

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Shabalala N.O. and Others (9734/12) [2014] ZAKZPHC 17 (19 March 2014)

[2014] ZAKZPHC 17

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Nzimande

CASE / FILE NUMBER

9734/12

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO. 9734/12

In

the matter between:

ABSA
BANK
LIMITED.....APPLICANT
and
DUMISANI
SIPHO
DERRICK
SHABALALA N.O.....FIRST
RESPONDENT
BEATRICE
OTRINA
NTOMBENHLE
SHABALALA N.O.....SECOND
RESPONDENT
DERRICK
SHABALALA.....THIRD
RESPONDENT
NTOMBENHLE
SHABALALA.....FOURTH
RESPONDENT

JUDGMENT

delivered on 19 March 2014

NZIMANDE A J

- [1] The applicant is ABSA Bank Ltd, a bank duly registered and incorporated as such, with its principal place of business situated at Ground Floor, Absa Towers East, 170 Main Street, Johannesburg.
- [2] The first respondent is Dumisani Sipho Derrick Shabalala N.O. and the second respondent is Beatrice Otrina Nthombenhle Shabalala N.O., both cited in their capacities as the trustees of the Othandweni Family Trust (IT No. 1323/2005).
- [3] The third respondent is Dumisani Sipho Derrick Shabalala, an adult male farmer, whose full and further particulars are unknown to the applicant, but who resides on the property owned by the Othandweni Family Trust at Othandweni Farm, Old Greytown Road, Pietermaritzburg. The fourth respondent is Beatrice Otrina Nthombenhle Shabalala, an adult female, wife of the third respondent,

who resides with the third respondent

- [4] The applicant seeks judgment against the respondents jointly and severally for the amount outstanding on a mortgage loan agreement,

together with an order declaring the mortgaged property specially executable. It is alleged that the Trust has breached the terms and conditions of the loan agreement in that it has failed to pay its monthly instalments. As a result of the breach, as at 01 July 2012 the arrear instalments were R350,014.26 and the balance owing was R6,553,916.91 plus interest calculated at the rate of 7.5% per annum, capitalised monthly from 21 July 2012 to date of payment. The respondents' late filing of their practice note and their short heads of argument was condoned as there was no opposition thereto. Mr. Bedderson, who appeared for the respondents, abandoned the argument regarding the non-joinder of the Curator which had been raised in the papers.

- [5] It is common cause that on 16 August 2007, at Pietermaritzburg, the applicant and the Othandweni Family Trust (the Trust) concluded a written loan agreement in terms of which:
 - (a) the applicant loaned and advanced to the Trust the sum of R16,700,000.93;
 - (b) the Trust's initial monthly instalment was the sum of R197,411.24;
 - (c) the Trust's monthly mortgage instalment was reduced during 2009 to R105,000.00 after a lump sum payment of R10,700,000.00 had been paid directly into the mortgage bond by the third respondent. The loan period of two hundred and forty months remained unchanged after this payment.

It is also common cause that no instalments were paid by the Trust, since January 2011. That on 19 August 2010 this Court granted a restraint order in terms of Act 121 of 1998 against the third and fourth respondents and others under Case No. 6447/2010. Amongst other things, the order referred to any cash amounts owned and held by the respondents, whether directly or indirectly, including any cash amounts as might be found in any bank account held by any banking institution on behalf of the respective respondents.

- [6] The only issue to be considered by this Court is whether the applicant has proved a breach of the mortgage loan agreement.
- [7] The applicant's cardinal argument is that the Trust was obliged to pay the loan and it elected to make payments by stop order against the third respondent's personal bank account. Mr. Stokes S C, who appeared for the applicant, argued that the parties had agreed that the method of payment elected by the borrower would not in any way detract from the borrower's obligations to ensure that the Bank received the payments in terms of the agreement (paragraph 7.3 of the Mortgage Loan Agreement). He further argued that the third respondent was aware that no deductions were made from his personal bank account for eighteen months, but he did nothing about it.
- [8] The respondents' fundamental argument is that the applicant should have used the existing stop order to service the bond account at all times. Mr. Bedderson argued that the onus is on the applicant to prove the breach of the mortgage bond and the loan agreement on a balance of probabilities. He further argued that there were material contradictions in the applicant's affidavits with regard to the certificate of balance and the allegation that no bond repayments had been made in 2011. Finally he argued that this can only be cleared by oral evidence, referring the Court to the case of *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*. 1949 (3) SA 1155 (T).
- [9] Mr. Stokes responded by arguing that there were no contradictions in the applicant's papers and that the respondents had not challenged the breach of the mortgage loan agreement in the answering affidavit.
- [10] My considered view is that the points raised by the respondents regarding the breach of the mortgage loan agreement were not

supported by the facts, which are common cause.

- [11] I am satisfied that the applicant has established the breach of the mortgage loan agreement and that there were no contradictions in the applicant's papers.

In the result I make the following order:

1. Judgment is granted in favour of ABSA Bank Limited against the first and second respondents (as trustees of the Othandweni Family Trust) and the third and fourth respondents, all jointly and severally, for:

- (a) Payment of the sum of R6,553,916.91;
- (b) Interest thereon at the rate of 7.5%, capitalised monthly, from 21 July 2012 to date of payment;
- (c) Costs of suit on an attorney and client scale.

2. As against the first and second respondents, an order is granted declaring executable the immovable property described as:

(I) The farm Sunshine No. 17503, Registration Division FT, Province of KwaZulu-Natal, in extent 146,1807 (one hundred and forty six comma one eight zero seven) hectares, held by Deed of Transfer No. T273/06, subject to the conditions therein contained and subject to certain expropriations in favour of the Roads Department.

(ii) Portion 5 (of 4) of the farm Lot 37 No. 1294, Registration Division FT, Province of KwaZulu-Natal, in extent of 359,1915 (three hundred and fifty nine comma one nine one five) hectares, held by Deed of Transfer No. T63670/06, subject to the conditions therein contained and subject to the pre-emptive right in favour of Reynolds Brothers Limited No. 1974/002594/06 and subject to certain expropriations in favour of the Roads Department and more specially a servitude of restraint in favour of Illovo Sugar Limited No. 1906/000622/06 referred to and registered under Notarial Deed of Servitude No. K1396/04S.

NZIMANDE AJ

Appearances /

Appearances:

For the Applicant: Mr. A. Stokes S C

Instructed by : A. J. Johnston & Partners

Durban

C/o Stowell & Co.

Pietermaritzburg

For the Respondents : Mr. B. Bedderson

Instructed by : S.D. Moloi & Associates

Durban North

C/o Ngcobo Poyo & Diedricks Inc

Date of Hearing : 24 February 2014

Date Judgment delivered : 19 March 2014

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