

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 7916/2021

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

APPLICANT

AND

INNOCENT GWASAI

FIRST RESPONDENT

NANDISA GSCHWARI

SECOND RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 27th of January 2023.

DIPPENAAR J:

[1] The applicant seeks a monetary judgment and an order declaring certain immovable property, being Holding Number 147 Kyalami Agricultural Holdings ("the property") over which a mortgage bond is registered in its favour, specifically executable, together with ancillary relief.

[2] The first respondent filed a notice to abide, which was withdrawn shortly thereafter. However, the first respondent has not opposed the application, nor delivered any answering affidavit.

[3] The second respondent, who concluded various sale agreements with the first respondent pertaining to the property, opposes the application. She has also raised certain counter claims against both the applicant and the first respondent.

[4] The applicant seeks final relief. The matter is thus to be determined on the basis of the so called *Plascon Evans* test¹. It is well established that motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts.

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A) at 634E to 635C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para [26]

[5] The second respondent claims an interest in the subject matter of these proceedings, namely the property, arising from a suite of agreements pertaining to the sale of the property concluded between her and the first respondent during 2014 and 2015.

[6] The second respondent filed four affidavits: (i) an affidavit opposing the application; (ii) a further affidavit headed 'counterclaim to the applicant', in which the second respondent seeks payment from the applicant of damages in the aggregate sum of R14.79 million; (iii) a further affidavit headed 'claim against the first respondent', in which the second respondent seeks payment from the first respondent of damages in the sum of some R2.1 million; and (iv) a further affidavit in terms of which the second respondent seeks a final interdict (a) restraining the sale of the Property and (b) compelling the applicant to furnish '*...all documentation required in regards the bond account...*'.

[7] The second respondent's case in sum is that the applicant became party to the sale agreements concluded between her and the first respondent as they accepted the sale of the property and has colluded with the first respondent to defraud her. She has paid a total of R5 475 493.96 that benefitted both the applicant and first respondent. The first respondent defrauded her and fled the country after she paid him an amount of R2 million. She accuses the applicant of intimidation, of misleading the court in its papers and of causing damage to the property as it was vandalized and various items stolen. She argues that the plaintiff should not have launched the present proceedings but instead should have negotiated an amicable resolution to the issue with her as the purchaser of the property.

[8] The second respondent further contends that she was attempting to settle the balance with the applicant after the first respondent fled the country and that the first respondent abandoned his rights of ownership in terms of the sale agreements. She claims not to know the outstanding amount due under the bond as the applicant refused

to disclose the financial information requested by her, thus preventing her from settling the outstanding amount due.

[9] The relevant facts are by and large common cause. The first respondent is the registered owner of the property. The applicant holds a mortgage bond over the property as security for the first respondent's indebtedness to it in terms of a home loan agreement for R5.25 million, concluded between the applicant and first respondent on 23 February 2007.

[10] The first respondent breached the agreement resulting in the applicant obtaining an order of foreclosure against him on 22 August 2013. It was undisputed that the agreement was later reinstated in terms of section 129(3) of the National Credit Act² (the "NCA") pursuant to a rescission application launched by the first respondent. As a result, the foreclosure order obtained on 22 August 2013 lapsed and is invalid.³

[11] The sale agreement pertaining to the property was concluded between the first and second respondents on 10 July 2014. Subsequent thereto, between July 2014 and March 2015, they concluded various deeds of amendment and an addendum to the aforesaid sale agreement. The applicant was not a party to the written agreements, although the second respondent contends that the applicant became a party to the agreements by accepting the sale agreements.

[12] Ultimately, the sale agreement was not acceptable to the applicant as mortgagee. It was not disputed that the second respondent, as purchaser of the property, failed from time to time to make certain payments provided for in the sale agreement, as amended and that she breached the terms of the sale agreement concluded between her and the first respondent and never made payment of the full purchase price reflected therein either timeously or at all.

² 34 of 2005

³ Nkata v Firstrand Bank Ltd 2016 (4) SA 257 (CC).

[13] It was common cause that the second respondent made certain sporadic payments directly into the first respondent's home loan account, and in the aggregate sum of some R3.4 million. After 2015, no further payments were made.

[14] The applicant's undisputed version is that it elected to treat the payments as advance instalments payable under the agreement without prejudice to any of its rights under the agreement. Those payments had the effect of servicing the home loan until August 2015 and settling the arrears, resulting in the reinstatement already referred to.

[15] It is further undisputed that notwithstanding the payments made by the second respondent in terms of the sale agreement, the first respondent was, as at 18 January 2021, in arrears in the aggregate sum of R917 000.00. After complying with the relevant requirements of ss 120, 129, and 130 of the NCA, the applicant cancelled the loan agreement by giving notice in its founding papers in the present proceedings⁴, which were instituted during February 2021. It is well established that an innocent party such as the applicant is entitled to give notice of cancellation in its application itself⁵.

[16] Importantly, no cogent admissible evidence was presented by the second respondent casting any doubt of the veracity of the applicant's claim as illustrated by its certificate of balance and remains uncontroverted. The high water mark of her case is that second respondent wants to get an expert involved.

[17] The contention that the applicant became a party to the agreements concluded between her and the first respondent lacks legal merit. It is clear from the agreements that the applicant was not a party thereto. Having been aware of the agreements does

⁴ A credit provider must still comply with Part C of Chapter 6 of the NCA if it wishes to invoke the more serious remedy of cancellation in terms of section 123. *Absa Bank Ltd v De Villiers and Another* 2009 (5) SA 40 (C) at [12] and [13]; see also *CM van Heerden & JM Otto 'Debt Enforcement in Terms of the National Credit Act' 2007 TSAR 655*; *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at [12]; *Naidoo v Absa Ltd* 2010 (4) SA 597 (SCA) at [8].

⁵ *Noble v Laubscher* 1905 TS 125 at 126; *Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd* 1946 WLD 518 at 519 – 520; *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C) at 462 C – D; *Swart v Vosloo* 1965 (1) SA 100 (A) at 105H; *Truter v Smith* 1971 (1) SA 453 (E).

not make the applicant party to the agreements and it was undisputed that the applicant at all times negotiated with the second respondent with full reservation of its rights.

[18] Importantly, it was common cause that the mortgage bond was never cancelled and that ownership of the property was never transferred to the second respondent. That, together with the second respondent's breaches of the sale agreement concluded between her and the first respondent, is fatal to her case. Simply put, the second respondent has not illustrated any legal standing to oppose the application.

[19] The second respondent is an adult woman who freely and voluntarily concluded the sale agreement with the first respondent on the unconventional terms agreed to between them. As such, she is the author of her own misfortune and the applicant cannot be held accountable for her conduct.

[20] In my view, the applicant has made out a proper case for the relief sought and conclude that it is entitled to judgment.

[21] What must be considered next is whether a reserve price should be set. The second respondent avers that she resides on the property and has done so since 2021. It is further undisputed that despite all rental income in respect of the property being ceded to the applicant under the mortgage bond, no rental payments received by the second respondent were paid over to the applicant.

[22] According to the second respondent, she had a tenant on the property from whom she was receiving R70 000 per month until November 2019, which tenant was "scared off" by the applicant's representatives attending the property. She lost her tenant in November 2019 allegedly due to continued threats by the applicant to the tenant. The second respondent's allegations regarding the alleged threats are untenable and unsubstantiated. Moreover, substantial *bona fide factual* disputes exist on this issue.

[23] Thus, whilst the second respondent paid the applicant an amount of R3.4 million in respect of the first respondent's liability, the second respondent has not accounted for any rental income on the property. Moreover, no payments have been made in respect of the municipal services account. As of January 2021, the outstanding amount exceeded R352 000.

[24] According to the latest available valuation report obtained by the applicant, the property is in a severe state of neglect and its value has been negatively impacted by the fact that the interior has been converted to multiple rental units. The amount outstanding to the applicant is some R3.6 million, the forced sale value is R2.4 million.

[25] There is thus a negative equity in the property, taking into account the liability and relevant charges. In those circumstances, I am persuaded that it would not be appropriate to set a reserve price, considering all the relevant factors envisaged by r 46A (9).

[26] I am fortified in this view by the unusual circumstances of this case and the fact that the second respondent is not the judgment debtor, but a third party who has not made out any case on her papers that she will be rendered homeless if an order is granted.

[27] I urn to consider the counterclaims raised by the second respondent. These appear simply from the affidavits filed and no notices of motion accompanied the affidavits. It does not appear from the papers filed of record that the claims against the first respondent were served on him. It follows that such claims cannot succeed and it is not necessary to deal with them in detail. The second respondent is at liberty to pursue any claims she may wish to institute in appropriate legal proceedings properly served on the first respondent.

[28] The second respondent's counterclaim against the applicant pertains to damages of R14.79 million allegedly suffered at the hands of the applicant. Such damages pertain to stolen curtains, legal fees, lost rentals, "renewal rental" and rehabilitation costs.

[29] It is trite that in motion proceedings, the application papers constitute both the pleadings and the evidence⁶. Whilst I have sympathy for the fact that the second respondent has no legal representation, her claim must be adjudicated based on the relevant applicable principles. The counterclaim is pleaded in vague and excipiable terms, does not identify whether the claim is based in delict and does not contain the necessary averments or facts. The second respondent elected not to deliver any replying affidavit and the factual averments of the applicant stand uncontroverted. The applicant's version in its answering papers cannot be rejected as palpably false and untenable⁷. On the papers there are numerous *bona fide* factual disputes which cannot be resolved. The second respondent did not seek a referral to trial or oral evidence.

[30] Simply put, the second respondent has not made out any case for relief in the application papers. For these reasons, the second respondent's damages claim is doomed to failure.

[31] As far as the second respondent's claim for a final interdict is concerned⁸, she has failed to overcome the first hurdle; being to illustrate a clear right to such relief. In addition the second respondent has alternative suitable remedies at her disposal to protect her interests, notably appropriate legal proceedings against the first respondent for damages, which in the present circumstances would constitute adequate redress⁹.

⁶ Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464(D)

⁷ Wightman t/a J W Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371(SCA) para [12]-[13]

⁸ It is trite to state that the requirements for a final interdict are as follows (see in this regard D E Van Loggerenberg *Erasmus: Superior Court Practice* (E – Publication) Appendix D6 at RS16, 2021, D6 – 13):

- a) A clear right on the part of the applicant.
- b) An injury actually committed or reasonably apprehended.
- c) The absence of any other satisfactory remedy.

⁹ Erasmus v Afrikander Propriety Mines Ltd 1976 (1) SA 950 (W); UDC Bank Ltd v Seacat Leasing and Finance Co (Pty) Ltd 1979 (4) SA 682 (T) at 695 D – 696 C.

[32] It follows that this claim too must fail.

[33] There is no reason to deviate from the normal principle that costs follow the result. Costs were sought against the second respondent only in the event she opposed the application. Counsel, correctly so in my view, did not persist in seeking costs on a punitive scale.

[34] I grant the following order:

[1] Judgment is granted against the first respondent for:

[1.1] Payment of the sum of R3 680 976.31;

[1.2] Payment of interest on the sum of R3 680 976.31 at the rate of 8.450% per annum, calculated daily and compounded monthly in arrears from 31 December 2022 to date of payment, together with monthly insurance premiums of R5 367.12;

[2] The immovable property, Holding Number 147 Kyalami Agricultural Holdings, Extension 1, District of the City of Johannesburg, Gauteng Province, measuring 2, 4409 hectares and held by Deed of Transfer T056336/07, is declared specially executable;

[3] The Registrar of the High Court is authorised to issue a Warrant of Execution against the property referred to in [2] above;

[4] The second respondent's counterclaim for damages and the claim for an interdict against the applicant are dismissed with costs;

[5] The second respondent's counterclaim against the first respondent is dismissed;

[6] The first and second respondents are directed to pay the costs of the application, jointly and severally, the one paying, the other to be absolved.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 24 January 2023
DATE OF JUDGMENT : 27 January 2023
APPLICANT'S COUNSEL : Adv M de Oliveira
APPLICANT'S ATTORNEYS : Jason Michael Smith Incorporated
SECOND RESPONDENT : In person