

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Cholwich (2016/20145) [2017] ZAGPJHC 155 (20 June 2017) [2017] ZAGPJHC 155

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nyathi

CASE / FILE NUMBER

2016/20145

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2016/20145

Not reportable

Not of interest to other judges

Not revised.

20 June 2017

In the matter between

ABSA BANK LIMITED PLAINTIFF

and

CHOLWICH T. DEFENDANT

JUDGMENT

NYATHI AJ:

PLAINTIFF'S AVERMENTS

[1] This is an opposed application for summary judgment. The plaintiff seeks summary judgment against the defendant for:

1.1 Payment for the amount of R 1 123 229.78.

1.2 Interest on the above-mentioned amount at the rate of 8.6% per annum, capitalized monthly, from 3 February 2016 to date of final payment, both days inclusive.

1.3 The immovable property known as Erf 896 LITTLE FALLS Extension 2 Township, Registration Division I.Q., Province of Gauteng measuring 831 square meters, held by Deed of Transfer No. T26093/2003 to be declared specially executable and for the plaintiff to be authorized to issue a writ of execution to attach the aforesaid property as envisaged in terms of Uniform Rule 46(1).

1.4 Costs of suit on the attorney and client scale.

[2] In support of its application for summary judgment, the plaintiff attached a dummy loan agreement instead of the original loan

agreement concluded between the parties. (i.e. a blank/uncompleted printout of the bank's standard agreement form with the standard

terms of the loan agreement)

[3] The plaintiff avers that the original loan agreement cannot be traced despite a diligent search.

[4] The plaintiff relies on two signed mortgage bonds as well as the loan agreement.

[5] The mortgage bonds contain an unconditional acknowledgement of liability in a fixed and determinate amount.

[6] The mortgage bonds refer to the defendant's indebtedness arising from the loan agreement.

DEFENDANT'S AVERMENTS

[7] In its affidavit resisting summary judgment, the defendant takes issue with the unsigned dummy loan agreement attached.

[8] The defendant states that the failure to attach a copy of the agreement breaches Uniform Rule 18(6) and has the effect that the plaintiff has failed to prove its case. In other words plaintiff's failure to attach the loan agreement to the application for summary judgment is fatal to its claim.

[9] the defendant then goes at length to question the formation of agreement within the bank, and deals with the Ghost Convey software

used.

[10] At some point (Paragraph 54 of the defendant's heads) the defendant raises an exception based on an alleged irregular step.

[11] At no point does a specific defence appear explicitly.

[12] There was also no defence proffered with regards to the prayer to have the immovable property subject of this application declared specially executable.

THE LAW

- [13] The summary judgment procedure came into being as a result of judicial disapproval of delaying tactics. It inter alia aims to dissuade opposition to a claim the purpose of which is merely to cause delay; and provides a means by which a plaintiff can obtain speedy relief in commercial matters[1]
- [14] A defendant seeking to resist the grant of summary judgment need only satisfy the court by affidavit (usually), that he has a bona fide defence to the action. The said affidavit or oral evidence if he gets leave of the court, shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.[2]
- [15] A defendant must go beyond the formulation of disputes and must disclose the grounds upon which he disputes the plaintiff's claim with reference to the material facts underlying the disputes raised[3].
- [16] For the defendant to succeed in having the application for summary judgment and be granted an opportunity to defend the matter, he should present facts on paper, which show an arguable defence.
- [17] In *ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd and Another*[4] the essential complaint raised in an exception was that the plaintiff had failed to annex to its particulars of claim the mortgage loan agreement.
- [18] In the *Zalvest* matter, the signed mortgage loan agreement was destroyed in a fire. Despite a diligent search the plaintiff could not find a copy of the mortgage loan agreement.
- [19] The plaintiff annexed to its particulars of claim a copy of the standard loan agreement regularly used by it at the time. This
- contained terms and conditions similar to those in the agreement it had concluded with the defendant.
- [20] The defendant raised an exception alleging non-compliance with rule 18(6). It alleged that plaintiff had not complied with the rule in that it had not annexed a true copy of the written contract to its particulars of claim.
- [21] *Traverso* DJP held that "the rules of court exist in order to ensure fair play and good order in the conduct of litigation.

Further, the rules did not lay down the substantive law of evidence. The substantive law is to be found elsewhere, mainly in legislation and the common law".

- [222] The court continued and stated that in terms of the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded and that the original must be adduced. But there are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite a diligent search. In such a case the litigant who relies on the contract can adduce secondary evidence of its conclusion and terms".
- [23] I am in agreement with the viewpoint in the Zalvest matter that the assertion by the defendant that the plaintiff's inability to annex a copy deprives it of a cause of action is wrong. This holds true of this instant matter.
- [24] In *The Land and Agricultural Development Bank of South Africa v Chidawaya And Another*[5] *Baqwa J* in rejecting a similar defence resisting default judgment, held that "The defendants further submit that the failure to attach the loan agreement to the summons is fatal to the plaintiff's claim. As already stated, the plaintiff's claim is based on a mortgage bond in which the indebtedness of the defendants is expressly acknowledged and set forth. It therefore stands as an independent written agreement between the parties which is capable of standing as the basis for a course of action and which is a liquid document as defined in Rule 32." [6]
- [25] The defendant does not deny the conclusion of a loan agreement between the parties.
- [26] The defendant does not deny the terms of the loan agreement as pleaded by the plaintiff.
- [27] Further, the defendant does not deny that she is in arrears with the payment of their monthly installments in terms of the loan agreement.
- [28] The defendant does not complain of any prejudice caused by the inability to attach the loan agreement.
- [29] The defendant does not disclose clear grounds as stated in Par 15 and 16 above, instead he is pedantic and deals with trifling

issues.

- [30] As a result of the foregoing, I make the following order:

Summary judgment is granted against the defendant for:

30.1 Payment of the amount of R1 123 229.78

30.2 Interest on the above-mentioned amount at the rate of 8.6% per annum, Capitalized monthly, from 3 February 2016 to date of final payment, both days inclusive.

30.3 The immovable property known as Erf 896 LITTLE FALLS Extension 2 Township, Registration Division I.Q., Province of Gauteng measuring 831 square metres, held by Deed of Transfer No. T26093/2003 is declared specially executable and the plaintiff is authorized to issue a writ of execution to the aforesaid property as envisaged in terms of Uniform Rule 46(1).

29.4 Costs of suit on the attorney and client scale.

JS Nyathi

Acting Judge of the High Court

Date of Hearing: 25th April 2017

Judgment

Delivered: 20th June 2017

APPEARANCES

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[1] Paraphrased from Summary Judgment - A Practical Guide by Van Niekerk et al P2-3, par 2

[2] Uniform Rule 32(3)(b).

[3] See also Chairperson, IEC v Die Krans Ontspanningsoord (Edms) Bpk 1997(1) SA 244 (T) 249F-G

[4] 2014(2) Sa 119 (WCC); [2013] ZAWCHC 169.

[5] Case No: 39106/2013 ZAGPPHC/2015/856.pdf

[6] P5, Par 11 of the judgment

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