

SOUTH AFRICA / JUDGMENT

First Rand Bank Limited v Ahmed (5400/2009) [2017] ZAKZDHC 16 (31 March 2017) [2017] ZAKZDHC 16

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Henriques

CASE / FILE NUMBER

5400/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 5400/2009

In

the matter between:

FIRST
RAND BANK
LIMITED Plaintiff
and
PAMELA
SHEIK
AHMED Defendant
ORDER
[1]

Judgment is granted in favour of the plaintiff as follows:

1.1 The defendant is directed to make payment of R 955 795,81 together with interest calculated daily on such amount at a rate of 13,4% per annum and compounded monthly from 1 March 2009 to 25 March 2009 and 12,4% from 26 March 2009 to date of final payment, both dates inclusive.

1.2 The defendant is directed to pay the plaintiff's costs of suit on an attorney and client scale.

[2]

The defendant's counterclaim is dismissed with costs.

[3]

Paragraph (c) of the order,[1] being the order to declare the immovable property executable is adjourned sine die.

The plaintiff is directed to serve and file a supplementary affidavit providing an updated valuation report in respect of the immovable property (not more than six months' old) and an updated statement excluding all legal costs.[2]

JUDGMENT

HENRIQUES J

Introduction

[1] This is an action against the defendant in terms of which the plaintiff seeks a monetary judgment together with costs and an order declaring an immovable property executable.

Pleadings

[2] It is common cause that the plaintiff pursuant to a mortgage loan agreement registered a mortgage bond over the immovable property

which forms the subject matter of the action. It is further common cause that even though the defendant applied for a loan for the full purchase price and transfer costs, the mortgage loan agreement only made provision for the full purchase price. On 13 December 2007, the plaintiff passed a mortgage bond over the immovable property as security for the monies loaned to the defendant in the sum of R960 000 together with interest thereon as covering security.

[3] The terms of the mortgage loan agreement are essentially common cause. It is further common cause that the defendant, in breach of the mortgage loan agreement, failed to pay the monthly instalments due and made only one payment. Subsequent to the signing of the purchase and sale agreement and prior to the registration of the mortgage bond, the defendant discovered that the immovable property had been vandalised as the seller had left the property vacant.

- [4] The defendant filed a plea and counterclaim and pleaded that subsequent to signing the purchase and sale agreement, but prior to registration of the transfer and mortgage bond, she discovered that the immovable property had been vandalised as it had been left vacant by the seller.
- [5] As a consequence her husband, Mr Sewpersad contacted the estate agent as well as the transferring attorneys and bond registration attorneys advising them of the damages. The response from the transferring attorneys was that the seller would make good these damages to the property before transfer and registration of the bond could take place.
- [6] The defendant pleaded that she sought an undertaking from the bond registration attorneys that the transfer would be placed on hold until such time as the property was restored to the condition it was in at the time the purchase and sale agreement was concluded. In breach of the undertaking, the bond registration attorneys as well as the transferring attorneys refused to place the transfer or bond registration on hold or delay it and instructed the defendant the day before the transfer was to occur to obtain an interdict to stop the transfer and registration of the mortgage bond. The defendant was unable to do so and as a consequence the transfer and bond registration went through.
- [7] The defendant pleads that she has suffered damages in the sum of R 240 000,00 as a consequence of having to effect repairs to the property. It is for these reasons that despite receiving the section 129 notice and being informed of the breach, she has not made payment of any bond instalments apart from one instalment which she made under protest.
- [8] The defendant pleads that the summons is premature as the matter was referred to the banking ombudsman in October 2008 and the ombudsman has not finally decided the issue. It is for these reasons that the defendant pleads that she is exercising a lien over the property until such time as the plaintiff pays her damages or alternatively the damages she sustained be set off against the monthly bond instalments. A counterclaim to that effect was delivered simultaneously with the plea.
- [9] When the trial commenced it was placed on record that the defendant bore the onus to prove the defence contained in the plea and counter claim and the following was admitted namely:
- [9.1] the terms of the loan agreement;
- [9.2] that the bond was registered;
- [9.3] that there was compliance with the provisions of the National Credit Act;
- [9.4] that the defendant was in breach of the terms of the loan agreement.

The evidence

- [10] The plaintiff called no witnesses and the defendant called Mr Sewpersad the defendants' common law husband to testify.

[11] Even though the bank official and the person from the bond registration attorneys were subpoenaed to testify by the defendant,

the defendant chose not to lead their evidence and graciously made such witnesses available to the plaintiff. The plaintiff

elected not to call them. The defendant's husband testified that he dealt with all matters on behalf of the defendant

and liaised with the relevant banking officials. He testified that the plaintiff gave an undertaking that the bond would not be

registered until the property was restored to the same condition it was in at the time of conclusion of the purchase and sale agreement.

[12] During the course of argument, however Mr Chetty who appeared for the defendant submitted that the pleadings were defective in light of the fact that the loan agreement was not put up and that the plaintiff relied on the registration of the bond for its cause of action. He made reference to the fact that the terms as pleaded in the summons and the declaration were not contained in the actual covering bond annexed to the papers and it must have been contained in the loan agreement which was not put up.

[13] These submissions flew in the face of what was placed on record at the commencement of the trial. The terms of the loan agreement and the fact that the defendant was in breach thereof was not placed in dispute. What was placed in dispute was the fact that a certificate could be put up by a manager evidencing the amount owing. It was also not in dispute that the plaintiff had complied with the provisions of section 129. Mr Chetty submitted however, that in addition to complying with the provisions of section 129, the plaintiff was compelled in terms of the loan agreement to comply with the provisions of clause 4.26 which required the plaintiff to give the defendant written notice to remedy the breach within 10 days failing which they would institute an action.

[14] In addition the defendant admitted that if the summons was premature then they accept that the counterclaim and plea would also be premature. The defendant also challenged the terms of para 4.6 of the particulars of claim.

[15] During the course of argument Mr Chetty acknowledged that for the purposes of the plea and counter claim should I find that the summons was not premature, then for the purposes of the plea and counterclaim one must accept that a valid loan agreement exists and further that the bond was validly registered.

Issue

- [16] The issue for determination in this matter is whether or not the plaintiff through its employees gave an undertaking not to register the bond until such time as the property had been restored to the condition it was in at the time of signature of the purchase and sale agreement.

Analysis

- [17] The plaintiff, the bond holder's claim arises from the defendant's breach of the mortgage loan agreement. The terms of the loan agreement are common cause and it is also common cause that the defendant made only one payment towards the mortgage bond. It is also common cause that the monies were advanced and the mortgage bond was registered over the immovable property which served as security for the monies loaned.

- [18] It is not disputed that the plaintiff complied with its obligations in terms of the mortgage loan agreement. The defendant accepts that the monies were loaned and advanced but submits that the bond ought not to have been registered. Even though the defendant denies that a certificate (clause 4.6 of the declaration) was agreed to, it cannot be disputed that this is the amount that is presently owing in terms of the loan agreement and the loan agreement came into existence. The defendant's defence is that the bond ought not to have been registered as there were defects in the immovable property.

- [19] The defendant's witness who is her husband confirmed during his evidence that he was at all times liaising with the transferring

attorneys and not the bond registration attorneys. It was apparent that he did not understand the difference between the bond registration attorneys and the transferring attorneys. This is clear from his evidence.

- [20] Moreso, he acknowledged that he was advised by the transferring attorneys to obtain an interdict to prevent the transfer from going through. On his own version, he was in Underberg on 10 December 2007 when he was advised of this by the transferring attorneys and in his view, it was too late to do anything about this. However, this evidence is contradicted by his later evidence during the course of the trial.

- [21] It was apparent that when the defects in the property were noted by the defendant and her husband, he contacted the transferring

attorneys and the estate agent. They facilitated negotiations between him and the seller in terms of which the seller was to make good the damages. In fact, the defendant's witnesses' evidence is that he was contracted to do the electrical repairs and was paid for this and also further repairs. These monies, for the cost of the repairs, were reimbursed to him from the monies due to the seller.

- [22] However, things appeared to have unravelled in regard to the repairs to the alarm system and the roof. Issues arose between the parties as a consequence of which the defendant then took the stance that the transfer must be stopped. At all times, contrary to what was put to Ms Suleman, he was liaising with the transferring attorneys and the estate agent and not the bond registering attorneys. In addition, he chose not to call Mrs Logie Budram to confirm his version relating to the plaintiff giving an undertaking.
- [23] Even though the defendant's witness appears to have contacted the bond registering attorneys, Vanidha Naik & Associates, the response from the bond registration attorneys was to contact the transferring attorneys. The transferring attorneys according to the witness refused to stop the transfer. However, this is contradicted by his evidence that he was told that should he wish to stop the transfer, he had to obtain a High Court interdict to do so.
- [24] It also appears to be common cause on the papers that the defendant and her husband took occupation of the premises to prevent further vandalism to the property. In addition, the defendant acknowledges that he took money from his business and injected it into the property to make it what he termed "habitable". He also appears to have accepted that he was required to make payment in terms of the mortgage loan agreement as one payment was made.
- [25] His version that this was done only on the advice of the transferring attorneys can safely be rejected. The witness and the defendant are fully aware of the implications of accepting the monies and signing the mortgage loan agreement. In fact, an acknowledgement of this appears to be the fact that after the transfer had been registered, the defendant and her common-law husband instituted an action against the seller for the balance of the monies owing in respect of making good the damages.
- [26] Ms Suleman, a conveyancing attorney of some 10 years' experience confirmed that the mortgage bond was registered to serve

as security for the monies loaned. In addition she acknowledged that in terms of the voetstoets clause in the purchase and sale agreement the purchaser takes the property as is. The function of the bond registering attorneys is to register the mortgage bond. Ms Suleman testified that once the mortgage loan agreement is signed and registration of the bond goes through, then the plaintiff has performed in terms of the obligation and the purchaser is liable to comply with the terms of the mortgage loan agreement. In addition there is no obligation on the bond registering attorneys to prevent the registration of transfer going through and the registration of the bond going through under these circumstances.

- [27] It was put to Ms Suleman during the course of her evidence that the facts of this matter are such that the defendant had instructed not to proceed with the registration of the mortgage bond until such time as the issues in relation to the defects to the property was sorted out. She submitted that under those circumstances it would then be obligatory for the bond registration attorneys not to proceed with the registration of the mortgage bond until such time as instructions were given to it to do so. What was not put to Ms Suleman was the fact

that on the facts of this matter the defendant was liaising with the transferring attorneys who had indicated to him that if he wanted to stop the transfer of the immovable property and registration of the mortgage bond, he had to obtain a court interdict.

[28] During the course of the trial the plaintiff elected not to call any witnesses and the defendant called her common law husband to testify only. Logie Budram who is employed by the plaintiff and Dylan Naik were made available to the plaintiff to be called as witnesses. However the plaintiff declined to do so.

[29] Given the evidence presented in totality and the version presented by the defendant, I am unable to accept that the plaintiff's

representative gave an undertaking to stop the registration of the bond and thus owed the defendant a duty not to proceed to register

the bond.

[30] It must also follow that I do not agree with the submission that a certificate of balance was not agreed to by the defendant. It is not in dispute that the loan agreement was signed by the defendant and therefore caveat subscriptor would apply. In addition the defendant acknowledged she was in breach of the home loan agreement as she had only effected one payment and had failed to pay any further monthly instalments and further acknowledged receipt of the section 129 letter.

[31] As regards the defence that the summons and counterclaim is premature, it is evident from the pleadings that the Banking Ombudsman dismissed the complaint on 16 July 2008. The defendant indicated that she was entitled to make further representations which she has done. The issues which have been referred to the Ombudsman are contained in para 23[3]. One of the issues is the very same as the one which this Court has to decide is whether an undertaking was given by the plaintiff. The second relates to the failure to include the transfer costs in the amount of the monies advanced in terms of the loan agreement.

[32] In my view the latter is not a live issue which results in the summons being premature. As I am of the view that on the evidence

presented, no undertaking was given by the plaintiff not to proceed with the bond registration. On the defendant's version, all the evidence points to the defendant allowing the transfer to go through and the bond to be registered as a consequence of the advice he was given by the transferring attorneys. In addition he was advised to obtain an interdict to stop the transfer. The defendant was content to allow the transfer to go through when he was reimbursed for the damages, it was only when the transferring

attorneys were not able to facilitate the seller paying for the damages that the defendant wanted the undertaking to stop the transfer.

[33] In addition on the evidence, it would also appear that the defendant's husband utilised monies from his business to make

good the damages and the defendant has not suffered any damages. It is correct that the plaintiff's case essentially is unchallenged. The crux of the issue which this court has to decide is whether the plaintiff owed either an express, implied, or tacit duty contractually to the defendant not to register the mortgage bond.

[34] Having regard to the witnesses' evidence presented, it is clear that the defendant liaised with the transferring attorney who in turn facilitated negotiations between the seller and the defendant to make good damages to the property. In fact the defendant was reimbursed for costs of certain repairs. Having regard to the documents put up by the defendant, it is clear he was told on 10 December that if he wanted to stop the transfer from proceeding, he would have to interdict the transfer. In addition the defendant was aware that his rights of recourse lay against the seller and/or the transferring attorney.

[35] What is further noteworthy about the matter is that the transferring attorneys appear to have been liaising constantly with the defendant's husband. The transferring attorneys, Mooney Ford & Partners are not a party to the proceedings.

The order to declare the immovable property executable

[36] At the hearing of the matter in September 2015 the plaintiff's counsel handed up exhibit "E" which are the bank statements for the period through December 2012 to 25 July 2015. Having regard to such printout it would appear that legal fees and legal costs have been debited to the mortgage bond account. It is for these reasons that the order in paragraph 3 will have been issued. In addition the exhibit "D", which is the valuation report, renovations commenced to the immovable property and the valuator had regard to the old valuation as internal access to the premises was only gained on 26 November 2007. From the evidence presented at the trial it is evident that the renovations which the defendant's husband testified to may be complete at this point in time and an updated valuation accompanied by an affidavit of the valuator is necessary for such relief.

Conclusion

[37] For the reasons aforementioned in the judgment I grant the following orders. Judgment is granted in favour of the plaintiff as follows:

37.1 The defendant is directed to make payment of R 955 795,81 together with interest calculated daily on such amount at a rate of 13,4% per annum and compounded monthly from 1 March 2009 to 25 March 2009 and 12,4% from 26 March 2009 to date of final payment, both dates inclusive.

37.2 The defendant is directed to pay the plaintiff's costs of suit on an attorney and client scale.

[38] The defendant's counterclaim is dismissed with costs.

[39] Paragraph (c) of the order, being the order to declare the immovable property executable is adjourned sine die. The plaintiff is directed to serve and file a supplementary affidavit providing an updated valuation report in respect of the immovable property (not more than six months' old) and an updated statement excluding all legal costs.

Case Information Date of argument : 26 August 2013 & 7,8 September 2015 Date of judgment : 31 March 2017 Appearances Counsel for Plaintiff : Adv. U. Lennard & A. Escott-Watson Instructed by : Glover Incorporated Suite 905, 9th Floor Old Mutual Building 300 Anton Lembede Street Durban Docex 252, Durban (Tel) 031-301 1539 Ref: Mat 18444/KZN Counsel for Defendant : Mr T. Chetty Instructed by : Theyagaraj Chetty Attorneys 296 Randles Road Sydenham (T) 031-208 0527 (F) 031-208 0527 Ref: Mr T. Chetty

[1] Pg 4, pleadings index.

[2] Having regard to exhibit "E" legal costs have been debited to the mortgage bond account.

[3] Page 42 of indexed pleadings

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