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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 14436/2015

In the matter between:

ABSA BANK LIMITED	**Plaintiff**
and	
GEORGE BARNARD SHAW N.O.	**First Defendant**
DANIEL STEFANUS DE VILLIERS N.O.	**Second Defendant**
FRANCIOS JACQUES DE VILLIERS N.O.	**Third Defendant**
In their capacities as Trustees of the Daniel Stephanus De Villiers Will Trust	
DORIS MAGDALENA MOSTERT	**Fourth Defendant**

JUDGMENT

DE WET, AJ:

INTRODCUTION:

1. The plaintiff issued summons during 2015 against the trustees for the time being of the Daniel Stephanus de Villiers Will Trust: MT2416/06 (“the trust”) and the fourth defendant, who was the sole trustee of the trust during the period 7 November 2003 until her resignation in 2012, for payment in the amount of R1,048,994.21, together with interest and costs jointly and severally. The plaintiff also sought an order declaring an immovable property known as Erf [....], Kuils River (“the immovable property”), which is registered in the name of the trust, executable in terms of Rule 46A.

2. The claims against the trust are in terms of three written mortgage loan agreements (“the loan agreements”) which were entered into between the plaintiff and the trust during December 2005, May 2006 and September 2006, respectively. At the time the loan agreements were entered into, the fourth defendant was the sole trustee of the trust. Pursuant to the loan agreements, two mortgage bonds were registered over the immovable property as security.

3. The trust made monthly payments to the plaintiff in terms of the loan agreements until November 2011, whereafter no further payments were received.

4. The claims against the fourth defendant are based on a written suretyship dated 2 December 2005 in terms whereof she bound herself as surety and co-principal debtor for the due payment of monies lent and advanced to the trust by the plaintiff.

5. The trust filed a plea during December 2015. In broad terms the trust pleaded that the fourth defendant had fraudulently, and contrary to the terms of the will, caused herself to be appointed as the only trustee of the trust with the sole purpose of benefitting herself through the trust and that the current trustees were unaware of the mortgage loan agreements. It was further pleaded that the monies advanced by the plaintiff in terms of the mortgage loan agreements were never paid to the trust or a banking facility belonging to the trust and that the mortgage bonds were not registered validly and lawfully. Finally, it is the trust’s pleaded case that the plaintiff acted negligently or in cahoots with the fourth defendant in causing the loan agreements to be entered into.

6. The action was not defended by the fourth defendant and the plaintiff obtained judgment by default against her on 19 October 2015 by way of an order issued by the Registrar of this court.

INTERLOCUTORY APPLICATION:

7. After complying with the pre-trial process the matter was declared ready and set down for hearing on 11 August 2021. The trial was then postponed by agreement between the parties, at the request of the trust, to 13 September 2021. On 10 September 2021 the trust filed a notice of intention to amend and on 12 September 2021 the trust also purported to file a special plea of *res judicata*. The trial was consequently again postponed by agreement between the parties to 9 November 2021 for trial. It was agreed that the special plea and notice of intention to amend would be withdrawn and that the trust would file an application for leave to amend the plea in terms of rule 28(4) in accordance with an agreed timetable. The application was filed on 27 September 2021 and opposed by the plaintiff. The trust did not file a replying affidavit.

8. The application for amendment sought to:

8.1 introduce a special plea being the *exceptio rei judicata* in terms of rule 22(1) based on the default judgment obtained against the fourth defendant on 19 October 2015;

8.2 include words to the effect that some other person than the fourth defendant had entered into the loan agreements.

8.3 include an allegation that the fourth defendant did not possess the requisite authority or contractual capacity to bind the trust;

8.4 include an allegation that the fourth defendant was not a *de lege* trustee of the trust and consequently any acts performed by her would be void *ab initio;*

8.5 include an allegation that the plaintiff is precluded from relying on the doctrine of ostensible authority;

8.6 include an allegation that there was no consensus between the parties in order for valid loan agreements to come into existence; and

8.7 include an allegation that the fourth defendant could not bind the trust as she could not conclude a valid contract on behalf of the trust without first obtaining the written consent of the single beneficiary of the trust, Mrs Rene de Villiers.

9. This application was dismissed with costs on 15 November 2021.

10. It is trite that the primary object of an amendment is to facilitate a proper ventilation of the disputes between the parties in order to determine the real issues between them so that justice may be done. In the full bench decision of *Vinpro NPC v President of the Republic of South Africa WCC Case number 1741/2021 dated 3 December 2021 (unreported),* the approach to be followed in amendment applications was summarised as follows:

"*[25] On this score it is trite: that a court is vested with a discretion as to whether to grant or refuse and amendment: that an amendment cannot be granted for the mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that the party seeking the amendment must show prima facie that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause {of} an injustice to the other side which cannot be compensated by costs; that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is not reason, in itself for refusing the application*"

11. For purposes of the interlocutory application the trust therefor had to show that it did not, after becoming aware of the material it wanted to rely on, delay and that the

material is something deserving of consideration. In other words – triable issues for which a factual foundation must be set out. The proposed amendment must further not render the pleading excipiable.

12. The special plea of *res judicata* was based thereon that the order against the fourth defendant (which did not expressly state that the fourth defendant is jointly and severally liable with the trust to the plaintiff) amounted to a final judgment and that the fourth defendant is therefore solely liable for the amount claimed by the plaintiff. It was further submitted that should the trust be held liable jointly and severally with the fourth defendant, it would result in the plaintiff obtaining double compensation.

13. The submissions in this regard are simply baseless and spurious. An order by this court that the trust be held jointly and severally liable with the fourth defendant (who has already been held to be liable in terms of the default order) would not amount to double compensation. The action against the trust before me is a continuation of the same action wherein the fourth defendant was held liable. The authorities relied upon by the trust (in the main action) for their argument that a final judgment had been granted by the court by way of the registrar, are clearly distinguishable from the facts in this matter and dealt with belated applications to amend orders in terms of Rule 42(1)[1]. In this matter the plaintiff's case has always been that it is entitled to judgment against the defendants jointly and severally and it can never seriously be argued that the Registrar had finally determined an opposed action in respect of the plaintiff's claim against the trust. The opposed action of the plaintiff against the trust in the same matter still needed to be determined at the time that default judgment was granted. The proposed special plea is not *bona fide* and did not raise a triable issue.

14. The other amendments were either a duplication of what had already been pleaded and would have rendered the pleadings vague and embarrassing or amounted to admissions the trust attempted to withdraw in a very unconvincing

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[1] In the matter of First National Bank of Southern Africa Ltd v Van Rensburg NO and Others 1994(1) SA 677 TPD, a final judgment against all the defendants was granted by default and the notice of set down filed on behalf of the plaintiff did not state that judgment would be sought on a joint and several bases. The Court found the application for a correction of an alleged mistaken order was not made timeously and further that the applicant had not made out a case that the order was mistakenly granted. In the matter of First National Bank of South Africa and Others v Jurgens and Others 1993(1) SA 245 WLD, the default order was granted by the Court and not the registrar. The Court found that for purposes of Rule 42 the order of Coetzee J contained no ambiguity, patent error or omission which was attributable to the Court.

manner. The trust further failed to plead any facts in support of the already problematic allegations included in the proposed amendment. Merely as an example, the trust, whilst admitting since 2015 in its plea and later in the answer to the request for further particulars, that the fourth defendant was appointed by the Master as the sole trustee of the trust during the relevant period and that the fourth defendant had fraudulently or unlawfully entered into the loan agreements on behalf of the trust, wanted to add words to the effect that the fourth defendant may not have signed the loan agreements. These vague and unsubstantiated statements are also contrary to the trust's version under oath in the application for summary judgment, where it was stated that the fourth defendant, by burdening the fixed property of the trust by obtaining and registering the bonds, stole from the trust.

15. The trust also pleaded that it should not be bound by the fourth defendant's fraudulent actions. To suggest in the aforesaid circumstances, at the eleventh hour, that "someone other than the fourth defendant may have signed the loan agreements", raises serious concerns regarding the *bona fides* of the trustees in the opposition to this action.

16. In light of the aforesaid and in the exercise of my discretion, the application to amend was dismissed.

THE MAIN ACTION:

17. The facts upon which the claim of the plaintiff is founded are mostly common cause.

18. The trust is a testamentary trust which was established by the joint will of the late Daniel de Villiers and his wife.

19. The trust admitted that the fourth defendant caused the bonds to be registered, as well as the terms of the mortgage bonds which provide for *prima facie* proof of any amount owing on the bonds, by means of a certificate signed by a manager of the plaintiff, for costs on the scale as between attorney and client and that the mortgagor

renounces the exceptions of *non numeratae pecuniae, causae non debiti* and *de errore calculi*.

20. The effect of renouncing the benefit of *non numeratae pecuniae* was explained in *FNB of SA Ltd v Bophuthatswana Consumer Affairs Council 1995 (2) SA 853 (BG)* at 866 D-F as follows:

> *"…the defendant in an action…on a mortgage bond who has renounced the benefit of the exceptio non numeratae pecuniae is not debarred, either in the principal case or in the provisional sentence proceedings, from relying on the defence that he did not receive the money, notwithstanding the acknowledgment of his indebtedness. Normally, once this defence is raised, the plaintiff would have to prove that the money was paid. By renouncing the benefit, the defendant takes upon himself/herself the onus of proof. The effect of the renunciation is that it places the onus on the mortgagor."*

21. The trust therefore had the onus to prove that there were no valid loan agreements (*causae*) between the trust and the plaintiff or that the monies were not paid to the trust in terms of the loan agreements.

22. The effect of renouncing the benefit of *non causa debiti* is that it shifts the onus in respect of proof of a valid causa away from the plaintiff and onto the mortgagor. In *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) the court held that t*he "renunciation of the exception means no more than that, when the creditor asserts a claim in terms of the suretyship, the surety will bear the onus of establishing that the principal debt for which he undertook liability does not exist."*

23. I therefore agree with the plaintiff that the trust had the onus to prove that:

23.1 The principal debt for which the trust undertook liability does not exist, and

23.2 The monies were not paid to the trust.

24. The trust correctly agreed that it also had the onus to prove that the fourth defendant's appointment was done fraudulently and unlawfully as a result of the absence of the permission of the income beneficiary and that her appointment was contrary to s 7 of the Trust Property Control Act. The trust also correctly agreed that it had the onus to prove that the amount claimed was incorrectly calculated.

25. The plaintiff called Mr Prinsloo who confirmed that he had done the calculations in respect of the amount outstanding on the account based on the electronic records of the plaintiff with reference to section 15(4) of the Electronic Communications and Transactions Act, 25 of 2002. He confirmed that in terms of his calculations (which were placed before the court) the amount owing by the trust as at 19 June 2021 amounted to R 1 654 704.64 taking into account the *in duplum* rule. The correctness of his calculations was not disputed during cross-examination.

26. Mr Prinsloo further testified that the certificate, in terms of clause 9 of the mortgage bonds, was signed by a manager of the plaintiff, Ms Fossey. It was not disputed by the trust that Ms Fossey is a manager of the plaintiff. Mr Prinsloo further confirmed that he has often worked with Ms Fossey and could confirm her signature. As the trust did not accept that the certificate was signed by Ms Fossey, despite the evidence of Mr Prinsloo, the certificate was signed again by Ms Fossey on 2 February 2022 in the presence of Mr Cloete, a credit manager of the plaintiff, who was called to testify. He confirmed that it was her signature and that she signed the certificate in his presence. This evidence was not challenged and I accept that the certificate was signed by Ms Fossey and that the certificate constitutes *prima facie* proof of the amount owing by the trust.

27. The defendant called two witnesses: the third defendant, one of the sons of the late Mr de Villiers and Ms de Villiers, the income beneficiary of the trust.

28. Neither of the witnesses presented any evidence to substantiate the allegations that the fourth defendant was fraudulently appointed or that the Master was not authorised to appoint her.

29. The evidence of Ms de Villiers was that “they” (the family) had appointed the fourth defendant and that “they” had trusted her. Mr de Villiers confirmed that all the capital beneficiaries of the trust agreed in writing to remove Standard Trust as trustees and to appoint the fourth defendant as the sole trustee of the trust

30. No evidence on the further issues raised on the pleadings was presented. This is not surprising as it is common cause that neither the trustees nor Ms de Villiers were present when the loan agreements were entered into between the trust, represented by its sole trustee and the plaintiff.

31. In the heads of argument filed on behalf of the trust, only three points were pursued: the effect of the default judgment that was granted against the fourth defendant in October 2019, whether the wording of the trust deed created a prohibition on the plaintiff to enter into the loan agreements and mortgage bonds without the written consent of the income beneficiary (surviving spouse) and whether the plaintiff had breached its obligations in terms of the Financial Intelligence Centre Act of 2001 (“FICA”) and the consequences thereof.

DISCUSSION:

32. The relevant clauses of the trust deed for purposes of this judgment are clauses 2.3.2 and 6 which read as follows:

> “*2.3.2 Ons Trustees sal alle vaste eiendomme wat deel van die restant van die Testateur se boedel uitmaak as bate van die Trust behou en die Testatrise en ons kinders toelaat om huurvry enige van die eiendomme te bewoon tot by die beëindiging van die Trust of totdat die Testatrise haar woonreg vrywilliglik opgee. Enige eiendom wat nie deur die Testatrise bewoon word nie sal tot beste voordeel van die Trust verhuur word en die huurgelde sal as gewone inkomste van die Trust beskou word. Ons Trustees sal geregtig wees om enige vaste eindomme te verkoop en in die plek daarvan ‘n ander vaste eiendom aan te koop mits ons Trustees skriftelik daartoe versoek word deur die Testatrise*.”

6. Ons bepaal dat benewens die spesiale magte wat elders in hierdie Testament aan ons Trustees toegesê is hulle geregtig sal wees om enige of almal van die volgende magte uit te oefen in omstandighede waarin hulle na hulle volkome en onbelemmerde goedunke dit paslik ag om so te doen. Ons Trustees sal geregtig wees om gelde te leen en/of voor te skiet teen Sekuriteit van 'n verband…"

33. It was submitted that as it was the main object of the trust to provide the surviving spouse with a lifelong right to occupy any of the immovable properties registered in the name of the trust, clause 2.3.2 should be interpreted to mean that prior to the registration of any bond(s) over the properties of the trust by the trustee(s), the trustee(s) was obliged to first obtain the permission of the income beneficiary, Ms de Villiers. As Ms de Villiers had not consented in writing to the registration of the mortgage bonds, it was submitted that they could not be validly registered and were not enforceable.

34. It was further argued that the plaintiff had a duty to obtain the trust deed and consider the terms thereof prior to entering into the loan agreements and registration of the mortgage bonds as a perusal of the trust deed would have alerted the plaintiff to the right of the surviving spouse to live in the trust properties. It was further argued that the terms of trust deed required her written consent to sell or alienate immovable property, which was not obtained and that the plaintiff's failure to consider the terms of the trust deed should therefore absolve the trust from any liability. This argument, which was not pleaded, was based on s 21(1)(c) and (d) read with s 29 of FICA.

35. Clause 2.3.2 does not require the consent of the income beneficiary prior to registration of a mortgage bond and clause 6 in any event empowers the trustee(s) to enter into mortgage loan agreements in their unfettered discretion. In this regard I was referred to the fact that clause 6 specifically states that the trustee(s) has the right "benewens", which means besides or in addition to or over and above, any other rights conferred upon them, to enter into mortgage loan agreements on behalf of the trust. It further appears from the bond registration documents which was placed before court, that the plaintiff and the transferring attorney did have a copy of the trust deed. In any event, and even if the plaintiff had not complied with the standards as set out in section

21 of FICA, it still does not render the loan agreements and registered mortgage bonds invalid or unlawful. In the matter of *Afrasia Special Opportunities Fund (Pty) Ltd v Royal Anthem Investments 130 (Pty) Ltd [2016] 4 All SA 16 (WCC)(28 July 2016)*, Binns-Ward J held as follows in this regard at para [64]:

> "…..*Furthermore, and in any event, I am not persuaded of the relevance of an accountable institution's duty of information gathering in terms of FICA to what might reasonably be expected of a person transacting with a company in respect of accepting the authority of a person held out by the company as having the requisite authority to represent it in the transaction. The information that an accountable institution is required to obtain in terms of FICA has to be collected for the purposes of combatting money laundering and the financing of terrorist activities. The legislation is not directed in any way that I am able to discern at raising the bar for the ability of any person dealing with a company to rely on ostensible authority*."

36. I now turn to the issue of fraud. It appears from the evidence of Mr de Villiers that the fourth defendant might have entered into the loan agreements to the detriment of the trust and in order to benefit herself in breach of her duty as a trustee. Whether or not the fourth defendant had acted in breach of her duties as a trustee or whether or not she had stolen funds from the trust is irrelevant for purposes of the plaintiff's claim. The trust had the onus to prove that the loan agreements which were entered into between the trust, duly represented by the fourth defendant, and the plaintiff were fraudulent. No such evidence was placed before the court. It was further the evidence of Mr Prinsloo, which was not disputed, that the monies advanced by the plaintiff to the trust were paid, at the request of the fourth defendant, into nominated accounts.

37. I find on the evidence and admitted facts, that the fourth defendant, who was duly authorised by the Master upon the request of all the capital beneficiaries of the will to act as the sole trustee, entered into the loan agreements and mortgage bonds on behalf of the trust, that the monies were paid to the trust by the plaintiff in the manner she had instructed and that the amount owing by the trust in terms of the mortgage loans is R1 654 704.64.

APPLICATION IN TERMS OF RULE 46 A

38. It is common cause that the judgment debtor herein is a trust and that in terms of clauses 8 of the mortgage loans the plaintiff is entitled to seek an order declaring the property executable.

39. In the recent matter of *Petrus Johannes Bestbier and Others v Nedbank Limited (150/2021) [2022] ZASCA 88 (13 June 2022)* the Supreme Court of Appeal explained the legislative and historical context of rule 46 A which is premised on justiciable socio-economic rights which includes the right to have access to adequate housing as enshrined in s 26 of the Constitution. The court held that "*a blanket approach that considers all immovable property held in the name of juristic person fall outside the protection of rule 46 A is too narrow*" and that "*due regard must be had to the impact that the sale in execution is likely to have on vulnerable and poor beneficiaries who are occupying the immovable property owned by the judgment debtor who are at risk of losing their homes*". This is not a Jaftha-kind case[2] and the immovable property is further not the primary residence of the income beneficiary or any of the capital beneficiaries of the trust. Ms Villiers further testified that she receives R 25 000.00 a month from the fourth defendant and did not allege that she would be homeless if the property is declared executable. There is further no basis to find that the loss of the rental income would result in her not having access to adequate housing. It further appears that the trust also has no reasonable alternative means to pay the judgment debt owing to the plaintiff, save for the sale of the property in execution.

40. I am accordingly satisfied that that the plaintiff is entitled to an order declaring the property executable.

41. On the issue of costs, the plaintiff has established that it is entitled to costs on the scale of attorney and client given the terms of the mortgage loan agreements. I see no reason to why costs should not be awarded on the basis as agreed.

42. In the circumstances, I make the following order:

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[2] Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC).

1 Judgment is granted against the first to third defendants jointly for:

1.1 Payment of R1 654 704.64;

1.2 Interest on the above amount at 6.25% per annum calculated on the daily outstanding balance and capitalised monthly in arrears from date of judgment until date of payment, both days included;

1.3 Costs of suit on the attorney and client scale including the waisted costs occasioned by the postponements on 11 August 2021, 19 November 2021, 7 February 2021, 8 February 2022 and 25 March 2022.

1.4 The first to third defendant's liability arising from the above judgment is joint and several with that of the fourth defendant arising from the default judgment that has already been granted by the Registrar on 19 October 2015;

2 In respect of the application in terms of Rule 46A it is ordered that:

2.1 The immovable property described as Erf [....] Kuils River, in the City of Cape Town, Division Stellenbosch, Province of the Western Cape held by the first to third defendants in terms of Deed of Transfer T[....] and mortgaged to the plaintiff by virtue of mortgage bonds B2576/2006 and B48905/2006 is declared executable;

2.2 The following clause shall be inserted in the conditions of sale of any sale in execution:

> "*Where the execution creditor is the purchaser, the purchaser is relieved of the obligation to pay the deposit or provide any guarantee in respect of the balance of the purchase price or to make payment thereof, but for such amount that would be in*

excess of the amounts payable under the mortgage bonds, it being expressly stated that such obligation would be extinguished by sett-off immediately when due and the execution creditor shall provide proof of such sett-off to the execution debtor. It is further expressly stated that the commission payable to the sheriff following upon the sale in execution shall be paid within 21 days of the date of sale by the execution creditor to the sheriff if the execution creditor purchased the property at the auction.";

2.3 The sale in execution shall be subject to a reserve price of R 1 600 000.00 million;

2.4 The first to third defendants shall jointly pay the costs of the rule 46A application on the scale as between attorney and client.

A De Wet
Acting Judge of the High Court

Coram:	De Wet AJ
Dates of hearing:	11 August 2021, 13 September 2021, 12 November 2021, 19 November 2021, 7 February 2021, 8 February 2022, 25 March 2022 and 26 April 2022
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