

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 1868/2012

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

JOHN GEORGE WILSON

First Defendant

DOROTHEA REGINA WILSON

Second Defendant

Coram: P.A.L. Gamble, J

Date of Hearing: 6 and 7 June, 27 and 28 July 2022

Date of Judgment: 30 August 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 30 August 2022.

JUDGMENT DELIVERED ON 30 AUGUST 2022

GAMBLE, J:

INTRODUCTION

1. On 2 December 2012 the plaintiff ("the Bank") issued summons against the two defendants, who are married in community of property ("the Wilsons"), for payment of the sum of R845 730,66 together with interest and costs on the attorney client scale, claiming repayment of monies lent and advanced to the Wilsons against security of their immovable property, a suburban residence, in Strand ('the property').

2. After an entry of appearance to defend had been filed by the attorneys then acting for the Wilsons, the Bank (also then represented by a different firm of attorneys) filed its declaration. The declaration alleged that there were two agreements of loan during the period 1998 to 2006, which loans were secured by first and second mortgage bonds over the property. The Wilsons' plea was filed in November 2013, to which the bank did not file a replication. In April 2017 the bank filed "Amended Particulars of Claim" (rather than an amended declaration) and the matter eventually came to trial in June 2022.

3. At the trial the Bank was represented by Adv.W.Jonker (instructed by attorneys Fourie Basson and Veldtman) while the Wilsons represented themselves. Ms. Wilson attended to the matter in Court as Mr. Wilson has a sight problem. Mr. Wilson was nevertheless alongside Ms. Wilson in Court and she regularly consulted with him when issues arose. I might add that Ms. Wilson was on top of the facts and put up a feisty defence.

4. The Bank presented the evidence of 3 witnesses – 2 bank officials and a conveyancer - while Ms. Wilson testified on behalf of the defendants. At the conclusion of the proceedings, Mr. Jonker moved for an order for payment of the capital then outstanding in the amount of R1 281 797.09, interest at the rate of 6.85% with effect from 22 May 2022 until date of payment, costs on the attorney and client scale and an order that the property be declared executable.

THE ISSUES

5. The Wilsons disputed the amount claimed as well as the registration of the second mortgage bond. They did not dispute the conclusion of the first loan agreement or the registration of the first bond, which was in the form of a typical

home loan. Although the registration of both bonds was admitted in the Wilsons' plea of November 2013, the Court permitted the challenge to the second loan and the second bond to be ventilated in light of the fact that the Wilsons' were not legally represented. Mr. Jonker accepted the defence on the basis that it was put up in Court and led evidence to challenge it. There is no prejudice to either party as all relevant issues were fully ventilated during the trial which lasted over four days.

THE DEFENCE VERSION

6. I shall deal firstly with the defendants' case as it transpired through the cross-examination of the Bank's witnesses and later through Ms. Wilson's evidence. The Wilsons admitted that the first loan was concluded in March 1998 in the sum of R256 842.90, repayable over 20 years at an initial interest rate of 17.75%. The monthly instalment was to be R4021.00. That loan was secured by a first mortgage bond over the property in favour of the Bank for the capital sum of R260 000.00 and an additional amount of R52 000 in respect of costs, service fees etc. The first bond was numbered B[...]. The Wilsons regularly serviced the first bond and it was never in arrears. As of September 2006, the monthly instalment on the first bond was of the order of R2306 and the outstanding capital was shown in evidence to have been R 161 237.71, with all payments up to date.

7. The Bank advanced evidence to show that a second loan agreement was concluded with the Wilsons in September 2006 for an amount totaling R809 999.40. The term of the second loan was to be 240 months, the variable interest rate was initially fixed at 12.1% and the instalment on the second loan was initially R9265.60.

8. The Bank alleged that the second loan was secured by a second mortgage bond registered in its favour in the amount of R550 000.00 together with an additional sum of R110 000.00. This sum, together with the cover under the first bond, brought the Bank's security up to R810 000.00. The Bank appointed the firm Miller Bosman Le Roux in Strand to register the second bond and the relevant documentation reflects that it was so registered in the Deeds Office, Cape Town on 19 October 2006, under registration number B[...].

9. Ms. Wilson was adamant that they did not conclude a loan in 2006 as they did not need to raise any additional capital at that stage. She explained that she, Mr. Wilson and their deceased son ran a fresh fruit and vegetable business in Hermanus and Gansbaai under a close corporation called Hermanus Market CC ("the CC"). Their son was the manager of the business but both Mr. and Ms. Williams were actively involved therein. Ms. Wilson said the business was not cash strapped in 2006.

10. Ms. Wilson explained that in 2006 they acquired a truck for the business, which they financed separately through the Bank. Later, in 2007, said Ms. Wilson they decided to equip the truck with a refrigeration facility and needed money from the Bank to finance this. She was adamant that any bond that may have been registered to accommodate an increase in their banking facility would have taken place in the second half of 2007.

11. Given the dates on the documentation produced by the bank in this litigation, Ms. Wilson said she harboured a suspicion that the second bond registered in 2007 had been back-dated by the Bank to meet the requirements of the then recently enacted National Credit Act, 34 of 2005. She also pointed to an entry on the property's title deeds which she believed evidenced conveyancing activity in 2007. Further, the Wilsons queried whether the instalments that had been paid under the first bond had all been credited to their account.

12. Lastly, Ms. Wilson said that after they had fallen into arrears on the account and before the Bank had commenced proceedings in 2012 to foreclose on the bond, there had been telephonic contact with the Bank in an endeavour to avoid the inevitable. She said that an arrangement had been concluded telephonically with a call-centre agent in terms whereof they would continue to pay an instalment of R3900 until the total indebtedness was paid off. Ms. Wilson said that this arrangement had been implemented and an instalment of R3900 paid until the Covid-19 pandemic struck in 2020, when they were unable to meet their obligations and they defaulted on the telephonic arrangement. Later, when matters improved, they reverted to paying R3900 per month. The position then is that the Wilsons have not completely shrugged off their obligations to the Bank. Believing that they were

entitled to, they have doggedly paid R3900 per month, save for a period of about 12 months during 2020/1.

THE EVIDENCE ON BEHALF OF THE BANK

13. The Bank called Mr. D. Cloete, a credit manager with more than 20 years' experience, to explain the structure of the account and the arrangement of the Wilsons' facility. Mr. Cloete took the Court through both loan facilities granted to the Wilsons. The loan supported by the first bond was signed by the parties and, as I have said, presented no issue.

14. Mr. Cloete explained that the original loan agreement in respect of the advance under the second bond could not be produced as it had been destroyed in a notorious fire at the Bank's storage facility in Gauteng on 28 August 2009. I say "notorious" because many Judges sitting in motion court have, over the years, been asked to accept copies of bank documents on account of the alleged destruction of the originals in "the warehouse fire". Judicial scepticism about the non-availability of originals was eventually removed when a series of affidavits was put up to establish the integrity of the allegations regarding the fire, which had been made by various banks.

15. In any event, Mr. Cloete concluded from a computerized imprint on the unsigned agreement that it had been generated in April 2007. More about this date later. Mr. Cloete took the Court through the Wilsons' account and demonstrated that the outstanding balance (which was never in arrears) had remained of the order of R145 000 to R150 000 odd throughout 2006 and up to the end of September 2007. As of October 2007, the facility on the account was raised to R810 000 and the instalment was increased to R9200 odd. Ms. Wilson agreed that it was at around this time that the refrigeration unit was installed on the truck.

16. Mr. Cloete was asked to comment on the allegation regarding the telephonic arrangement to drop the instalment to R3900 after the account fell into arrears and the Bank issued summons. He referred to a series of printouts generated by the Bank's online system from as early as October 2010 which confirmed a series of telephonic discussions between the Bank's call centre clerks and the debtors. While

the terms of the loan agreements and the bonds required any variations to be reduced to writing and signed by both parties, the Bank seems to have been happy to go along with this arrangement, notwithstanding the absence of compliance with formalities.

17. The issue as to whether the loan agreements were indeed varied is not something which needs to be determined in these proceedings. This is because, whatever alternative arrangement may have been made, such arrangement lapsed when the Wilsons defaulted for nearly 12 months during the Covid-19 lockdown.

18. After checking the bank's records, Mr. Cloete confirmed that in June 2005 Mr. Wilson had stood personal surety for the CC's facility with the Bank and had signed an unlimited suretyship in that regard. Ms. Wilson's consent thereto had been procured. Mr. Cloete looked at the status of the CC's account with the Bank in 2006 and noted that it had an overdraft facility which peaked at R693 000 in October 2006. Given that the Bank had no security for the liability of the CC other than Mr. Wilson's suretyship, Mr. Cloete drew the informed conclusion that the second mortgage bond had been registered to beef up the security which the Bank held in respect of the exposure of the CC and Mr. Wilson to it under the suretyship.

19. As far as establishing the extent of the Wilsons' current indebtedness under the bonds was concerned, the Bank called Mr. W.A.Prinsloo, a manager in its interest calculating department. Prior to testifying, Mr. Prinsloo painstakingly went through the Wilsons' account with the assistance of a computer programme and checked each and every entry thereon, producing a printout of the account of 27 pages. He explained how the interest on the account had been calculated and capitalized and how certain deductions had been made which were in respect of legal charges which did not form part of the capital lent. The Court was able to verify the correctness of this evidence through the printout which was handed in as an exhibit. There was a single account with reference number [...] in the name of JG & DR Wilson.

20. Mr. Prinsloo testified that as of 6 June 2022 the outstanding capital on the Wilson account amounted to R1 282 797.09. The arrears amounted to

R1 280 766,59, with the instalment then standing at R24 286.83. The account had been in arrears for some 52 months. While Ms. Wilson sought clarity from Mr. Prinsloo on various issues by way of cross examination, she candidly accepted when she was ultimately cross-examination by Mr. Jonker that the Wilsons were not in a position to challenge the evidence of Mr. Prinsloo as to the extent of their joint indebtedness to the Bank.

21. Lastly, the Bank called Mr. Grant Hill, a conveyancer with the firm Miller Bosman Le Roux which now practices in Somerset West, who attended to the registration of the second bond on behalf of the Bank. Mr. Hill is a senior attorney with many years of conveyancing experience, having practiced as such since 1987. It turned out that he was well-disposed to the Wilsons, having helped Ms. Wilson draw up an affidavit in February 2019 which was presented to the Bank, setting out the factual basis of the Wilsons' defence to the claim. That defence raises substantially the same issues as were put up before this Court.

22. Mr. Hill took the Court through the process that he normally follows when registering a bond for a bank that has lent money to a client. Due to the passage of time, his file relevant to this matter had already been destroyed but Mr. Hill was clear that he would not have deviated from his customary practice. Mr. Hill confirmed that in this matter his instructions came from the Bank and that the loan agreement (the unsigned copy whereof was produced by Mr. Cloete) would have been signed by the Wilsons in his office and witnessed by a member of his staff when instructions were taken to register the second bond.

23. With reference to the copy of that second mortgage bond before Court, Mr. Hill testified that the loan agreement in respect of the second loan for R550 000 was concluded on 28 September 2006. At the same time the Wilsons signed a power of attorney (on 28 September 2006) authorising Mr. Hill (or one of his conveyancing partners, including Ms. Lynne Botha) to register the second bond on their behalf at the Deeds Office in Cape Town. Mr. Hill did the necessary paper work and drafted the bond documents whereafter his colleague, Ms. Lynne Botha, lodged the documentation at the Deeds Office in Cape Town.

24. The signature of the Registrar appears on page 5 of the bond document which records that it was duly registered on 19 October 2006. Mr. Hill explained to Ms. Wilson under cross-examination that it was not possible for a bond registration to be back-dated – the Registrar of Deeds would never permit this – and he pointed out that, in any event, bonds are numerically numbered in the Deeds Registry reflecting the year of registration. In this case the number is 109093/2006, which clearly establishes that it was registered in 2006.

25. Ms. Wilson had referred the Court earlier to an entry on the bond document date stamped by the Registrar of Deeds on 27 June 2007. Ms. Wilson thought that this reflected that the bond had been registered in 2007, the year in which they needed money for the refrigeration unit on the truck. Mr. Hill examined the entry on the bond and explained that it related to a servitude which had been registered over the property in 2007 and to which the Bank, as bond holder, had consented. Ms. Wilson then recalled that Eskom had registered a servitude over the property in relation to a power line.

CONCLUSIONS

26. In the light of the foregoing, the Court is satisfied that the following facts have been established on a balance of probabilities.

(i) The defendants, Mr. and Ms. Wilson, concluded an agreement of loan with the plaintiff bank on or about 28 September 2006 in the amount of R550 000.

(ii) The loan was secured by a second mortgage bond registered over the Wilsons' residential property, Erf [....] Strand situated in the City of Cape Town, Stellenbosch Division in favour of the plaintiff under reference number B[...] on 19 October 2006.

(iii) The initial drawdowns on the said loan occurred early in October 2007 when the amounts of R342 000, R200 000 and R120 000 were credited to the Wilsons' current account with the Bank.

(iv) On 2 June 2022 the total indebtedness of the defendants to the plaintiff under account no [...] amounted to R1 281 797, 09.

(v) The sum of R810 000, 00 of that total indebtedness is secured under two mortgage bonds registered in favour of the plaintiff.

27. I should add that the Court is satisfied that the dispute on the part of Ms. Wilson regarding the date of the second loan is attributable to genuine confusion on her part and not dishonesty. It is unfortunate that Mr. Wilson jnr. was not alive and able to give evidence as he may have been in a position to elucidate the extent of the CC's obligations to the Bank in 2006. The Court accepts the explanation of Mr. Cloete that the Bank was most likely looking for additional security for its exposure to the CC in addition to the suretyship of Mr. Wilson and that this, on a balance of probabilities, accounts for the registration of the second bond in October 2006. It seems that, thereafter, the Wilsons accessed the funds made available under the complete facility when they needed same in 2007.

RULE 46A ENQUIRY

28. The Bank asks that the property be declared executable. That request triggers an enquiry under the provisions of Uniform Rule 46A. The following relevant facts emerge from that enquiry.

(i) The immovable property constitutes the primary residence of the defendants. In this regard, Ms. Wilson explained that when they were unable to meet the instalments on the bond, they rented out the main house on the property to a local crèche and set themselves up in a so-called "granny flat" in the garden. The rental income from the crèche was used by the Wilsons to pay part of the instalment on the bond. This was interrupted in 2020/1 when the crèche experienced liquidity problems due to the Covid-19 lockdown.

(ii) The Wilsons continue to reside in the granny flat and once again receive income from the crèche. This is their primary source of income, in addition to SASSA grant monies and a small annuity of R1000 per month. They are otherwise to be regarded as retired or unemployed.

(iii) There are no assets other than the immovable property with which to settle the debt to the bank. The property must thus be sold.

(iv) The Wilsons are both in their mid-70's and their prospects of finding alternate accommodation is limited. They accordingly need time to seek suitable accommodation, which might include finding a buyer for the property who is prepared to accommodate them further in the granny flat. It is thus just and equitable to delay the execution of the property to enable the defendants to make alternative accommodation arrangements.

(v) I take into account that the Wilsons have been living in the property for about 10 years since summons was issued and have in the interim enjoyed the use thereof while paying significantly less than the monthly bond instalment. They have effectively financed their accommodation needs by increasing their indebtedness on the bond.

(vi) The market value of the property according to the bank valuation is R1,85m, while the municipal valuation is R2,06m. The municipal rates and taxes account is up to date.

(vii) In light of the difference between the secured debt and the unsecured debt owed by the Wilsons to the Bank, I am of the view that this is an appropriate case for a reserve selling price to be fixed.

(viii) Despite the parties having been afforded an opportunity to come to an amicable resolution of this dispute at the conclusion of the evidence, no such agreement could be reached. The Court must thus make an order which is just and equitable in the circumstances. That order follows hereunder.

ORDER OF COURT

There will be judgment as follows-

1. Payment by the defendants to the plaintiff of the amount of R1 281 797.09;

2. Payment by the defendants to the plaintiff of interest on the said amount of R1 281 797.09 at the rate of 6.85% per annum from 2 June 2022 to date of payment, such interest to be reckoned on daily balances and capitalised monthly from 2 June 2022;

3. The undermentioned immovable property mortgaged by mortgage bonds numbers B[...] and B[...] is declared specially executable:

ERF [...] STRAND, in the City of Cape Town, Division Stellenbosch, Western Cape Province,

IN EXTENT 889 square metres,

HELD BY Deed of Transfer No. T[...]

(*“the property”*);

4. No sale in execution pursuant to this order shall take place on a date earlier than 28 February 2023. The Registrar of this court is directed to issue a warrant of execution to enable the sheriff to attach the property in the meantime;

5. The defendants are notified that in terms of s 129(3) of the National Credit Act 34 of 2005 they may, at any time prior to the sale in execution of the property, reinstate the credit agreement by paying to the plaintiff all amounts that are overdue (i.e. in arrears), together with the plaintiff's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement, which amounts, charges and costs the plaintiff must on enquiry from the defendants furnish to them;

6. If the credit agreement is reinstated by payment as aforesaid, the property may not be sold in execution;

7. The property shall be sold by the Sheriff subject to a reserve price of **R1 200 000.00**;

8. The defendants shall pay the plaintiff's costs of suit on the attorney and client scale.

GAMBLE, J

Appearances:

For the plaintiff:	Mr. W. Jonker
Instructed by	Fourie, Basson and Veldtman
	Tyger Valley
	C/o Walkers
	Cape Town

For the defendants: In person