

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd v Carinus and Others (13358/2006) [2007] ZAWCHC 84 (27 March 2007) [2007] ZAWCHC 84

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

13358/2006

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 13358/2006

DATE: 27 MARCH 2007

In the matter between

ABSA BANK LTD Applicant

And

RENE SUSANNA CARINUS 1st Respondent

JOHANNES J P CARINUS 2nd Respondent

PETRUS A M CARINUS 3rd Respondent

JUDGMENT

BOZALEK, J: [1] This is an application for summary judgment against effectively two respondents, a trust, which is cited as the three trustees in their capacity as such. The second respondent is one of the trustees who is sued in his capacity as surety for the principal debt which is an overdrawn bank account. [2] No opposing affidavit was filed and the only point taken by Mr Verster for the respondents is that the application for summary judgment in the notice proper and the affidavit refers to an application for summary judgment against the respondent. Therefore there is no certainty as to against which respondent the summary judgment is being

sought, or which cause of action is relied on because two inter related causes of action are involved and the affidavit does not specify which. [3] Ms Forbes argues that this is a technical defence, that it is clear against whom the applicant is seeking summary judgment, namely both respondents, and that this error should be condoned. She relies on the case of *Standard Bank South Africa Ltd v Roestof* 2004(2) SA 492 (W) where the Court granted summary judgment in circumstances where there was one defendant and the affidavit or application referred to "defendants". [4] It is a technical defence but equally it is trite law that the summary judgment remedy is a far-reaching one and that the

provisions of the rule must be strictly complied with. One sees from the papers in this matter that at an earlier stage there was an application for default judgment. There the plaintiff made it quite clear against whom they were seeking default judgment, namely first and second defendants jointly and severally, the one to pay the other to be absolved. [5] I have little doubt that an error was committed when the summary judgment application and the affidavit were drafted, but nonetheless on any reading of those documents it is not clear whether the application is brought against first or second respondent and it does not indicate that it is brought against both respondents. [6] In the circumstances, there has not been compliance with the provisions of Rule 32 and, in my view, it is not open to this Court to condone the error by interpreting the affidavit or the application more liberally so as to include both respondents. [7] In the circumstances, the applicant is not entitled to summary judgment against either respondent. As far as costs are concerned,

there are indications that this may be the only defence raised by the second respondent. If that is the case, I am not sure that the respondents would be entitled to their costs. I therefore propose to order that the trial Court will decide who should bear costs. Therefore the order that I make is that the summary judgment application is refused. Costs of this application are to stand over for later

determination.

BOZALEK, J

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[1] This is an application for summary judgment against

effectively two respondents, a trust, which is cited as the three trustees in their capacity as such. The second respondent is one of the trustees who is sued in his capacity as surety for the principal debt which is an overdrawn bank account.

[2] No opposing affidavit was filed and the only point taken by Mr Verster for the respondents is that the application for summary judgment in the notice proper and the affidavit refers to an application for summary judgment against the respondent. Therefore there is no certainty as to against which respondent the summary judgment is being sought, or which cause of action is relied on because two inter related causes of action are involved and the affidavit does not specify which.

[3] Ms Forbes argues that this is a technical defence, that it is clear against whom the applicant is seeking summary judgment, namely both

respondents, and that this error should be condoned. She relies on the case of Standard Bank South Africa Ltd v Roestof 2004(2) SA 492 (W) where the Court granted summary judgment in circumstances where there was one defendant and the affidavit or application referred to "defendants".

[4] It is a technical defence but equally it is trite law that the summary judgment remedy is a far-reaching one and that the

provisions of the rule must be strictly complied with. One sees from the papers in this matter that at an earlier stage there was an application for default judgment. There the plaintiff made it quite clear against whom they were seeking default judgment, namely first and second defendants jointly and severally, the one to pay the other to be absolved.

[5] I have little doubt that an error was committed when the summary judgment application and the affidavit were drafted, but nonetheless on any reading of those documents it is not clear whether the application is brought against first or second respondent and it does not indicate that it is brought against both respondents.

[6] On the circumstances, there has not been compliance with the provisions of Rule 32 and, in my view, it is not open to this Court to condone the error by interpreting the affidavit or the application more liberally so as to include both respondents.

[7] In the circumstances, the applicant is not entitled to summary judgment against either respondent. As far as costs are concerned,

there are indications that this may be the only defence raised by the second respondent. If that is the case, I am not sure that the respondents would be entitled to their costs. I therefore propose to order that the trial Court will decide who should bear costs.

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BOZALEK, J

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