

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Golden Quilt Investments 217 CC (16626/2009) [2009] ZAWCHC 193 (7 December 2009) [2009] ZAWCHC 193

COURT

Western Cape High Court, Cape Town

BEFORE

Sholto-Douglas

CASE / FILE NUMBER

16626/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

CASE

NO: 16626/2009

In

the matter between:

FIRSTRAND

BANK LIMITED Plaintiff

and

GOLDEN

QUILT INVESTMENTS 217 CC Defendant

JUDGMENT

DELIVERED ON 7 DECEMBER 2009

SHOLTO-DOUGLAS, AJ

[1] This is an application for summary judgment against the defendant for payment of the sum of R854 851,12, together with interest and costs, being the amount alleged to be due, owing and payable by the defendant to plaintiff arising out of a written loan agreement

concluded between the parties and secured by a mortgage bond passed over immovable property.

[2] The defendant has filed an answering affidavit in which a number of defences to the plaintiffs claim for summary judgment have been raised. Certain of these are technical points relating to the procedure of summary judgment and others relate to the substance of the plaintiffs claim.

[3] In my view, all but one fail to raise a bona fide defence to the plaintiffs claim. The one exception is a defence raised which relies on an interpretation of the loan agreement.

[4] Clause 4.28 of the agreement provides as follows:

"4.28 If the Customer is in default of this agreement then the Bank may at its option: -

claim immediate repayment of the full outstanding balance; or

terminate this agreement, upon which all amounts whatsoever owing to the bank by the Customer shall then forthwith be payable in full. "

[5] The plaintiff has not elected to terminate the agreement, but asserts that it is entitled to the full amount of the capital and finance charges outstanding in terms of the loan by operation of clause 4.28.1. It was argued by the defendant's counsel that unless the plaintiff elects to terminate the agreement, all that clause 4.28.1 entitles the plaintiff to claim in the event of a default on the part of the defendant is payment of the arrears then outstanding.

[6] In my view, that is an interpretation that a court in due course dealing with the issue may find to be correct. At this stage I need not, and do not, express any view in this regard. Suffice it to say that it would be inappropriate to decide this matter finally in summary judgment proceedings. All that need be said is that the difference in choice of wording in 4.28.1 {"the full outstanding balance"} and that in 4.28.2 {"all amounts whatsoever owing"} is sufficient to say that the defendant's point is not unarguable.

[7] On that argument, however, the allegation contained in the particulars claim that the defendant has defaulted in terms of the

loan agreement and is in arrear in respect of its instalments in an amount of R96 464,77 is unanswered. While I was tempted to grant judgment in that amount in the interim, I have decided against doing so. Apart from the fact that such relief is not in terms sought by the plaintiff, I consider that such a course would be imprudent, considering the ancillary relief sought in the form of an order declaring the hypothecated immovable property specially executable. That is a matter best left for the trial court.

[8] In the circumstances I refuse summary judgment, and order that the costs of this application stand over for determination in due course.

SHOLTO-DOUGLAS AJ

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