

SOUTH AFRICA / JUDGMENT

SB Guarantee Company (RF) Proprietary v Mahlangu (3979/2020) [2023] ZAFSHC 13 (23 January 2023) [2023] ZAFSHC 13

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

3979/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No: 3979/2020

Reportable:

NO

Of

Interest to other Judges: NO

Circulate

to Magistrates: NO

In

the matter between:

SB
GUARANTEE COMPANY (RF) PROPRIETARY
Plaintiff
and
PETER
MAHLANGU
Defendant
(Identity
No: [...])
HEARD
ON: 27 October 2022

JUDGMENT

BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 12h30 on 23 January 2023.

- [1] This is an opposed application for summary judgment against the defendant for the payment of R 1 109 875.01. The cause of action arose from an alleged breach by the defendant of the terms and conditions of a home loan agreement between the Standard Bank of South Africa and the defendant, concluded on/or about 28 September 2017.
- [2] The defendant's breach is stated as follows in the particulars of claim:
- "23. The Defendant, in breach of the terms and conditions of the Loan Agreement (annexure POC 1), have failed to pay the monthly instalments due in terms thereof, which breach was material.*
24. On 10 and 29 September 2020 respectively, the bank caused a letter of default and notice in terms of section 129 (1) (as read with section
- 130) of the National Credit Act ("the Default Notice") to be sent to the defendant's domicilium, mortgaged property and residential address, informing the Defendant that, inter alia:
- 24.1 The Defendant had failed to make payment of the full monthly instalment amounts due under the Loan Agreement and was consequently in breach of the Loan Agreement;
- 24.2 The Defendant were(sic) required to remedy his breach of the Loan Agreement by making payment of the arrears and all overdue amounts under the Loan Agreement to the Bank ("arrears");

24.3 Should the Defendant fail to remedy his breach of the Loan Agreement and pay the arrears, the Bank would be entitled inter alia, to cancel the Loan Agreement and/or to recover from the Defendant the full balance outstanding under the Loan Agreement together with interest on the outstanding balance to date of final payment, as well as any and all legal costs and other reasonable costs incurred by the Bank in enforcing its rights under the Loan Agreement and recovering any amount due and/or payable by the Defendant in terms of the Loan Agreement.

25. Notwithstanding the Default Notice, the defendant has failed and/or refused and/or neglected to make payment of the amount as set out in the default notice.

26. On or about 15 June 2018 the bank notified the defendant inter alia that;

26.1 The Defendant was in breach of the Loan Agreement;

26.2 The Plaintiff was forthwith required to discharge all of its obligations to the Bank in terms of the Plaintiff's guarantee, by promptly proceeding in a competent court against the Defendant, under the indemnity, by calling up and foreclosing on the mortgage bond and enforcing such other remedies as were available to the Plaintiff at law.

27. A copy of the bank's notification is annexed hereto marked "PoC6".

28. Accordingly, on or about 15 June 2018 the Plaintiff sent a demand for payment in terms of the indemnity to the Defendant requiring the Defendant to pay the full amount so due and payable forthwith ("the Plaintiff's demand"). A copy of the plaintiff's demand is annexed here to marked "PoC7".

29. Notwithstanding the Plaintiff's demand, the Defendant has failed and/or refused and/or neglected to make payment of the amount as set out in the Plaintiff's demand, and the Plaintiff is accordingly entitled to claim the total of all amount owing by the Defendant to the Plaintiff.

30. The Defendant is presently indebted to the Bank under the Loan Agreement, and therefore to the Plaintiff under the indemnity, in the amount of R 1 109 875.01 (One million one hundred and nine thousands and eight hundred and seventy-five and one cent), being the balance of the total Principal Debt, together with interest at the rate of 8.23% per annum from 03 October 2020 to date of payment, as reflected on the certificate of balance annexed hereto marked "PoC8".

[3] On an analysis of the above particulars of claim, it is evident that the plaintiff's claim is premised on the defendant being indebted to the bank as at 03 October 2020 in the amount of R 1 109 875.01, and therefore to the plaintiff in the same amount under the indemnity agreement. The indemnity agreement[1] states amongst others the following:

3.1 The guarantor has provided or will provide a guarantee in favour of the bank in terms of which the guarantor guarantees to the bank the fulfilment of the obligations of the borrower in terms of the loan agreement subject to the terms and conditions of such guarantee. As security for among others the borrower's indebtedness to the guarantor in terms of this indemnity, the borrower registered the mortgage bond in favour of the guarantor.[2]

3.2 The borrower acknowledges and agrees that the bank may, in terms of the loan agreement, cede and/or delegate (that is, transfer) any or all of its rights and obligations under the loan agreement to any person. If the bank seeds and/or delegates any or all of the rights and obligations under the loan agreement to a transferee, and a guarantee is given to the transferee, the parties acknowledge and agree that the guarantor shall, in the event of the fault occurs-exercise its rights in terms of this indemnity against the borrower in respect of any claims made against the guarantor by the transferee in accordance with the terms of the guarantee; realise the security under the security agreements, if necessary; and pay the transferee, in accordance with the guarantee given to it, the amount of its claim.[3]

3.3 The borrower acknowledges and agrees that if in terms of the guarantee given to the bank or the transferee, the bank or the transferee lodges or makes a claim against the guarantor, or the guarantor becomes liable to pay any amount to the bank or the transferee, the borrower shall immediately be liable to the guarantor in terms of this indemnity for the amount for which the guarantor is liable under the guarantee.[4]

[4] It is therefore clear that if the bank makes a claim against the plaintiff or the plaintiff, as guarantor, becomes liable to pay any amount to the bank, the defendant, as the borrower, shall immediately be liable to the plaintiff in terms of the indemnity for the amount for which the plaintiff is liable under the guarantee.

[5] Ms Elsie Wall, employed as a Manager, Defended Legal, Consumer and High Net Worth Credit, The Standard Bank of South Africa Limited with registered offices at 5 Simmonds Street Johannesburg, Gauteng, stated that she was duly authorised by the resolution of the board of directors of the applicant, which was passed on 13 April 2022 and by a letter of authority issued by the bank, to depose to this affidavit on behalf of the applicant and represent the applicant in these proceedings.[5] In the ordinary course of her duties and having regard to the applicant's files and records in her possession and control, she read the respondent's special plea and plea and confirmed that the defences, as pleaded, did not raise any issue for trial.[6] The respondent's special plea was based on an averment that the respondent had fallen into arrears with his payment obligations in 2018 which he had subsequently remedied in June 2019, causing the applicant's cause of action to fall way.[7]

[6] She stated that the applicant's cause of action was not based on the respondent's initial breach from 2018, but was instead based on the respondent's subsequent and consistent breach of the agreement from September 2019, which breach still subsisted.[8] From August 2019 to September 2022, the respondent made no payments towards the accounts. All debit orders levied against the respondent's account were reversed.[9]

[7] The affidavit of Ms Wall (who is an employee of the Standard Bank), is clear that the action against the defendant by the plaintiff is not based on the 2018 breach, but on the 2019 breach from September onwards. The bank, of its own volition, pursued steps against the defendant and sent a default notice to him which was apparently ignored. The demand entitled the bank, and not the plaintiff, to institute further legal steps against the defendant for his breach of the home loan agreement. Because the defendant ignored this demand, the plaintiff fell back on the notices issued in 2018, which were

attached to the particulars of claim as POC6 and 7,[10] as constituting the plaintiff's demand to entitle it to claim against the defendant.

[8] The bank's written notification that the defendant was in breach of the loan agreement[11] reads as follows:

"We hereby notify you that the borrower is in breach of the home loan agreement by failing to pay the monthly instalments since 2018/01/02.

Pursuant to the breach by the borrower of the home loan agreement, the amount of R 45 294.85 is due by the borrower to us.

You issued a guarantee in our favour guaranteeing the borrower's obligation to us under the home loan agreement, and you are required to proceed in any competent court against the borrower for payment of the full amount so due by the borrower as well as to take steps to foreclose under the mortgage bond and to realise any other security held.

We hereby unconditionally indemnify you for all loss, liability, damage, claim, cost or expense which you may incur in taking such action.

We remind you of your obligation to forthwith pay to us all of the proceeds you receive from or on behalf of the borrower."

[9] The plaintiff's demand dated 15 June 2018 to the defendant[12] reads as follows:

"Dear customer

1. We refer to the indemnity agreement you signed in favour of the SB Guarantee Company (RF) (the Guarantee Company), when you concluded your home loan agreement with Standard Bank under the above home loan account number [....].
2. In terms of the indemnity, you indemnified the guarantee company from any claims which may be made against it by Standard Bank, under a guarantee which the guarantee company provided to Standard Bank for the payment of your debts under the loan agreement.
3. You are currently indebted to Standard bank under the loan agreement in the sum of R 1 051 213.31.
4. Standard bank has requested the guarantee company to proceed against you for recovery of the amount due, and to pay the amounts recovered from you to Standard bank.

5. The Guarantee Company therefore demands that you immediately settle the amount due to it by making payment thereof into the following account: Standard bank Home loans (Account) Account number [...] branch code [...] reference [...].

Should you fail to pay the amount due to the Guarantee Company as demanded above, the Guarantee Company will institute legal proceedings against you, and will in such legal proceedings (and pursuant to the mortgage bond registered in favour of the guarantee company over your property) seek an order declaring your property specially executable.

- [10] The request to the plaintiff by the bank was two-fold: Proceed in any competent court against the defendant for the payment of the full amount so due and to take steps to foreclose under the mortgage bond. On consideration of these two letters of 15 June 2018, it would seem that the plaintiff was of the view that the amount due was R 1 051 213.31[13] which had to be recovered from the defendant for onward transmission to the bank.[14] Should the defendant fail to pay the amount due to the plaintiff as the guarantee company, legal steps would be taken for the recovery thereof. Nowhere in the letter was it mentioned that the defendant was in arrears in the amount of R 45 294.85, which was due and payable; on receipt of which it would be paid to the bank forthwith.
- [11] The demand notice speaks of R1 051 213.31 and not of R1 109 875.01 as indicated in the particulars of claim. The particulars of claim stated that the defendant failed to pay the amount as set out in the plaintiff's demand, which failure entitled the plaintiff to claim the total of all amounts owing by the defendant to the plaintiff.[15] This information is inaccurate and confusing.
- [12] In his answering affidavit, the respondent stated that he was, as of 19 June 2019, up to date with his payments under the home loan agreement and that the applicant had not in its particulars of claim, alleged a new breach that could sustain a cause of action as stated in his plea and special plea. If the applicant's action was not based on the 2018 breach, then the applicant had not alleged in his particulars of claim that it received a new notice from the bank after June 2019, alleging a breach of the home loan agreement and instructing the applicant to institute action against him. That was the only way under the common terms agreement, the mortgage bond and the indemnity agreement that the applicant would acquire a right of action or a cause of action against him.[16] This constituted a triable issue especially when viewed in the light that the applicant admitted that its cause of action did not arise in 2018 but only in September 2019. As of June 2019, the home loan account was up to date and the applicant could not issue summons as at that date.[17]
- [13] In his special plea, the defendant pleaded that the demand notice[18] was sent to an old address when the plaintiff fully knew at the time, that he resided on the property that is the subject matter of this case. He admitted that he was in arrears in 2018. He negotiated with the bank and paid an amount of R48 000.00 in March 2019 and cleared all arrears on 18 June 2019 when he made a payment of R95 600.00 as advised. He pleaded that the plaintiff did not have a cause of action against the defendant as the breach of 2018 had been cured. The

plaintiff, in order to institute an action against him, had to receive a notice from the bank for any subsequent breach of the home loan agreement by him.[19]

- [14] As succinctly set out by Mr Mazibuko on behalf of the applicant, the central issue is whether the plaintiff has a right of action against the defendant at this stage.
- [15] He submitted that on 15 June 2018,[20] the bank notified the plaintiff that the defendant was in breach of the loan agreement by failing to pay the monthly instalments since 2018/01/02 and that the amount due by the defendant was R 45 294.85. As the plaintiff had issued the guarantee in favour of the bank, he was required to proceed in any competent court against the defendant for payment of the full amount so due by the defendant as well as to take steps to foreclose under the mortgage bond and to realise any other security held. Mr Mazibuko argued and stated in his heads that the plaintiff demanded payment from the defendant of the amount of R 1 051 213.31 and notified the defendant that legal proceedings will be instituted if such an amount was not paid. By virtue of the notice given to the plaintiff by the bank on 15 June 2018, the plaintiff's right of action became perfected.
- [16] Mr Mazibuko contended that the defendant's contention that the plaintiff could not rely on that notification given by the bank to it in June 2018 to claim amounts arising out of his breach of the agreement which occurred after the 2018 breach, was misguided as the plaintiff assumed the right of action in June 2018 when it was notified of the plaintiff's breach by the bank. The judgment of SB Guarantee Company (RF) (Pty) Ltd vs. Bloemfontein Celtic Football Club (Pty) Ltd,[21] on which the defendant relied, did not assist the defendant. The facts in that case were distinguishable to the present matter. In contrast, there was no evidence on the papers in that matter to show that the bank had notified SB Guarantee in writing that it should make payments to it, owing to the debtor's breach of the home loan agreement. The court concluded as follows in that case:
- "in the absence of the required written demand for payment, in particular that the Plaintiff has not shown that Standard Bank notified the Plaintiff in writing to make any payments, it cannot be found that the Defendant is liable towards Plaintiff and in effect, that as correctly pointed out by Mr Reinders, assisted by Mr Greyling on behalf of the Defendant, the amount as claimed or any other amount is due and payable by the Defendant toward Plaintiff. For that reason, the application for summary judgment cannot succeed the Defendant does have a bona fide defence to Plaintiff's claim"* [22]
- [17] Mr Mazibuko submitted that the plaintiff's right of action originated from the following agreements: the loan agreement which was subject to the provision of a guarantee to the bank in terms of which the plaintiff agreed to pay the amount owing in terms of the loan agreement; the indemnity agreement which indemnified the plaintiff against any claim by the bank under the guarantee; the covering continuing mortgage bond over the immovable property in favour of the plaintiff, and the common terms agreement concluded between the bank and the plaintiff.
- [18] The common terms guarantee agreement stipulates amongst others that:

1. In consideration for each debtor granting the indemnity and the mortgage bond to the guarantor, and with effect from the date of registration of the relevant mortgage bond granted by each debtor to the guarantor over the property purchased by that debtor pursuant to the home loan agreement, the guarantor guarantees, subject to the terms and conditions of the common term agreement, the due and punctual payment of all sums now and subsequently due by each debtor to the creditor pursuant to each debtor's individual home loan agreement, which guarantees the creditor accepts.[23]
 2. If the creditor (the bank) gives written notice to the guarantor that and an individual debtor has breached any of its obligations under its relevant home loan agreement, then the guarantor shall forthwith discharge all of its obligations to the creditor in terms of the relevant guarantee by complying with its obligations in clause 4.1.[24] The written notice to the guarantor shall contain written details of the breach, the identity of the defaulting debtor, and the full amount owing by the relevant debtor to the creditor under the relevant home loan agreement, provided that on receipt of such notice the guarantor shall be obliged to forthwith discharge all of its obligations to the creditor and assume that such notification is true and correct in every respect.[25]
 3. The creditor shall not be obliged, before exercising any of its rights under this common terms agreement and or any guarantee to make any demand or take any action or obtain judgment in any court against the debtor or make or file any claim in the winding up, the solution, sequestration, administration, business rescue or curatorship of the debtor.[26]
- [19] Was the plaintiff's right of action perfected by the notice delivered on 15 June 2018? The answer, in my view, is in the negative. As of 19 June 2019, the defendant was not in arrears with his payment as confirmed by Ms Elsie Wall. The bank, though not obliged in terms of the common terms agreement, initiated recovery steps on 8 September 2020 against the defendant in accordance with the provisions of the National Credit Act. This step was necessitated by the defendant's breach of the loan agreement. Were there no breach of the home loan agreement, neither the defendant nor the plaintiff would have been liable to the bank under the contracts between the parties.
- [20] The bank, on 8 September 2020, may have chosen not to send a demand notice to the defendant. Instead, it may have relied on the guarantee given by the plaintiff and notified the plaintiff in writing to make any payments to it. The plaintiff, if so required, would have proceeded against the defendant under the indemnity.[27] The plaintiff's action against the defendant could only be triggered by a written notification by the bank to the plaintiff. No such written notification was made by the bank to the plaintiff to show that the defendant was in arrears in the amount of R 157 329.14 as of 3 October 2020[28] or any other period after 19 June 2019.

[21] The common terms agreement provides that each guarantee is a continuing security and shall remain in force notwithstanding any fluctuation in or extinction for any period whatsoever of any amounts owing to the bank by the defendant or any intermediate payment of any such debts. This agreement and each guarantee shall continue to apply to the remaining balance of the amounts owing to the bank by the defendant until such amounts have been finally, unconditionally- and irrevocably extinguished in full.[29]

[22] Having considered the above, I am in agreement with the decision in SB Guarantee[30] and conclude that in the absence of a written notification to the plaintiff to make payments, the defendant cannot be held liable

towards the plaintiff. The summary judgment application cannot succeed as I find that the defendant has a bona fide defence to the plaintiff's claim.

[23] I therefore make the following order:

Order:

1. The application for summary judgment is dismissed.
2. Leave is granted to the defendant to defend the action.
3. Costs will be costs in the main action.

MHLAMBI, J

On behalf of the plaintiff: Adv. MS Mazibuko

Instructed by:

Honey Attorneys

Honey Chambers

Northridge Mall

Kenneth Kaunda Road

Bloemfontein

On behalf of the respondent: Mr Peter Mahlangu

Instructed by:

In Person

57 Karas Avenue

Roodia

Sasolburg

[1] Page 72 of the indexed papers.

- [2] Clause 2.2 of the indemnity agreement.
- [3] Clause 2.4 of the indemnity agreement.
- [4] Clause 3.2 of the indemnity agreement.
- [5] Paragraphs 1.4 and 1.2 of the affidavit in support of the application for summary judgment.
- [6] Paragraph 4 of the affidavit in support of the application for summary judgment.
- [7] Paragraph 5.1 and 5.2 of the affidavit in support of the application for summary judgment.
- [8] Paragraph 6.1 of the affidavit in support of the application for summary judgment.
- [9] Paragraph 6.3 of the affidavit in support of the application for summary judgment.
- [10] Paragraphs 27 and 28 of the Particulars of Claim.
- [11] PoC6 dated 15 June 2018.
- [12] POC7 on page 103 of the Indexed Papers.
- [13] Clause 3 of POC7.
- [14] Clause 4 of POC7.
- [15] Paragraph 29 of the particulars of claim.
- [16] Paragraph 11 of the Answering Affidavit.
- [17] Paragraph 14 and 16 of the Answering Affidavit.
- [18] Poc7.
- [19] Paragraph 8 of the defendant's plea.
- [20] POC6 on page 102 of the Indexed Papers.
- [21]
- [2021] ZAFSHC 166
- [22] Paragraph 38 of the
judgment.
- [23] Clause 3.1 of the Agreement; Paragraph 18.1 of the Particulars of Claim.
- [24] Clause 5.1 of the Agreement; Paragraph 18.7 of the Particulars of Claim.
- [25] Clause 5.2 of the Agreement; Paragraph 18.8 of the Particulars of Claim.
- [26] Paragraph 5.4 of the Agreement.
- [27] Clause 4.1 of the Common Terms Guarantee Agreement.

[28] Paragraph 34.6 of the particulars of claim.

[29] Clause 11.2 of the Common Terms Guarantee Agreement.

[30] Supra.

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