

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Amani Lodge and Conference Centre (1740/2017) [2017] ZAGPPHC 660 (20 October 2017) [2017] ZAGPPHC 660

COURT

North Gauteng High Court, Pretoria

BEFORE

MF Legodi

CASE / FILE NUMBER

1740/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

CASE NUMBER 1740/2017

DATE 20 I 10 I 2011

ABSA BANK LIMITED

APPLICANT

And

AMANI LODGE AND CONFERENCE CENTRE

RESPONDENT

JUDGMENT

LEGODI,

- [1] On 9 October 2017 I granted an order for summary judgment without giving reasons for the order. I now do so and I do not intend to be long. The parties will be referred to as in the main action. Having concluded a bond loan agreement with ABSA Bank Ltd (the plaintiff), the defendant (Amani Lodge and Conference Centre (Pty) Ltd), defaulted in monthly payments towards the redemption of the loan.

[3] Consequent thereto the plaintiff on 28 March instituted summons against the defendant praying for judgment in the amount of R2 433 325.25 plus interest on the said amount calculated at a rate of 9.80% from 4 March 2017 to date of final payment. In addition the plaintiff asked for declaration of the immovable property forming the subject of a bond registered in favour of the plaintiff to be specially executable.

[4] The defendant having been served with the summons entered an appearance to defend which was met with an application for summary

judgment. As I said, I granted summary judgment after parties were given the opportunity to argue the matter.

[5] Three technical defences were raised in the opposing affidavit for summary judgment. Firstly that the deponent to the founding affidavit in the application for summary judgment did not establish that that he was authorised to institute the present application. I find no merit to this contention or averment.

[6] In paragraph 1 of the founding affidavit is stated as follows:

"I am an adult male, Assistant Vice President, Home Loans Recoveries Division of ABSA BANK LIMITED, the plaintiff, of Ground floor, No 9 Lothbury Road, Auckland Park, Johannesburg, Gauteng. I am entitled to within the scope of my employment dispose to this affidavit. I confirm that I have personal control over the documentation which relates to this specific matter, having dealt with this matter myself, and had personal dealings with the Defendant regarding this matter. The facts fall within my own personal knowledge and is to the best of my believe true and correct."

[7] The quotation above, in my view is also relevant to the other point raised. That is, that the deponent has no personal knowledge of the facts stated in the founding affidavit particularly regarding the defendant's indebtedness to the plaintiff.

[8] A distinction has to be drawn between authority to institute legal proceedings and authority to depose to an affidavit or to give evidence. Rule 32(2) provides that the plaintiff's notice of application for summary judgment should be accompanied by an

affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount,

if any, claimed and stating that in his opinion there is no bona fide defence to the action and that notice to defend has been delivered solely for the purpose of delay.

[9] A person's ability to swear positively to the facts is essentially to the effectiveness of the affidavit as a basis for summary judgment, and the court entertaining the application therefor must be satisfied prima facie that the deponent is such a person. Generally speaking, before a person can swear positively to the

facts

in legal proceedings they must be within his knowledge. For this reason practice has been adopted of requiring that a deponent to an affidavit in support of summary judgment other than the plaintiff himself, should state at least that the facts are within his personal knowledge (or make some averment to that effect) unless such direct knowledge appears from other

facts

stated[1].

[10] The extra-ordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised.

The grant of the remedy is based upon the suggestion that the plaintiffs claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application, and to achieve this end it is important that the affidavit should be deposed by either the plaintiff himself or by someone who has personal knowledge of the facts[2].

[11] The nature of the deponent's office in itself suggest very strong that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial statements with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of accounts indeed and if that were the degree of personal knowledge required it is difficult to conceive of circumstance in which a bank could ever obtain summary judgment[3].

[12] First-hand knowledge of every fact which goes to make up the applicant's cause of action is not required and that where applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and actual ability to swear positively to such facts[4]. I find the facts of the present case to fit into the case laws and particularly set out in the preceding paragraphs.

[13] What is quoted in paragraph [6] of this judgment deals with both alleged lack of authority to institute the present proceedings and lack of personal knowledge to the facts deposed to in the affidavit supporting the application for summary judgment. The deponent is Assistant Vice President, Home Loans Recoveries Division of Absa Bank Limited. The suggestion in the circumstances that he lacks authority to institute the present applicant for summary judgment in my view, is not based on any facts. He alludes to the fact that he is entitled to within the scope of his employment to depose to the affidavit.

- [15] The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution, but that form of proof is not necessary in every case. Each case placed before court warrants the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf[5].
- [16] In this case, one is dealing with application for summary judgment. This is a procedure that is intended to cut down technical

issues

which can only serve to delay action instituted against the defendant. To suggest that an Assistant Vice President, Home Loans Recoveries Division of the plaintiff, could have instituted the application for summary judgment without the permission of Absa in my view, is farfetched. In the circumstances of the case his position should be found to avert any probability that he could have acted without authority. Therefore both lack of authority and lack of personal knowledge to the facts deposed to, should be found to have no merits.

- [17] I now turn to the other point raised. That is, that interest of 9.8% on the capital amount should be found to have been incompetent in that interest rate was changed without giving formal notification as required by the agreement. The interest agreed upon is said to be 9.5% and that therefore the plaintiff was not entitled to charge 9.8% as no notice was given.
- [18] Clause 9.1 of the loan agreement specifically provides for change of interest rate chargeable on the amount outstanding. Whilst clause 16 of the agreement requires change of the agreement to be in writing, it does not specifically deal with change of interest, which as we know it fluctuates and automatically chargeable on the outstanding amount. Summons were issued on 28 March 2017 and the 9.80% interest rate is said to be calculated from 4 March 2017. That is, from date on which it became applicable. The fact that the defendant may not have been informed in time, does not in my view, invalidate the agreement and enforceability thereof on breach.
- [19] The suggestion that the plaintiff 'clearly omitted from the simple summons of any allegation as and when the agreement was amended to reflect the new interest rate' and that 'there is also no supporting or corroborating evidence to the fact that the agreement was amended in terms of clause 16 and that therefore it disputed quantum as amplified by the certificate of indebtedness', cannot be correct unless one looks at it in isolation. In both the simple summons and the application for summary judgment, it is indicated that the levying of the 9.8% on the amount outstanding is with effect from 4 March 2017. So, the amount of R2 433 325.25 outstanding until on 3 March 2017 is not calculated on the basis of 9.8% the latter interest only takes effect from 4 March 2017.

[20] Based on all of the above I granted the application for summary judgment regarding the only three points argued on behalf of the defendant. Therefore summary judgment remains as granted on 9 October 2017.

MF LEGODI

JUDGE OF THE HIGH COURT

DATE OF HEARING:

09 OCTOBER 2017

DATE OF REASONS GIVEN:

20 OCTOBER 2017

ATTORNEYS FOR THE PLAINTIFF: DELPORT VAN DEN BERG INC

SUMMIT PLACE OFFICE PARK

BUILDING 2, 221 GARSFONTEIN ROAD

MENLYN, PRETORIA

TEL: 012 361 5001

REF: EDDIE DU TOIT I ch/ AHL 1693

ATTORNEY FOR THE DEFENDANT: VAN RENEN HEYNS INC

C/O MATHYS KROG ATT

1213 COBHAM ROAD

QUEENSWOOD

PRETORIA

TEL: 012 333 5610

REF: RH/tk/AL6565

[1] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423 A-H

[2] Dean Gillian Rees v Investec Bank Ltd [2014] 2ASCA 38 (28 March 2014)

[3] Barclays National Bank Ltd v Love 1975 (2) SA at 514 (D) at 516 H-517A

[4] Shackleson Credit Management (Pty) v Microzone Trading 88 CC and Another 2010(5) SA 112 (KZP)

[5] Mall (Cape) (Pty) Ltd v Merino Kooperasie Bpk 1957 (2) SA 347 (C)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/660.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/absa-bank-limited-v-amani-unknown-topic-agpphc-2017>

Prepared on 9 October 2026 · Esheria