

SOUTH AFRICA / JUDGMENT

ABSA Home Loans Guarantee Company (RF) (PTY) LTD and Another v Badenhorst and Another (90270/18) [2023] ZAGPPHC 29 (19 January 2023)

[2023] ZAGPPHC 29

COURT

North Gauteng High Court, Pretoria

BEFORE

Kuny

CASE / FILE NUMBER

90270/18

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case No. 90270/18

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

JUDGE KUNNY

19

JANUARY 2023

In

the matter between: ABSA HOME LOANS GUARANTEE
COMPANY
(RF)
(PTY)
LTD
First Plaintiff
ABSA
BANK
LIMITED
Second Plaintiff
and
JOHAN PIETER
BADENHORST
First Defendant
(ID:
5[...])
SUSANNA WILHELMINA
BADENHORST
Second Defendant
(ID:
7[...])

JUDGMENT

KUNY J:

- 1) The first and second plaintiff instituted action on 14 December 2018 against the first and second defendant for payment of monies lent and advance in respect of a loan agreement allegedly concluded on 30 May 2007. They claim payment of an amount of R1 629 191,56 and interest thereon at the rate of 8.38% from 21 September 2018.
- 2) The loan agreement, according to an unsigned agreement annexed to the plaintiffs' particulars of claim, was entered into by the defendants and Sanlam Huis-Lenings 101 (Eiendoms) Beperk, Registration No 2[...]. The plaintiffs allege in paragraph 5 of their particulars of claim that during 2008 the second plaintiff acquired the assets and liabilities of this entity.
- 3) The plaintiffs also seek to declare executable a property owned by the defendants described as Section No 1 on Sectional Plan No. SS 7[...], in the scheme R[...] R[...], Erf 1[...] R[...], City of Tshwane Metropolitan Municipality ("the property").
- 4) The plaintiffs rely on a written indemnity alleged to have been signed by the defendants. Clause 1.1 states as follows:

1.1 In consideration for Absa Home Loans Guarantee Company (RF) Proprietary Limited, registration number 2[...], and/or all persons who take transfer of, or acquire its rights and obligations under this Indemnity ("the Guarantee SPV") guaranteeing my/our obligations under a loan agreement as amended, substituted by a new agreement or replaced from time to time (the

“Loan”) entered into between me/ourselves and Absa Home Loans, a division of Absa Bank Limited, registration number 1[...], and/or all persons who take transfer of, or acquire its rights and obligations (the “Lender”) in terms of a guarantee as amended, substituted by a new agreement and/or replaced from time to time, given by the Guarantee SPV to the Lender (the “Guarantee”) I/we, the signatories below, [underlining added]

- 5) The plaintiff alleges that the signed copy of the indemnity has been mislaid and they annex to their particulars of claim an unsigned copy of a “similar indemnity”.
- 6) The plaintiffs further allege that pursuant to the conclusion of the loan agreement and the above indemnity, the defendants caused an indemnity mortgage bond to be registered over the property in favour of the first plaintiff. A copy of a registered mortgage bond headed entitled “DEELDEKKINGSVERBAND WAARKRAGTENS ‘N EENHEID VERHIPOTEKEER WORD” is annexed to the particulars of claim.
- 7) The following further steps were taken in the matter after the issue of summons:
 - a) On 13 April 2019 the defendants entered a notice of intention to defend.
 - b) On 22 July 2019 the plaintiffs applied for summary

judgment.

- c) The defendants delivered an opposing affidavit, purportedly signed on 8 June 2021.
- d) On 14 October 2019 the court granted the defendants leave to defend in the summary judgment application.
- e) On 13 November 2019 the plaintiff delivered a notice of bar.
- f) On 14 November 2019 the defendants served a notice in terms of Uniform Rule 35(14). This was responded to by the plaintiffs on 7 May 2020.
- g) On 8 February 2021 the plaintiffs applied for default judgment against the defendants.
- h) On 21 September 2021 the defendants brought an application in terms of Rule 27 to lift the notice of bar and to permit them to file a plea in the matter. The defendants request in their application in terms of Rule 27 that their affidavit opposing summary judgment should be read as their plea.
- 8) The plaintiffs contend that the defendants are ipso facto barred from pleading to the action instituted by them. They have applied for default judgment against the defendants inter alia for the following relief:
 - a) Payment of the amount of R1 629191,56.
 - b) Interest on the aforesaid amount at a rate of 8.38% per annum from 21 September 2018 to date of payment, both dates inclusive.

- c) An order declaring the property specially executable.
- 9) The defendants opposed the plaintiffs' application for default judgment and have filed a detailed affidavit in this regard. They take issue in their opposing affidavit inter alia, with the fact that the plaintiffs are not in possession of and were unable to annex to their particulars of claim signed copies of the loan agreement, the indemnity and the guarantee relied upon. They also challenge the 2002 Master Agreement in terms of which the second plaintiff is alleged to have acquired the assets and liabilities of the lender in terms of the loan agreement. These documents are not admitted by the defendants who allege that the plaintiffs are unable to substantiate the existence, validity or terms of these agreements.

- 10) The defendants contend the following in paragraph 6.5 of their answering affidavit:

6.5 In the light of the aforementioned it is my respectful submission that the Plaintiffs' lack to provide documentation facts, (sic) boils down to educated guesswork rather than reliance on evidence adduced and therefore the Honourable Court should with respect dismiss this Application.

- 11) The plaintiffs annexed to their particulars of claim a certificate of name change issued on 26 November 2011 by the Registrar of Companies and Close Corporations certifying that "Sanlam Home Loans Guarantee Company (Proprietary) Limited", Registration Number 2[...], changed its name to "Absa Home Loans Guarantee Company (Proprietary) Limited". It is therefore demonstrated that the first plaintiff is the mortgagee in respect of the bond registered over the property.
- 12) The lender in terms of the unsigned loan agreement relied upon by the plaintiffs is "Sanlam Huis Lenings 101 (Eiendoms) Beperk, Registrasie No. 2[...]. However, the lender in terms of the mortgage bond ("the uitlener"), is Sanlam Home Loans 101 (Pty) Ltd, Registration No 2[...]. (being the entity whose assets and liabilities the second plaintiff is alleged

to have acquired). These entities, based on the registration numbers of the said companies, appear to be different lenders.

- 13) The certificate of balance is given in respect of the following companies:

- a) Absa Bank Limited, registration number 1[...]. (the second plaintiff).
- b) Absa Home Loans Guarantee Company (RF) (Pty) Ltd, registration number 2[...]. (the first plaintiff).

- 14) No certificate of balance has been furnished in respect of the purported lender in terms of the loan agreement, ie. Sanlam Huis Lenings 101 (Eiendoms) Beperk, registration no 2[...].
- 15) The plaintiffs in their particulars of claim expressly rely on the loan agreement to substantiate their cause of action. The alleged indebtedness is supported by the indemnity and the guarantee. None of these documents allegedly signed by the defendants have been presented to the court.

- 16) The plaintiffs' cause of action is also supported by the indemnity mortgage bond. However, anomalies arise from the fact that prima facie, the lender in terms of the loan agreement is not the same entity as the lender referred to either in the indemnity or in the mortgage bond. Furthermore, prima facie, the second plaintiff did not acquire the assets and liabilities of the lender referred to in the loan agreement.
- 17) The defendants must show good cause in order to satisfy the court that the bar should be lifted and that they be permitted to file a plea. In order to do so, they must provide a reasonable explanation for their non-compliance with the rules of court. The explanation must be sufficient to enable the court to understand how the default came about and to assess their conduct and motives. Furthermore, the defendants must show that they have a bona fide defence to the action. This requirement is satisfied if facts are set out or allegations are made that if proved at the trial, would constitute a defence.[1]
- 18) The explanation advanced by the first defendant for the delay in the filing of the defendants' plea is lack of financial means, ill-health and problems caused by the Covid lockdown. I am prepared to accept the defendants' explanation for the purposes of this aspect of the enquiry. Although the defendants have been remiss in the filing of their plea, their defence was fully set out in their affidavit filed in opposition to summary judgment in or about June 2021 and this defence was accepted by the court as a basis on which to grant leave to defend.
- 19) Not all the delay has been attributable to the defendants. It will be seen from the history of the matter set out above that a period of approximately 15 months elapsed from the serving of the notice of bar and the application for default

judgment.

- 20) I cannot ignore the fact that in the summary judgment application the court determined that the defendant should be granted leave to defend. The court could only have come to this conclusion on the basis that the defendants had set out a bona fide defence.
- 21) The defendants refer to the fact that the first plaintiff previously instituted proceedings against them under Case No 85524/14. In that action, application was also made for summary judgment. However, the matter was withdrawn by the first plaintiff for reasons that have not been canvassed before me.
- 22) In my view, a plaintiff seeking default judgment must ensure that its cause of action is correctly pleaded and that it is consistent in all respects. As pointed out above, anomalies arise in regard to the entity alleged to be the lender in terms of the loan agreement. This agreement forms the basis on which the plaintiffs' pleaded case rests. The anomalies may be due to errors in pleading or may relate to circumstances that require further explanation. In my view however, they preclude the grant of default judgment against the defendants at this stage.

- 23) In RGS Properties (Pty) Ltd v Ethekewini Municipality 2010 (6) SA 572 (KZD) the court, quoting various authorities with approval, stated at paragraph 10:

“... the court should not scrutinise too closely whether the defence is well founded, as long as, prima facie, there appears to the court sufficient reasons for allowing the defendant to lay before court the facts he thinks necessary to meet the plaintiff’s claim, and that, where a defendant has never clearly acquiesced in the plaintiff’s claim, but persisted in disputing it, the court should be slow to refuse him entirely an opportunity to have his defence heard.”

- 24) I am persuaded in light of all the circumstances, that the bar should be lifted. In paragraph 22 of the plaintiffs’ application for default judgment the following is alleged:

Pursuant to the conclusion of the loan agreement and the indemnity, the First and Second Defendants caused a mortgage bond to be registered over the immovable property in favour of the First Plaintiff. A copy of the mortgage bond is annexed to the Particulars of Claim as Annexure “EDT3”. The material express, alternatively tacit and/or implied terms of the mortgage bond is pleaded in paragraph 13 of the Particulars of Claim.

- 25) In answer thereto the defendants reply as follows:

AD PARAGRAPH 22

The content thereof is admitted, in as far as it pertains to a mortgage bond that was registered over the Property. I however deny, that the Plaintiffs caused the mortgage bond to be registered over the Property or that the Plaintiffs have any right or title in terms thereof, for the reasons fully set out herein.

- 26) The above statement made by the defendants is contradictory in that they appear to both admit and deny the registration of the mortgage bond over the property. A plea containing these allegations would embarrass the plaintiffs and in my view, would be excipiable. There is no basis on which to permit the defendants’ affidavit opposing summary judgment to stand as their plea. They are required to file a plea to the plaintiffs’ particulars of claim strictly in accordance with the order that I propose to give.

COSTS

- 27) The court has a wide discretion in relation to costs. The defendants seek an indulgence in their application to lift the bar. Delay in the matter has been caused by the problems experienced by the defendants. I do not exclude the fact that the defendants appear to be indebted to the first plaintiff in respect of the mortgage bond. However in my view, any indebtedness that may arise from the mortgage bond is not pleaded in a manner that would sustain an application for default judgment. Accordingly, it would be appropriate to order that costs in both applications be in the cause.

- 28) I accordingly grant the following order:

1 The plaintiffs’ application for default judgment is dismissed.

2 The defendants' application to lift the bar is granted.

3 The defendants are ordered to file a plea to the plaintiffs' particulars of claim within 14 days court days of the date on which this judgment is uploaded to Caselines.

4 The costs of both applications shall be in the cause.

KUNY J

JUDGE OF THE HIGH COURT

NORTH GAUTENG DIVISION

Date of hearing: 26 July 2022

Date of judgment: 19 January 2023

Plaintiffs' counsel: Adv J Eastes

Plaintiffs' Attorneys: Delport van den Berg Inc, email: liana@delberg.co.za

Defendants' counsel: Adv P.H. O'Halloran

Defendants' Attorneys: D S Goosen Attorneys, email: info@goosenprok.co.za

[1]Silber v Ozen Wholesalers (Pty) Ltd_1954 (2) SA 345 (A)

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