintiff and me ... the plaintiff then continues to plea alleged terms of the original agreement. It follows that the agreement was for 16 years and 7 months. The monthly instalment amounted to R33 813.65 and the mortgage bond be registered in favour of the plaintiff. In support of this the plaintiff annexed annexure A2 as said mortgage bond. I stop to pause and admit that annexure A2 was executed and registered over the immovable property known as erf [...] Eversdal in the City of Cape Town ... However, on perusing annexure A2 it is apparent that same contradicts the alleged terms of the original agreement as pleaded in the following respects. In annexure A2 I admit that I am indebted to the plaintiff in the sum of R200 000 with an additional amount of R40 000, not approximately R2 000 000."

In short, the fundamental proposition which has been advanced by the defendant is that there was one mortgage bond for R200 000 and that the claim which has been brought by plaintiff is unsubstantiated and has no basis in law or fact.

Plaintiff, by contrast, insists that there were four mortgage bonds over the property and not one as alleged by the defendant. Plaintiff submits further that, although the

originals have been lost, the copies attached to the papers suffice as evidence.

There is clear support for this argument to be found in the typically carefully constructed judgment by Rogers, J in Absa Bank v Zalvest 2014(2) SA 119(WCC) at paras 9-10 where the learned judge said the following:

> "The Rules of Court exist in order to ensure fair play and good order in the conduct of litigation. The Rules do not lay down the substantive legal requirements for a cause of action nor in general are they concerned with the substantive rules of evidence. The substantive law is to be found elsewhere, many in legislation and the common law. There is no rule of substantive law to the effect that a party to a written contract is precluded from enforcing it merely because the contract has been destroyed or lost. Even where a contract is required by law to be in writing (e.g. a contract for the sale of land or a suretyship) what the substantive law requires is that a written contract in accordance with the prescribed formalities should have been executed; the law does not say that the contract ceases to be of effect if it is destroyed or lost. In regard to the substantive law of evidence the original signed contract is the best evidence that a valid contract was concluded and the general rule

> is thus that the original must be adduced but there are exceptions to this rule, one of which is that where the original has been destroyed or cannot be found despite a diligent search in such a case a litigant who relies on the contract can adduce secondary evidence of its conclusion ... there are in modern law no degrees of secondary evidence (one does not have to adduce the best secondary evidence). While a photocopy of the last original might be better evidence than oral evidence regarding the conclusion in terms of the contract both forms of evidence are admissible once the litigant is excused from producing the original."

Manifestly this dictum applies to the facts of this case. There is no suggestion that there was not a diligent search by plaintiff nor that the copies are no copies of documents which clearly provide evidence.

There is a much more fatal additional fact of which consideration must be taken. In addition to the copies of the four mortgage bonds attached to the summary judgment application, plaintiff has produced a copy of an affidavit deposed to by the first defendant in a previous summary judgment application in 2016, the contents of which are devastating to its defence. The contents require to be read

fully:

> "The property is owned by myself under deed of transfer number T and the subject of the mortgage bond loan agreement with account reference number 806351115749 (the credit agreement). A credit agreement is found in the National Credit Act ... and which credit agreement is secured by four mortgage bonds registered over the property in favour of the bank."

I should add that this is manifestly the same property and therefore to that extent the same mortgage bond.

The defendant continues:

> "In and during 2004 I made application to the bank for a first mortgage bond agreement with account reference number [...]49 which was duly granted and the capital sum of R1 000 000.00 was lent and advanced to me by the bank as security for the mortgage loan. A mortgage bond was registered over my primary residence erf [...] Eversdal situated at [...] Road, Eversdal ... In and during 2006 I made a further application to the bank for a second mortgage loan under the same account reference number which was duly granted and the capital sum of R250 000 was lent and advanced to me by the bank as security for the mortgage bond. A second mortgage bond was registered over the property ... In and during 2006 I

made a further application to the bank for a third mortgage loan agreement under the same account reference number which was duly granted and the capital sum of R200 000 was lent and advanced to me by the bank. As security for the mortgage loan a third mortgage bond was registered over the property at the Cape Deeds Registry ... In and during 2006 I made a further application to the bank for a fourth mortgage loan agreement under the same account reference number which was duly granted and the capital sum of R150 000 was lent and advanced to me by the bank. As security for the mortgage loan a fourth mortgage bond was registered over the property ... The aforesaid mortgage loan agreements shall be collectively referred to as the credit agreement."

This Court is thus confronted by a defendant deposing to an affidavit in which she acknowledges expressly that there were four mortgage agreements in this regard. Yet brazenly she comes before this Court and opposes a summary judgment application by suggesting there was only one such mortgage bond and that she only owes R200 000 as opposed to R2 million and more. It is truly a quintessential act of bad faith.

There was no suggestion that the 2016 affidavit was not that of

the first defendant, that she had not deposed to it, that these were not facts of which account could be taken. This does reveal considerable level of bad faith by way of a bald denial that three other mortgage bonds did not exist. In short, the defendant has not come to court and honestly told the court of the facts which are relevant to this particular summary judgment application.

If one reads the judgment of Rogers, J to which I have already made reference in Absa v Zolvest, *supra* together with this affidavit there is absolutely no merit in the defence which has been put up. It is totally opportunistic and therefore has to be dismissed. To the contrary, the application for summary judgment is completely justified.

An order which is made in terms of the draft which I shall append to this judgment is therefore GRANTED.

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DAVIS, J

JUDGE OF THE HIGH COURT

DATE: ……