

SOUTH AFRICA / JUDGMENT

ABSA Bank Ltd v Boshoff (2410/2012)

[2012] ZAECPEHC 58 (28 August 2012)

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COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

G Goosen

CASE / FILE NUMBER

2410/2012

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE, PORT
ELIZABETH)

CASE NO: 2410/2012

Date

Heard: 21 August 2012

Date

Delivered: 28 August 2012

NOT / REPORTABLE

In the matter between:

ABSA BANK LIMITED

.....Applicant

and

MARK GEORGE BOSHOFF

.....Respondent

JUDGMENT

GOOSEN, J:

This is an application for summary judgment in which the plaintiff alleges that it entered into a mortgage loan agreement with the defendant to finance the purchase of an immoveable property being Erf 7792, Motherwell, Port Elizabeth. A mortgage bond was passed in favour of the plaintiff and registered against the property. It is alleged that the balance of the principal debt, together with finance charges as at 28 May 2012, is an amount of R185,597.55. The plaintiff also claims

interest on the balance at the rate of 8.65% per annum and seeks an order declaring the property executable.

The defendant opposes the application for summary judgment and has filed an opposing affidavit setting out the essential basis of his defence. It is not disputed that the plaintiff and the defendant entered into a loan agreement and that the plaintiff advanced monies in terms of such loan agreement to the defendant. Defendant's counsel sought to make something of the fact that the advanced money was apparently paid to a third party but did not, appropriately, press the issue. It is also not in dispute that the defendant is obliged to make payment of monthly payments in redemption of the loan payable to the plaintiff and that in this regard the defendant has fallen into arrears. It is accordingly not disputed that the defendant is entitled to claim payment of the full balance due to it in terms of the agreements and as secured by the mortgage bond. There are no issues in dispute in respect of formal compliance with the provisions of the National Credit Act.

The defendant resists summary judgment however on the basis of the allegation that the loan finance and the mortgage bond were entered into by him pursuant to an illegal investment scheme and, accordingly, that the obligation sought to be enforced by the plaintiff arises from such illegal scheme. It is also suggested that by granting the orders sought by the plaintiff the property rights of persons who are not parties to the action may be affected and accordingly, in the absence of such parties, it is not appropriate to grant the relief sought. Defendant's counsel sought to rely heavily upon a judgment of the Free State High Court in a matter of Ditshego & Others v Brusson Finance (Pty) Limited & Others (an unreported judgment under case number 5144/2009, delivered on 22 July 2010) in which Jordaan J made certain findings in respect of an investment scheme operated by Brusson Finance (Pty) Limited which was found to be illegal. It was suggested in argument that the scheme operated by Brusson Finance (Pty) Limited in that matter is exactly the same scheme as is relevant in this matter and accordingly that the judgment of Jordaan J is relevant in relation to the description of the scheme as well as its lawfulness. I shall return to this aspect hereunder. First it is necessary to outline the basis of the defendant's defence as disclosed in the opposing affidavit to which he has deposed.

The defendant says that during March 2008 he came to hear about what he described as "an excellent investment opportunity". This involved a scheme operated by Brusson Finance CC1 (hereinafter referred to as Brusson). Brusson apparently advertised loan finance which could be made available to home owners in financial distress. Such loan finance provided by Brusson would be made available against the security of the home owner's property. The defendant was presented with two agreements. The one involved an offer to purchase a residential property. It was explained that the defendant as an investor in the scheme he would make an offer to purchase a residential property owned by a home owner seeking loan finance, that the purchase price would be financed by way of a loan agreement with a financial institution secured by a mortgage bond. The investor would enter into a further agreement of sale of the property in terms of which the investor would sell, by way of an instalment sale agreement sell the property back to the home owner. The home owner would remain in occupation of the property and

would be obliged to pay monthly occupational interest, payable to Brusson who would act as the investor's agent. From the proceeds of these instalments Brusson would pay the mortgage payments due to the financing bank and the investor would receive a small commission.

Although this is the description given of the investment scheme the transactions actually entered into by the defendant differ. In this instance the investor purchased a residential property from home owners, who were allegedly themselves investors in the scheme, and then on-sold the property to a director of Brusson rather than back to the original home owner.

As indicated the defendant contended that the investment scheme is illegal, based upon a finding by the Free State High Court. The defendant further contended that Brusson has been liquidated and that various actions and proceedings are pending in the Gauteng High Court in relation to the scheme. It was suggested that in those proceedings the question as to the validity of the mortgage bonds, based upon a consideration of reckless credit, was being raised and for that reason it was necessary in this instance to investigate the issue of reckless credit.

The defendant's reliance upon the judgment of the Free State High Court is misplaced. In that matter former home owners who had sought loan finance from Brusson made application to set aside, as illegal, the transactions in terms of which they were divested of ownership of their property. The court, after finding that particular aspects of the scheme rendered it illegal, set aside those transactions and ordered restitution to the home owner. Significantly however restitution was ordered on a basis that recognised, and indeed protected, the rights of the bond holder who had, by way of a loan agreement, furnished the finance by which the investor had purported to purchase the home owner's property. Although the judgment is clear about the features of the investment scheme which are unlawful it does not in any manner suggest that the obligations that arise from the mortgage loan agreement are not enforceable by the bond holder. Thus whilst the judgment suggests that features of the investment scheme operated in this matter which bear a resemblance to that which applied in the Free State may be a doubtful legality, the judgment is not authority for the proposition that the bond holder's rights cannot be enforced against the defendant investor in this instance.

In my view that must be so. There is no suggestion on the papers that the plaintiff was in any manner aware of the terms of the investment scheme nor is there any suggestion that the plaintiff or any of its representatives approved any feature of the Brusson investment scheme. The particular transactions engaged in in this matter indicate the contrary. In the first instance the defendant purchased an immovable property from the sellers of that property. Loan finance was obtained from the plaintiff in order to finance the purchase price. A mortgage bond was entered into and registered against the property in order to secure the plaintiff's interests in securing repayment of the loan. The defendant then entered into an agreement with Brusson Finance in terms of which Brusson acted as its agent for the collection of occupational interest in respect of the property and, as its agent, made payment of the monthly mortgage bond instalments. The defendant also entered into an instalment sale agreement in respect of the property in terms of which it sold the property in instalments to a director of Brusson upon certain terms and conditions. What bearing that agreement could have upon the defendant's

obligation to make payment of the mortgage bond instalments due to the plaintiff is nowhere explained on the papers and there is accordingly no reasonable or bona fide legal basis set out in the defendant's opposing papers upon which it can be said that the defendant may avoid liability to the plaintiff on the basis of the transactions relevant to the investment scheme.

The defendant's opposing papers set out vague allegations as to the fact that there are other proceedings pending in the Gauteng High Court relating to the Brusson investment scheme. It is for instance suggested that proceedings are under way in which the defendant is a party in which the investors seek some form of restitution in respect of their involvement in the scheme. A bald allegation of this nature does not establish a bona fide defence. The defendant is represented by a firm of attorneys based in Gauteng. If indeed there are proceedings involving the defendant and the plaintiff in which the question as to the enforceability of the plaintiff's rights as against the defendant are at issue then such evidence ought to have been properly placed before this court. The failure to do so and the defendant's reliance upon a vague allegation of some form of pending proceedings reflects poorly on the defendant.

A defendant who seeks to resist an application for summary judgment must satisfy the court that the facts alleged if proved at trial will constitute an answer to the plaintiff's claim. Whilst it is not necessary to formulate the basis of the opposition with precision (see *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 C – D; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 184 C), it is nevertheless necessary that the basis of the defence alleged must be sufficiently clear to enable the court

to conclude that a defence has been set out which if proved at trial would constitute a good defence to the claim (*Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 933).

In my view it does not appear from a consideration of the defendant's opposing affidavit that the defendant has a bona fide defence to the plaintiff's claim.

A final aspect raised in argument was that of an alleged non-joinder. It was argued that in the event that judgment is granted and the court authorises execution against the immovable property that such execution would necessarily impact upon the property rights of former home owners who may have been divested of their property rights by operation of the investment scheme. This ground of opposition was not raised in the defendant's opposing papers and appears to have been seized upon belatedly as an argument to be advanced from the Bar. Even assuming that the argument ought to be considered, it does not avail the defendant. It is common cause on the papers that the immediate former home owners from whom the defendant purchased the property are themselves alleged investors in the investment scheme. There is nothing in the papers to indicate who the original home owners were and whether the property is now being occupied by those home owners or others who are in a position of tenants in relation to the defendant who is the registered owner of the immovable property at issue in this matter. Whilst it may be so that the operation of an illegal investment scheme which has had the effect of divesting persons of their ownership of residential property and

may well have thereby prejudiced them, the issue of redress for such persons is not at issue in this matter. The plaintiff has a valid and unanswered claim against the Defendant and it is entitled to judgment. In the light of the security it holds it is, in the circumstances of this matter, also entitled to an order permitting execution against the property.

In the result summary judgment is granted against the defendant and the following orders will issue:

The defendant is ordered to pay to the plaintiff the sum of R185,597.55;

The defendant is ordered to pay interest on the aforesaid sum at the rate of 8.65% per annum, from 29 May 2012 to date of payment thereof;

The hypothecated property, being Erf 7792, Motherwell, situated in Nelson Mandela Bay Municipality, division of Uitenhage in the province of the Eastern Cape is declared executable; and

The defendant is ordered to pay plaintiff's costs of suit on the scale as between attorney and client.

G GOOSEN

JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE PLAINTIFF: Mr Richards, instructed by
McWilliams & Elliot Inc.

FOR THE DEFENDANT: Mr Marais, instructed by
Du Toit's Attorneys, c/o
Heine Ungerer Attorneys

1The Defendant refers in his affidavit to Brusson Finance CC whereas the copies of the agreements all refer to Brusson Finance (Pty) Ltd. I shall assume in Defendant's favour that the reference to a close corporation is an error.

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Prepared on 10 October 2026 · Esheria