

SOUTH AFRICA / JUDGMENT

First Rand Bank Ltd v Moroka and Others (50425/2016; 56228/2016) [2020] ZAGPPHC 227 (12 May 2020)

[2020] ZAGPPHC 227

COURT

North Gauteng High Court, Pretoria

BEFORE

J Holland-Muter

CASE / FILE NUMBER

50425/2016; 56228/2016

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Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

CASE

NO: 50425 I 2016

56228

I 2016

In

the matters between:

FIRST
RAND BANK LTD
Applicant
and
MPHO
GRACE
MOROKA
1st
Respondent
MANYE
RICHARD
MOROKA
2nd
Respondent
MOTSHAOTSHELE
TRANSPORT (PTY) LTD
3rd
Respondent

JUDGEMENT

BEFORE: J HOLLAND-MUTER AJ:

- [1] These two matters first came before the Court as opposed motions. The applicant seeks to enforce the terms of the two credit facilities; a Rand Merchant Private Bank (RMB Private Bank) Single Facility account under account number [...] (case number 56228/2016) and a Mortgage Redemption Facility account under account number [...] (case number 50425/2016). I will refer to the accounts as the Single RMB and the Mortgage accounts. The matters were heard together.
- [2] The first and second respondents entered into two written agreements with the applicant to make use of the credit facilities on the said accounts according to the terms and conditions of the two agreements. The third respondent bound itself as surety towards the applicant for the liabilities of the first and second respondents arising out of the facility.
- [3] The opposed motions were simultaneously argued before Ranchod on 7 September 2017, the quantum of the applicant's claim referred to oral evidence. The motion papers therefore stand as evidence of the matter before this court.
- [4] The applicant has been struggling since September 2018 to convene a pre-trial meeting with the respondent's then attorneys of record and to have discovery by the respondents and to narrow down the disputes for trial. To say the least, the applicant was not successful to convene the pre-trial because of the non-response by the respondents.

- [5] The necessity to narrow down the disputes is to have the matter argued within the parameters of the court order referring the quantum of the out- standing balance to oral evidence. The respondents made it very difficult to have a pre-trial, and no narrowing of disputes were done and the second respondent made use of this to try and ague the whole dispute. It will be clear below that he even tried to argue the issue of compliance with Section 129 of the National Credit Act (NCA).
- [5] The respondents attorneys withdrew from record on 6 October 2019 and the second respondent attended the offices of the applicant on 3 December 2019 when he gave the assurance that new attorneys will be appointed before 6 January 2020 and that the documentation requested by the applicant will be discovered and delivered in due course. This also came to nothing.
- [6] A pattern developed with the second respondent (acting on behalf of the first respondent- his wife married in community of property) making several promises of appointing new attorneys and indicating available dates for a pre-trial but not honoring such undertakings.
- [7] The matter commenced on 4 March 2020 and continued until 6 March 2020 (three days) when judgement was reserved. Only one witness, Mr Ashraf Ali Rocker testified on behalf of the applicant while the second respondent testified on behalf of the respondents.
- [8] Before turning to the merits of the applications, certain procedural aspects need attention. This concern the prolonged delay before the matter ended up in court with reference to the second respondent's failure to expedite the pre-trial issues such as avoiding attending the pre-trial(s) arraigned by the applicant and the non-appointment of attorneys by the second respondent.
- [9] At the commencement of the hearing and after a long discussion between myself and the second respondent, the second respondent indicated
- that he was ready to proceed on his and the first respondent's behalf. Much was said about the preceding attempts on behalf of the applicant since the first and second respondents attorneys withdrew on 6 October 2019 and the efforts made by the applicant to accommodate the respondents. In view of the second respondent's various undertakings to have a legal team appointed and his failure to honor his undertakings to discover and attend pre-trial procedure, I ruled that no further delay will occur and the matter must proceed.
- [10] When the matter commenced on the second morning, the second respondent applied for a postponement to appoint new attorneys. He averred that he "convinced" attorneys to act on their behalf and instructed them to prepare brief for counsel. No attorney came onto record until then and nobody appeared in court to substantiate this claim. He then averred that he needed an hour to have counsel present at court. One would have expected the presence of an attorney at court to confirm this but no one attended court. The application was refused and the second respondent indicated that he would continue in person as on the previous day.

- [11] I may mention that if there was any substance in what the second Respondent averred, the instructed attorney or briefed counsel would have appeared at court during the day (the matter continued into the afternoon). This conduct was similar to previous by the second respondent to aver the appointment of attorneys to delay the process further.

CASE NUMBER 50425/2016: (MORTGAGE REDEMPTION FACILITY)

- [12] The parties (the applicant and the first and second respondents) entered into a Mortgage Redemption Facility Agreement on 24 April
2007. This is common cause between the parties. The relevant term of the facility was that a facility sum of R 1 400 000,00 was available to the respondents (the maximum limit of the facility) with monthly repayment in the amount of R 14 612,97. This was never denied.
- [13] The first and second respondent admitted signing the Facility Letter (annexure "B" to the founding affidavit) but they deny receiving the annexed Terms and Conditions thereto. The only reason for their denial thereof is that they did not initial the document annexed to the Facility Letter. I find this difficult to comprehend this in view of them admitting receiving the terms and conditions in the admitted signed Facility Letter.
- [13] Mr Rocker (hereafter referred to as "Rocker"), employed by the Applicant as a Credit Recovery Manager, testified on behalf of the applicant and confirmed that the annexed terms and conditions referred to are the standard terms and conditions applicable to this account. The two respondents denied that they were provided with copy of signed standard terms and conditions for the admitted facility to which they are parties. They did not deny that they were provided with the terms and conditions as acknowledged by themselves when signing the Facility Letter on 24 April 2007.
- [14] The only reasonable inference is that they were provided with a copy of the standard terms and conditions applicable to the facility. Whether the copy they received was the one annexed to the Facility Letter (annexure "B") or another copy, they were at least provided with a copy which they acknowledged by signing the Facility Letter. Why they did not annex the copy what they received, remains a mystery. Cases such as these based on facility accounts are a daily occurrence in the court and it can be accepted that in every agreement of kind the bank will annex the standard terms and conditions applicable on the use of the facility.
- [15] In view that no other copy (initialed or not) was presented by the two respondents, and taking into account their written acknowledgment of receiving a copy thereof, the reasonable inference is that the copy annexed to the Facility Letter is indeed the copy provided to the two respondents. The balance favors the applicant in this respect.
- [16] The argument on behalf of the two respondents that the unsigned copy is of no value to the matter, lacks substance. The argument that the unsigned terms and conditions has no legal force due to the operation of the common law is void of any merit. It is an evidential issue to prove that the annexed terms and conditions were part of the agreement. There are certain

statutory provisions requiring contracts reduced into writing to be lawful but that does not apply to this matter. It is not required to venture on this further. The court has to consider the totality of the evidence to find whether the annexed terms and conditions indeed apply.

- [17] The respondent's attack on the Notice in terms of section 129 of the NCA is likewise without substance. The delivery thereof to their daughter, over the age of 16 years, is valid in terms of the Uniform Rules of Court and the NCA regarding service. The contents thereof is in accordance to the minimum required information in terms of section
129. There is no evidence that the respondents wanted to result to alternative dispute resolution and the respondent's argument that there was no consultation with the respondents convened by the applicant before completing the certificate of balance is likewise without merit. The respondents did not apply for alternative dispute resolution. There is also no mandatory arbitration prescribed in Chapter 6 of NCA before the applicant may resolve to litigation.
- [18] It is not in dispute that the first and second respondent utilized this Facility as well as the facility relevant in case 56228/2016 to obtain another property in KwaZulu (Zimbali Estate) and that this property is unencumbered. The second respondent avers that the applicant was well aware of this fact and that this was part of the terms and conditions applicable on the two facility accounts. In the absence of any proof by the respondents that this was part of the terms and conditions of the two facilities, contrary to the evidence of Rocker, this version has no merit. It is highly improbable that the applicant would have included such term(s) concerning the purchase of another property in the normal terms and conditions applicable on the ordinary facility agreements.
- [19] The evidence of Rocker in relation to the arrears as on 28 October 2015 remained steadfast. Although extensively cross-examined by the second respondent, Rocker stuck to his version and in detail with reference to the account, explained how the amounts reflected on the annexed pages to the papers, were computed.
- [20] Rocker did a recalculation after the first day and presented such on the morning of the second day. From this recalculation (also included in the heads of arguments obo the applicant) it is clear that the respondents were in arrears in the amount of R 35 074,11 on 31 October 2015. This represented three months arrears on the account. Rocker listed the payments made by the respondents during August 2016 but that these payments were credited to the other account (the Single Facility RMB account). Rocker recalculated the account as from 31 August 2016 and no reversal fees were included. The outstanding arrears on 30 June 2017 amounted to R 176 542,01. See exhibit 'B'. The outstanding balance on 30 June 2017 was R 1 128 541,62 after all payments averred made, were included.
- [21] The second respondent failed to provide any evidence to the contrary of what Rocker testified as to the allocations of the payments made during August 2016 as set out above.

- [22] It is therefore clear that the respondents are in substantial arrears on the Mortgage Bond account and that the applicant made out a case for the relief sought. It has to be mentioned that the applicant only moves for a money judgement and no relief or order in terms of Rule 46A (for and order to have the property situated in Silverlakes declared specially executable). It is therefore not necessary to investigate the specific circumstances applicable before such order is granted. Although the property is the prime residence of the respondents, they used the facility to purchase the Zimbali property free of any encumbrances. The second respondent argued this aspect in detail although he was more than once informed that the applicant seeks no relief in terms of Rule 46A.
- [23] The second respondent referred to the judgement of *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005(2) SA 140 CC at 1611-163 B. This deals with the factors to be considered before declaring a property of a natural person specifically executable. As set out above, this is not the relief sought by the applicant and needs no consideration. Nothing will prohibit the applicant to execute any judgement against the Zimbali property.
- [24] The reference by the second respondent to the case of *First Rand Bank Ltd v Mdletye and Another* 2016(5) SA 550 KZD is likewise not applicable because no order to declare the property executable is sought. The reference to *First Rand Bank Ltd v Zwane* and two other cases 2016(6) SA 400 GJ is similarly not applicable because no execution order is sought.
- [25] The second respondent (and for that matter the first respondent) after signing the Facility Letter (acknowledging receiving the Standard

Terms and Conditions) and are therefore bound thereto. See *Burger v Central South African Railways* 1903 TS 571 at 577-578. The respondents acknowledged receiving terms and conditions when signing and receiving the Facility Letter and sought to have annexed the copies thereof which they acknowledged receiving; particularly when alleging that it was a specific term to use this facility to obtain the unencumbered property in Zimbali. Their failure to do so is indicative of the non-existence of such terms and conditions and should be rejected.

CASE NUMBER 56228 / 2016: RMB SINGLE FACILITY AGREEMENT;

- [26] This agreement was entered into on 7 June 2002. The credit limit on the facility was R 800 000,00. The monthly installment was R 9 349,82. The parties entered into an amended single facility agreement on 14 December 2004 with a credit limit of R 1 400 000,00, the monthly installment to be R 12 434,55. A further amended agreement was entered into on 30 October 2016. The credit limit on this agreement was R 3 200 000,00, the monthly installment was R 34 283,00. The respondents only dispute the terms and conditions applicable to each of these agreements and not the agreements. The respondents aver payments made and that these payments were not included in the applicant's calculation.
- [27] The calculation made on behalf of the applicant (in exhibit "D") indicates arrears of R 779 452,45 on 4 March 2017. The outstanding balance on this date was R 3 825 780,14.

- [28] The second respondent advanced similar arguments on this account as on the Mortgage Bond account. It is not necessary to repeat what was stated above, save to say that the respondent's arguments were unconvincing. Rocket clearly indicated during his evidence how the amounts not allocated according to the second respondent, was in fact taken into account in his calculations. I am satisfied that the first and second respondents were in arrears when the applications were issued and that the respondents do not have any bona fide defense against the claims. See the recalculation done in exhibit "C".
- [29] The second respondent in the heads of argument in both applications stated that they "made great efforts to service the mortgage payments " but failed to provide the necessary documentary proof that the accounts were indeed paid up at all relevant times. Their arguments of payments made not allocated was dealt with by Rocket and I have no reason not to accept Rocket's version when compared with that of the second respondent.
- [30] The second respondent tried to divert the court's attention from the proven arrears by continuously referring to the Constitution (in particular section 26 with regard to housing) even though the applicant clearly stated that no execution of the Silverlakes property was requested. The second respondent also tried to argue the section 129 of the NCA even though the matter was referred for oral evidence on the quantum issue only.
- [31] The court is satisfied that the applicant made out a proper case in both applications for the relief sought. The second respondent failed to counter the evidence by Rocket on the quantum issue and in particular the arrears on both accounts. The second respondent's attempt to persuade the court that there were other terms and conditions to those proved by the applicant cannot succeed. It was a mere attempt to divert the attention from the real dispute on the arrears and the respondents' defense must fail. The respondents failed to prove that the mortgage redemption facility was repaid in full in 2009 or that the terms and conditions were as they allege.
- [32] The next question is with regard to the third respondent. The first and second respondents sold their interest in the third respondent prior to the institution of the applications but the third respondent did nothing to have it released from the surety. There is no reason why the court cannot grant an order against the third respondent. It opposed the applications and participated in the hearings until the first hearing before Ranchod J during 2017. The heads of arguments filed for that hearing was for all three respondents. Under the circumstances an order against the third respondent is justified. The applicant in the draft orders handed to court only requested judgment only against the first and second respondents and no reason was given why the court should not follow if finding in favor of the applicant.

ORDER:

An order is granted against both the first and second respondents in both applications as set out in the draft orders annexed hereto

below.

CASE NUMBER 50425 / 2016:

The draft order marked "XYZ-1" is made an order of court.

CASE NUMBER 56228 / 2016:

The draft order marked "XYZ-2" is made an order of court.

J HOLLAND-MUTER

Acting Judge of the Pretoria High Court

12 May 2020.

Matter heard on 4, 5 & 6 March 2020.

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“XYZ-1”

IN THE HIGH COURT OF SOUTH AFRICA

On this 4th day of March 2020 before the Honourable Justice Holland-Mutter.

Case No: 50425/2016

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

MPHO GRACE MOROKA

[Identity Number: [...]]

1ST RESPONDENT

MANYE RICHARD MOROKA

[Identity Number: [...]]

2ND RESPONDENT

MOTSHAOTSHELETRANSPORT(PTY)LTD

[Registration Number: [...]]

3RD RESPONDENT

DRAFT ORDER

Having read the papers, listening to the evidence and after considering the matter, judgment is granted against the Respondents, jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment in the amount of R1 128 541.62;
2. Interest at the rate of 11% p.a. calculated daily and compounded monthly from 1 July 2017 to date of final payment, both days inclusive;
3. Costs of suit, including the costs of the opposed motion heard on 7 September 2016, on the attorneys and client scale.

BY ORDER

REGISTRAR

Counsel for Applicant: M Riley (082 365 2762)

Respondents in person

“XYZ-2”

Case No: 56228/2016

FIRSTRAND BANK LIMITED

APPLICANT

[Identity Number: [...]]

1ST RESPONDENT

[Identity Number: [...]]

2ND RESPONDENT

1. Payment in the amount of R4 043 136.36;
 2. Interest at the rate of 11% p.a. calculated daily and compounded monthly from 5 September 2017 to date of final payment, both days inclusive;
 3. Costs of suit, including the costs of the opposed motion heard on 7 September 2016, on an attorney and client scale.
-

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Prepared on 9 October 2026 · Esheria