

SOUTH AFRICA / JUDGMENT

SB Guarantee Company (RF) Pty Limited v Hadien (10141/2020) [2024] ZAGPPHC 360 (9 April 2024)

[2024] ZAGPPHC 360

COURT

North Gauteng High Court, Pretoria

BEFORE

SM Maritz

CASE / FILE NUMBER

10141/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**SAFLII****Note: Certain**

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 10141/2020****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: NO****DATE:**

9 APRIL 2024

SIGNATURE:

SM MARITZ AJ

In

the matter between:

SB
GUARANTEE COMPANY (RF) PTY LIMITED
APPLICANT/PLAINTIFF
[REGISTRATION
NUMBER: 2006/021576/07]
and
NASIRAH
AISHA HADIEN
RESPONDENT/DEFENDANT
[IDENTITY
NUMBER: 7[...]]

JUDGMENT

MARITZ AJ

Introduction

[1] The Applicant, SB Guarantee Company (RF) Pty Ltd (“the Applicant”), applied for summary judgment in terms of Rule 32 read with Rules 46 and 46A of the Uniform Rules of Court, against the Respondent, Nasirah Aisha Hadien (“the Respondent”). The Respondent opposed the application. The Applicant in the summary judgment application is the Plaintiff in the main action and the Respondent in the summary judgment application is the Defendant in the main action. For ease of reference, the Court will refer to the parties as in the application for summary judgment.

[2] The Applicant seeks relief against the Respondent as follows:

2.1 Payment of the amount of R482 458.35 [FOUR HUNDRED AND EIGHTY TWO THOUSAND FOUR HUNDRED AND FIFTY EIGHT RAND AND THIRTY FIVE CENTS];

2.2 Payment on the amount referred to above at the rate of 9.40% per annum from 29 January 2020, to date of payment, both days inclusive;

2.3 That the immovable property describe as:

ERF 1[...] ZAKARIYYA PARK EXTENSION 8 TOWNSHIIP

REGISTRATION DIVISION I.Q., THE PROVINCE OF GAUTENG

MEASURING 1768 (ONE THOUSAND SEVEN-HUNDRED AND SIXTY EIGHT) SQUARE METERS

HELD BY DEED OF TRANSFER NO. T[...]

SUBJECT TO THE CONDITIONS THEREIN CONTAINED (“the immovable property”)

be declared executable for the aforesaid amounts;

2.4 An order authorising the issuing of a writ of execution in terms of Rule 46 read with Rule 46A for the attachment of the immovable property;

2.5 That the immovable property be sold in execution at a reserve price of R 328 748.32;

2.6 That in the event that a reserve price is set in terms of Rule 46A(8)(e) and the reserve price is not attained, and subject to Rule 46(9)(d) and (e), the Applicant may approach this Honourable Court on these papers, duly supplemented, for an order that the Honourable Court reconsider the reserve price in terms of Rule 46A(9)(c);

2.8 Costs of suit on attorney and client scale.

[3] The Respondent prays that the application for summary judgment be dismissed with costs. Additionally, the Respondent prays that the immovable property described in the notice of motion (summary judgment application) be declared not specially executable, the loan be cancelled and the title deed of the Respondent's house be returned.

Relevant Background Facts and Legal Nexus

[4] At the time of applying for the loan the Respondent was self-employed involved in selling automotive paint directly from her car to panel beaters. The Respondent asserted that her business was failing due to theft and mismanagement. According to the Respondent, she saw a billboard advertisement by the a company named Financial

Services Bond ("FS Bond"), which advertised about the possibility to apply and secure a loan in the event that a person has a bond free property that is registered in one's name. She stated that she was interested as she was the owner of a house, which she inherited from her mother in 2000 and which is bond free.

[5] The Respondent claimed to have applied for a home loan through FS Bond, refuting any direct application to the Standard Bank of South Africa Limited ("Standard Bank") for the loan.

[6] The legal nexus between the parties arose from a loan agreement concluded between Standard Bank and the Respondent on 14 January

2016. Pursuant to the conclusion of the loan agreement, the Respondent caused to be registered over the aforementioned immovable property a first covering continuing mortgage bond. On 14 January 2016, Standard Bank advanced the sum of R 430 000.00 (FOUR HUNDERED AND THIRTY THOUSAND RAND) to the Respondent. The principle debt incurred by the Respondent was R 430 150.58 (FOUR HUNDERED AND THIRTY THOUSAND ONE HUNDERED AND FIFTY RAND AND FIFTY EIGHT CENTS), which amount was to be repaid in 240 (TWO HUNDERED AND FORTY) months. The initial monthly instalment was R 3 980.13

(THREE THOUSAND NINE HUNDERED AND EIGHTY RAND AND THIRTEEN CENTS).

- [7] The aforementioned loan agreement was subject to certain conditions, which included that:
- 7.1 the Applicant provided a guarantee to Standard Bank in respect of the loan agreement, in terms of which the Applicant agreed to pay the amount owing in terms of the loan agreement to Standard Bank in the event of a default by the Respondent under the loan agreement;
- 7.2 the Respondent signed a written indemnity in terms of which the Respondent indemnified the Applicant against any claim by Standard Bank under the guarantee given by the Applicant to Standard Bank in respect of all sums then and subsequently due by the Respondent to Standard Bank in terms of the loan agreement.
- [8] On 14 January 2016, the Respondent executed a written indemnity agreement in favour of the Applicant and its successors in title or assigns ("the indemnity agreement").
- [9] As far back as 1 March 2015, the Applicant and Standard Bank concluded a written common terms guarantee agreement. On 14 January 2016, pursuant to Standard Bank and the Respondent's conclusion of the aforementioned loan agreement and the Respondent's executing of the indemnity, the Applicant furnished Standard Bank with a written guarantee in terms of which, inter alia, the Applicant guaranteed the due and punctual payment of all sums which were then and which may subsequently become due by the Respondent to Standard Bank, pursuant to the conclusion of the loan agreement.
- [10] It was submitted that Standard Bank and the Applicant fulfilled all its obligations in terms of the aforesaid agreements.
- [11] The Respondent breached the terms and conditions of the loan agreement, by failing to pay the monthly instalments due. That is not in dispute. On 26 November 2019, Standard Bank notified the Applicant, inter alia, that the Respondent was in breach of the loan agreement. The Applicant was forthwith required to discharge all of its obligations to Standard Bank in terms of the Applicant's guarantee, by promptly proceeding in a competent court against the Respondent, under the indemnity, by calling up and foreclosing on the mortgage bond and enforcing such other remedies as were available to the Applicant at law.
- [12] On 26 November 2019, the Applicant sent a letter of demand for payment in terms of the indemnity to the Respondent requiring the Respondent to pay the full amount so due and payable. Notwithstanding, the demand, the Respondent has failed and/or refused and/or neglected to make payment of the amount as set out in the Applicant's letter of demand and the Applicant is accordingly entitled to claim the total of all amounts owing by the Respondent to the Applicant.
- [13] According to the Applicant's certificate of balance, the Respondent is indebted to Standard Bank under the loan agreement, and therefore to the Applicant under the indemnity, in the amount of R 482 458.35 (FOUR HUNDRED AND EIGHTY TWO THOUSAND FOUR HUNDRED AND FIFTY EIGHT RAND AND THIRTY FIVE CENTS), together with interest at the rate of 9.40% per annum from 29 November 2020 to date of payment.

- [14] On 14 January 2020, Standard Bank sent a letter of demand and statutory notice in terms of section 129(1) read with section 130 of the National Credit Act, 34 of 2005 (“the NCA”) to the Respondent. Despite this notice, the Respondent did not make any payment and/or execute any of the available remedies referred to therein. On 29 January 2020, prior to issuing the summons, the Respondent was indebted to Standard Bank under the loan agreement, and therefore to the Applicant under the indemnity, in the amount of R 482 458.35 and the arrears in monthly instalments amounted to R 57 801.88.
- [15] On or about 12 February 2020, the Applicant issued summons against the Respondent, which was duly served on 11 June 2020 on the Respondent’s chosen domicilium citandi et executandi address.
- [16] On 23 June 2020, the Respondent filed a Notice of Intention to Defend the action.
- [17] As at 21 November 2020, the Respondent’s monthly arrears has escalated to R 107 690.83, which is more than 22 months in arrears with an instalment amount of R 4 739.27. The last payment received from the Respondent was the amount of R 1 200.00 which was received on 29 March 2019.

Respondent’s Plea and Defences

- [18] On or about 10 November 2020 the Respondent filed her plea. The following defences, against the Applicant’s claim, were raised:

18.1 The Respondent pleaded that she is a victim of reckless credit lending by Standard Bank, in particular that the credit provider, Standard Bank, failed to conduct an affordability assessment, and that Standard Bank did not explain anything to her. She pleaded that “all that was said to me sign here and here and here”. Furthermore, that she did not understand the risks of the credit, and that the debt pushed her into a situation where she became over-indebted.

18.2 She pleaded that the credit provider did not check and verify her affordability against her pay slips, credit bureau records and bank statements even though she is/was a customer of Standard Bank.

18.3 She pleaded that the credit provider failed to take reasonable steps to establish her financial means and obligations.

18.4 She further pleaded that she believes that there is a corrupt relationship between the “agent” of Standard Bank and the third party company called FS Bond. She pleaded that she used the company called FS Bond to apply for refinancing of her house that she inherited and she paid R 16 000 as a service fee to FS Bond. She pleaded that all FS Bond wanted to know was whether she has the title deed to her house and whether the house was in her name.

18.5 She pleaded that according to her, the over-indebted situation was forced upon her by Standard Bank due to the fact that Standard Bank has failed to do an affordability assessment and/or failed to conduct a proper affordability assessment.

Applicant's Summary Judgment Application

- [19] On 27 November 2020, the Applicant served the application for summary judgment on the Respondent, via email, in which the Applicant sought relief as set out in paragraphs 2.1 to 2.8 above.
- [20] In the Applicant's affidavit in support of the application for summary judgment, the Applicant stated that none of the defences raised constitute a bona fide defence fit for trial and that the Respondent has entered an appearance to defend simply for purposes of delaying the proceedings and judgment.
- [21] It is the submission of the Applicant that the defence of reckless credit lending and a corrupt relationship between Standard Bank and an alleged third party "agent" is not a bona fide defence. It was further submitted that Standard Bank complied with section 81(2) of the NCA.
- [22] The Applicant submitted that the Respondent does not dispute having concluded a loan agreement with Standard Bank, but that she merely makes sketchy propositions about an alleged third party "agent."
- [23] It is submitted by the Applicant that the defences raised are bold averments and sketchy propositions which are not sufficient to stave off summary judgment.
- [24] The Applicant submitted that the Respondent is unable to service the loan agreement as she is unable to work and is relying on family, friends and the Mosque. The Applicant referred to the Respondent's answering affidavit in which the Respondent mentioned that she is self-employed and that as a result of the Covid-19 pandemic she was unable to continue working and her business was crippled. The last payment from the Respondent was on or about March 2019.
- [25] The Applicant further submitted that numerous attempts were made to assist the Respondent by affording her an opportunity to make payment in order to remedy the breach of the loan agreement, i.e., in access of 50 (FIFTY) telephone calls were made to the Respondent in an attempt to assist her in making payment arrangements to bring the arrears up to date.
- [26] The Applicant submitted that despite the aforesaid attempts, the Respondent failed to conclude a payment arrangement with the Applicant and/or neglected to adhere to payment arrangements concluded between the Applicant and the Respondent.
- [27] It was further submitted that the Applicant would not have provided the Respondent with the guarantee in the absence of an indemnity signed by the Respondent, which indemnity provides the aforesaid immovable property to act as security to satisfy the judgment debt which is sought.

- [28] In the Applicant's supplementary heads of argument it submitted that the Respondent's main contention, is that the credit provider (Standard Bank) failed to conduct an affordability assessment and that it (Standard Bank) has failed to verify her affordability assessment against her payslips. Furthermore, that Standard Bank has failed to establish her financial means and that it has failed to explain the loan agreement's terms and conditions to her. Based on this the Respondent sought that the mortgage bond be cancelled and the title deed be returned due to reckless credit lending.
- [29] It is the Applicant's contention that the Respondent did not aver that the information in the bond application was inaccurate or irrelevant.
- [30] It was further submitted that the Respondent did not say what information should have been considered but was not considered. Similarly, it was submitted that the Respondent did not say that the information considered by the Applicant/Standard Bank did not reflect the status of her financial affairs at the time when the Applicant/Standard Bank undertook assessments, nor on what basis it can be said that she is unable to afford the monthly instalments. The Court was referred to *First Rand Bank Limited v Madigage* 2021 JDR 2317 (GJ) (27 September 2021) in support of these submissions as well as to *Horwood v Firststrand Bank Ltd* 2010/36853 [2011] ZAGP JHC 121 in support of the submission that a prospective consumer must fully and truthfully answer any request for information made by the credit provider as part of the assessment in terms of section 81 of the NCA. Furthermore, a credit provider is entitled to

accept for this purpose the veracity of the information provided to it by or on behalf of a prospective consumer.

- [31] It was submitted by the Applicant that the alleged failures by Standard Bank to conduct an affordability assessment and to explain the terms of the agreement, are meritless. In support of this submission reference was made to the Acceptance by the Borrower section of the loan agreement, wherein inter alia, the following is recorded:

"1.1 The quotation ("Part A") and the terms and conditions ("Part B") have been fully explained to me/us and I/we understand my/our rights and obligations, and the risks and costs of the loan;

1.2 I/we have been informed that I/we can refer any further questions I/we may have to the Bank;

1.3 I am/we are aware of the importance of the wording printed in bold;

1.4 I/we acknowledge that we have been free to secure independent advice in respect of the contents of this Agreement;

1.5 I am/we are aware that any assessment by the bank of any Property or asset for purposes of determining the value of any Collateral (i.e. security) under this Agreement, has been performed (done) for bank use only in order to secure this Agreement;

1.6 I/we accept the offer of the loan contained in Part A and the related terms and conditions in Part B, acknowledge that I/we have been given copies of this Agreement, and confirm that:

1.6.1 I/we can afford the Loan and interest payments as well as the costs, fees and charges referred to in this Agreement;

1.6.2 I/we have fully and truthfully disclosed my/our income and expenses to the Bank and have fully and truthfully answered all requests for information made by the Bank leading up to the conclusion of this Agreement; and

1.6.3 I/we have disclosed to the Bank all other applications that I/we have made to third parties for credit, whether processed or not at the date of my/our application for this Loan;...”

[32] It was submitted by the Applicant that based on the principle of caveat subscriptor, the Respondent is bound by the loan agreement. The Court was referred to *Burger v Central South African Railways* 1903 TS 571 at pp 577 to 579 in this regard and also to *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) in respect of a defence of “reckless credit” and “over-indebted”.

Respondent's Opposing Affidavit

The Respondent made the following submissions in her opposing affidavit:

[33] The Respondent stated that her business was severely affected by the Covid-19 pandemic lockdown, leading to a complete halt in sales, which greatly devastated her business. Adding to her challenges, she mentioned experiencing ill-health during this period, providing evidence such as a referral letter from her medical practitioner.

[34] The Respondent claimed to have applied for a home loan through a company named FS Bond, refuting any direct application to Standard Bank for the loan. She clarified that her only interaction with Standard Bank was on the day she signed the loan documents.

[35] Furthermore, the Respondent stated that she did not receive any emails or other forms of communication from Standard Bank regarding an affordability assessment. She mentioned that her only notification was a phone call from FS Bond instructing her to sign, with assurance that everything was approved, along with the address, time and date of signing.

[36] She expressed dissatisfaction, noting that she was not adequately informed about the loan's risks during the signing process. She alleged that she was simply instructed to sign without any detailed explanation, leading to her unawareness of the financial risks and ultimately finding herself in a state of over-indebtedness.

[37] The Respondent claimed to have made several attempts to arrange payment schedules with Standard Bank, providing details of the individuals she contacted within Standard Bank and the dates of her attempts to reach out or arrange meetings. However, she asserted that she received no response from these bank representatives.

- [38] Additionally, the Respondent pointed out that the application form from FS Bond explicitly welcomed “blacklisted” applicants, suggesting that her status was known to the agent handling her loan application. She argued that the attorney failed to perform a thorough assessment despite having access to all her financial information through her personal banking account with Standard Bank. She alleged that Standard Bank and/or FS Bond did not check or verified her affordability against her pay slips, credit bureau records and bank statements even though she is/was a customer/client of Standard Bank and they had full access to her personal bank account.
- [39] The Respondent alleged that there was a corrupt relationship between the agent who represented Standard Bank and a third party company called FS Bond which she alleged she has used to refinance the aforesaid immovable property.
- [40] Although the Respondent elaborated on and supplemented the allegations stated in her plea and opposing affidavit by attaching annexures as proof of her allegations, to her heads of argument, the Court cannot consider the annexures attached to her heads as these had to be attached to her opposing affidavit and not to her heads of argument. Heads of argument is not evidence as it is not given under oath. Heads of argument is merely a persuasive comment made by the Respondent and/or her legal representative with regards to question of fact or law. Heads of argument cannot serve as the opposing affidavit or plea.

Decision

- [41] Against this backdrop, was the application for summary judgment before this Court.

Legal Principles

Rule 32

- [42] The relevant part of Rule 32 of the Uniform Rules of Court, and more specifically Rule 32(3) (b), provides as follows:

“Rule 32(3) – Upon the hearing of an application for summary judgment the defendant may-

- (a) ...
- (b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence

shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.”

- [43] The law applicable to the above was well set out by Corbett JA (as he then was) in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 as follows:

“All that the court enquires into is:

- (a) Whether the defendant has ‘fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and
- (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment either wholly or in part, as the case may be.”

Reckless Credit Lending – National Credit Act

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2024/360.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/sb-guarantee-company-rf-pty-limited-v-hadien-unknown-topic-agpphc-2024>

Prepared on 11 October 2026 · Esheria