

SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Khambule (2019/003137) [2025] ZAGPJHC 426 (2 May 2025) [2025] ZAGPJHC 426

COURT

South Gauteng High Court, Johannesburg

BEFORE

E Raubenheimer

CASE / FILE NUMBER

2019/003137

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2019/003137

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES / NO

(3)

REVIEWED: YES/NO

2

May 2025

In

the application by

ABSA

BANK LIMITED.

Applicant

And

KHAMBULE:

MILLICENT SINDISWE

Respondent

JUDGMENT

Raubenheimer AJ:

Introduction

- [1] The matter came before me as an application for Summary Judgment for the payment of an outstanding arrears amount on a bond and for the bonded immovable property to be declared preferentially executable.
- [2] The application was opposed by the respondent.
- [3] I granted the application for summary judgment, declared the property preferentially executable and set a reserve price. The declaration of the property as preferentially executable and the issuing of a writ of execution for the attachment of the property was suspended until 1 August 2025.
- [4] The reasons for the order follow below.

The litigation history

- [5] The parties entered into two loan agreements in 2001 and 2006 respectively. The debt in terms of the loan agreements amounted to R200 000 and R600 000 respectively and were secured by two coverage mortgage bonds in favour of the applicant and were repayable in monthly instalments of R8 690.01.
- [6] The respondent breached the agreement by failing to make the monthly payments as a result of which the outstanding amount of R55 416.40 became due and payable. The agreement contained an acceleration clause in terms of which the total amount due and owing became payable.
- [7] When the applicant issued summons on 30 January 2019 the total outstanding amount was R628 308.01 plus interest at the rate of 8.50% per annum capitalised monthly from 27 October 2018 to date of payment.
- [8] The respondent entered an appearance to defend on 12 February 2019 and the applicant applied for Summary Judgment on 13 March 2019.
- [9] The respondent did not file a Plea but filed an answering affidavit to the application for Summary Judgment on 26 September 2022. The answering affidavit does not deal with the affidavit in support of Summary Judgment in detail and amounts to a mere denial.

[10] The court granted an order for substituted service for service of process by means of affixing in terms of Rule 4(1)(a)(iv) on 25 January 2022 and the matter was postponed twice during 2022 namely on 14 June and on 13 September. On the latter date the respondent was also ordered to file her affidavit resisting Summary Judgment no later than 30 September 2022.

Submissions

by the applicant

[11] The cause of action as well as the indebtedness of the respondent was confirmed by the Assistant Vice President, Home Loan Recoveries

employed by the applicant.

[12] The defence raised by the respondent that she never entered into the second loan agreement or had it had been secured by a second bond registered in the Deeds office is not a good and bona fide defence as the defence amounts to a mere denial. The respondent provides no explanation for the payments that was made in reducing of the loan agreement up to 2017 apart from denying that she made the payments.

[13] The applicant attempted on numerous occasions to assist the respondent to bring her account up to date but to no avail. During

the course of these attempts which entailed telephone calls, Credit Customer Assistance to restructure the account and payment

arrangements the respondent never raised the defence that she did not enter into the second loan agreement.

[14] The defendant did not fully disclose the nature and grounds of her defence or the material fact on which the defence is based.

[15] The applicant did not attach the original loan agreement due to it not being able to locate it despite a diligent search. The applicant

relies on a Comprehensive Detail Sheet which is a computer printout of the Loan agreement and captured on the electronic database of the applicant. The applicant furthermore relies on the two mortgage bonds registered in its favour as security for the loan agreements.

[16] The financial records pertaining to the reduction of the loan amount was contained in the financial records database of the applicant.

These records have been provided to the respondent as attachments to the Particulars of Claim. The respondent never took issue with the correctness of these records save by denying that she made the payments between 2007 and 2017.

[17] The applicant contends that it has complied with all the requirements in terms of Rule 32, Rule 46A as well as the provisions of the National Credit Act, Act 34 of 2005 by serving the section 129(1)(a) notice via registered mail on 30 November 2018.

The submissions by the respondent

[18] The respondent admits that she concluded a loan agreement with the applicant that was secured by a mortgage bond and registered in the Deeds office in 2002. The final payment of this loan was made in 2007.

[19] She denies that she concluded a further loan agreement for the amount of R600 000 in 2006 or that she is in arrears with the monthly

repayments.

[20] The respondent furthermore denies that she made any payments towards the reduction of the loan since 2007 and has no knowledge who made the payments.

Discussion.

[21] The main issue raised by the respondent in opposition of Summary judgment is that the applicant did not attach a copy of the original

loan agreement. This is the basis for her denial that she entered into such an agreement.

[22] A party to a contract is not precluded from enforcing the contract merely because the contract has been lost or destroyed.[1] In such a case it is permissible for the party relying on the contract to present secondary evidence in respect of the conclusion

as well as the terms of the contract.[2] This, the applicant did by presenting the Mortgage Bonds registered over the property, the Comprehensive Data Sheet as well as the payment records in respect of both loan agreements.

[23] The respondent cannot merely rely on the absence of the original loan agreement as proof of her assertion that she did not enter into the second loan agreement. She is required to raise a good and bona fide defence as well as provide the factual basis for the defence.[3]

[24] The respondent did not place evidence before the court to the effect that she has evidence that the second loan agreement and bond is tainted by fraud and that should that evidence be accepted at trial it would constitute a defence.[4]

[25] The respondent wants the court to conclude that the second loan agreement and the registration of the mortgage bond came about as a result of fraud. Her only evidence to support this allegation is a denial that she entered into the agreement.

- [26] The defence raised by the respondent lacks merit and does not amount to a bona fide defence. She initially did not raise the defence when the applicant attempted to assist her with bringing the arrears of the account up to date by phoning her, offering to restructure the loan and proposing a payment plan.
- [27] She does not explain why payments were continually made on a regular basis to reduce the indebtedness. Her averment that she did not make the payments are unsubstantiated as she produces no proof by means of for instance bank statements to support her contention. She provides no explanation for the registering of a bond over the property in her name.
- [28] Her defence that the applicant does not have a copy of the loan agreement in its possession and therefore she did not enter into such an agreement amounts to a mere technical and opportunistic defence.[5]
- [29] The omission of the original loan agreement is not material and does not prejudice the respondent.[6]
- [30] The defendant has not fully disclosed the grounds of her defence and the foundational facts on which the defence rests, neither does the facts disclosed by the defendant amount to a bona fide defence which is good in law.[7]
- [31] The respondent furthermore avers that the claim for the outstanding amount is not a liquidated amount.
- [32] The claim for the outstanding amount is based on Rule 32(1(b) namely a liquidated amount of money. The outstanding amount was arrived at by a simple calculation of the amounts appearing in the financial data held by the applicant and the sum was contained in a certificate of balance.[8]
- [33] Although the property is the primary residence of the respondent the parties have placed sufficient factors before the court to consider the granting of special executability.[9]
- [34] The applicant has provided the court with the market value as determined by a sworn valuator, the municipal value of the property

as well as the amount owed to the municipality. The respondent has made no payments since 2018 and has made no arrangements to reduce the indebtedness. Based on the available figures the reserve price was set in compliance with Rule 46A(5). The issuing of a warrant of execution was suspended to 1 August 2025.

Conclusion

- [35] The applicant is entitled to Summary Judgment for the outstanding amount of the bond as well as having the property declared preferentially executable as the respondent not having raised a good and bona fide defence

E Raubenheimer

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be

COUNSEL FOR THE APPLICANT: Adv Mhalanga

INSTRUCTED BY: Precious Muleya Inc

COUNSEL FOR THE RESPONDENT: Adv Mokwena

INSTRUCTED BY: Social Economic Rights Institute

DATE OF ARGUMENT: 29 January 2025

REASONS

REQUESTED: 20 February 2025

DATE OF JUDGMENT: 2 May 2025

- [1] ABSA Bank Limited v Zalvest 20 (Pty) Ltd 2014 (4) SA 119 (WCC)
- [2] ABSA Bank v Limited v Jenzen; ABSA Bank Limited v Grobbelaar (Gauteng Local Division Case numbers 2014/877 & 2014/7728)
- [3] Oos-Randse Bantoesake Administrasie v Santam 1978(1) SA 164
- [4] Oos-Randse Bantoesake Administrasie (n3 above)
- [5] Brenner's Service Station and Garage 11 (Pty) Ltd v Mine and Another 1983 (4) SA 233 (W), Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) and Standard Bank v Roestof 2004(2) SA 492 (W)
- [6] Standard Bank of South Africa Ltd v Roestof (n 5 above)
- [7] Maharaj v Barclays National Bank Limited 1976 (1) SA 418 (AD)
- [8] Both v W Swanson & Company (Pty) Ltd 1968 (2) PH F85 (CPD)
- [9] ABSA Bank v Mokebe and Related cases 2018 (6) 492 (GJ)

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