IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

20/02/19
DATE

M GWALA

CASE NO: 50590/2017

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **APPLICANT**

and

CLASSIC CROWN PROPERTIES 55 CC **FIRST RESPONDENT**

CALVIN NYIKO MAPHOPHE **SECOND RESPONDENT**

THANDIWE LYDIA MAPHOPHE **THIRD RESPONDENT**

Judgment

Gwala AJ

1. The applicant instituted motion proceedings against the respondents in which it claims payment of the sum of R5, 014, 864.96 inclusive of interest as at 05 May 2017. It claims further interest on the aforesaid amount particularised as follows – on the amount from R0.00 to R3, 500, 000.00 the interest is claimed at the rate of 8.50% per annum and on the amount above R3, 500,000.00 interest is claimed at the rate of 8.70%, per annum.

2. The applicant also seeks an order declaring specially executable the property known as Erf 3469 Northcliff Extension 25 Township Registration Division: I.Q. Gauteng Province Measuring 1010 Square Meters, held under Deed of Transfer T50498/2002, situated at 85 Maluti Avenue, Northcliff extension 25 ("the immovable property") and that and that it be allowed to execute thereon. The respondents are opposing the relief sought.

3. According to the applicant the background to this matter is that it [the applicant] entered into three loan agreements with the first respondent. These were concluded on different dates. Each loan agreement is constituted by various documents such as a letter of grant and general terms and conditions.

4. The first loan agreement was concluded on 11 June 2002. In terms of this agreement the applicant agreed to lend and advance a sum of R1 450 000.00 to the first respondent. The second agreement was concluded on 03 December 2004 and in terms thereof the applicant agreed to lend and advance a sum of R2 050 000.00 to the first respondent. The third and last agreement was concluded on 12 October 2005. In terms thereof the applicant agreed to lend and advance a sum of R500 000.00 to the first respondent. The first respondent agreed to repay the principal debt together with interest in monthly instalments.

5. The applicant further asserts that the first respondent caused three Mortgage Bonds (*"the mortgage bonds"*) to be registered in favour of applicant over the immovable property as continuing covering security for the aforesaid loan agreements. The first mortgage bond with bond numbers B30388/02 was registered on 12 July 2012, the second with bond B84509/04 was registered on

14 December 2004 and the third with bond number B82188/05 was registered on 24 October 2005.

6. The applicant asserts further that in terms of each of the mortgage bonds the first respondent declared itself to be lawfully indebted and bound to the applicant for the several amounts referred to above. The first respondent also agreed that certificates signed by any of the applicant's managers, whose appointment need not be proved, would on its mere production constitute *prima facia* proof of the amounts due to the applicant from time to time.

7. The first respond agreed that should it fail to observe or perform any of the provisions of the mortgage bond or fail to pay any some legally claimable by the applicant or fail to perform any other obligation on due date or at all, then all amounts secured by the mortgage bond would become immediately due and payable.

8. According to the applicant on 11 November 2002, and on 12 October 2005 as well as 03 December 2005, the second and third respondents, signed suretyship agreements in terms of which they bound themselves as sureties and co-principal debtors with the first respondent for the payment of all existing and future debts of any kind owing by the first respondent to the applicant. The second and third respondents are now sued in this application in their capacities as sureties and co-principal debtors.

9. The applicant asserts further that pursuant to the agreements the applicant advanced the amounts in terms of the loan agreement to the first respondent. It

now contends that the first respondent breached its obligations in terms of the loan agreements and that the second and third respondents also breached their obligations in terms of their suretyship agreements in that they failed to pay the monthly instalment when they fell due which the first respondent owed to the applicant.

10. The respondents do not dispute that pursuant to the aloan agreements several amounts were paid by the applicant. Instead the respondents took what appears to be points *in limine* in opposing the relief sought. The first point was that the deponent to the founding affidavit lacked authority to depose thereto. The respondents contended that the deponent to the founding affidavit was not authorised by the applicant to depose to the founding affidavit on its behalf. And on that basis, so the argument goes, the founding affidavit should be struck out. I will deal, first, with these submissions.

11. As I understand it the law does not require that a witness be authorised in order to give evidence. This applies even in motion proceedings. There is no requirement that one should be authorised in order to depose to an affidavit including the founding affidavit. The legal position is that only the institution of the legal proceedings should be authorised. In any event, the remedy to a challenge whether the legal proceedings were authorised or not does not lie in taking an issue with the authority of the deponent to an affidavit. The remedy lies in the provisions of Rule 7 of the Uniform Rules of Court. I need not deal with this further because it was not the respondents' case that the legal proceedings were not authorised hence no notice in terms of Rule 7 was served.

12. A person who deposes to an affidavit does so purely as a witness and on the basis that he has knowledge of the facts relevant to the matter. Any person who can testify as to the relevant facts in a matter and who is competent to give evidence may do so without being authorised. In a similar challenge as that raised by the respondents, the Supreme Court of Appeal in the case of Ganes and Another v Telecom Namibia Ltd[1] stated thus:-

> "[19] ... [I]n the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised..."

13. Thus on the principle that the deponent to an affidavit need not be authorised to depose to an affidavit as enunciated in Ganes, the respondents' submission that since the deponent to the founding affidavit was not authorised and therefore the founding affidavit should be struck out cannot be upheld. I add that to the extent that the applicant had attached to the founding affidavit what it called certificate

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[1] **2004 (3) SA 616 at 624 para 19 G-H.**

of authority, such attachment was superfluous and could only have been done out of caution.

14. The second point raised by the respondents was that the deponent to the founding affidavit did not have personal knowledge of the applicant's dealing with the respondents in relation to the transactions pertaining to the loan agreements and therefore could not depose to the founding affidavit.

15. The deponent to the founding affidavit clearly stated that she had perused the documents in the possession of the applicant and that he has unlimited access thereto. Not only that, he stated that he has control over those records. The denial by the respondents that the deponents to the founding affidavit had knowledge of the fact he deposed to lacks any basis. It was made in the air without any facts supporting same. The respondents did not did gainsay, for instance, that the deponent had perused the documents in possession of the applicant and that he had unlimited accesses thereto. Again, this point cannot be upheld.

16. The third point raised by the respondent was that the applicant did not produce any evidence to the effect that it was a registered credit provider in terms of the National Credit Act 34 of 2005. I need not say much in this regard because this point was wisely abandoned by the respondents' counsel during argument.

17. The fourth point taken by the respondents was that there were no letters of demand sent to them prior to the institution of the proceedings. Even if this point was validly made, the applicant had attached to its founding affidavit the post-

dispatch track and trace reports which show that the letters of demand were collected after first notification was sent to the respondents. Thus, to the extent applicable, the principle in the case of **Sebola and Another v Standard Bank of South Africa Ltd and Another**[2], was satisfied by the applicant. In that matter the Constitutional Court stated the following:

> *" [74] These considerations drive me to conclude that the meaning of "deliver" in section 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach – by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the section 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the section 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer.*
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> *[75] Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. Even though registered letters may go astray, at least there is a "high degree*

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[2] **2012 (5) SA 142 (CC).**

of probability that most of them are delivered." But the mishap that afflicted the Sebola's notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

[76] *In practical terms, this means the credit provider must obtain a post-despatch "track and trace" print-out from the website of the South African Post Office. As BASA's submission explained, the "track and trace" service enables a despatcher who has sent a notice by registered mail to identify the post office at which it arrives from the Post Office website. This can be done quickly and easily. The registered item's number is entered, the location of the item appears, and it can be printed.*

[77] *The credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence*

of contrary indication, and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office.

[78] The evidence required will ordinarily constitute adequate proof of delivery of the section 129 notice in terms of section 130. Where the credit provider seeks default judgment, the consumer's lack of opposition will entitle the court from which enforcement is sought to conclude that the credit provider's averment that the notice reached the consumer is not contested.

[79] If in contested proceedings the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to once collected, the court must make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true, and, if so, adjourn the proceedings in terms of section 130(4)(b)."

18. In view of the evidence about the post-despatch track and trace reports, I am satisfied that the applicant has complied with the requirements as to proof of delivery of the letters of demand to the respondents. There is also evidence that these letters of demand were uplifted.

19. The last point raised by the respondents was that there is no evidence that valid loan agreements and the suretyship agreements relied upon by the applicant

were indeed concluded. They contend that the loan agreements were, in fact, not attached to the founding affidavit.

20. In so far as the submissions regarding the loan agreements are concerned, the respondents challenge the fact that the applicant was relying on a letter of grant as well as the documents containing the general terms and conditions. In short, the respondents challenged the fact that none of the loan agreement was contained in a single document. This, according to them, was evidence that there was no loan agreement in the first place.

21. There is no merit in this argument and cannot be upheld. First, the suretyship agreements are attached to the founding affidavit. The respondents are not denying their signatures. Second, all of the documentation showing the existence of the loan agreements relied upon by the applicant were attached to the founding affidavit. As previously mentioned, the loan agreements are composed of several documents which when read together evidence that contracts were concluded between the applicant and the first respondent. All these documents were attached to the founding affidavit.

22. The fact that each loan agreement was made up of several documents and not contained in a single document does not mean that the agreements do not exists. A contract does not have to be contained in a single document.[3] I am satisfied

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[3] **post-dispatch track and trace reports See Hersch v Nel [1948] 3 All SA 427, 1948 (3) SA 686 (A) 702 per Davies AJA, approving Malk v Pergiondakis 1916 WLD 40, which also held that the writing need not be in a single instrument, but may take the form, for instance, of an exchange of letters. Davies AJA's reasoning necessarily involves approval of this aspect of the decision also. See also Coronel v Kaufman 1920 TPD 207 209; Meyer v Kirner [1974] 4 All SA 201, 1974 (4) SA 90 (N) 97E.**

that the applicant has established the existence of the loan agreement including the suretyship agreements in which the second and third respondents bound themselves as sureties and co-principal debtors with the first respondent.

23. In the premise, I am of the view that the challenge waged by the respondents to the relief sought is unsustainable. The applicant has proved its and I am satisfied that the applicant is entitled to the relief it seeks. I will make an order in the end that the respondents be ordered to pay the amount claimed together with interest thereon.

24. This brings me to the other relief sought by the applicant namely that the property be declared specially executable. In support of this prayer to have the property declared specially executable the applicant made the following allegations

"7.3 *[t]he applicant, prior to the institution of this [action] took all reasonable steps to conclude a satisfactory arrangement with the first respondent to comply with the provisions of the aforesaid mortgage bond, and in particular with effect regular payment[s] of the monthly bond instalments due in terms thereof. These steps included contact with the respondents and its attorneys during the period at March to November 2014 to attempt to conclude a repayment arrangement with them.*

7.4 *Notwithstanding the above and the fact that the applicant had previously instituted action against the respondents under numbers 48819/2014 and 83405/2016 (which were both subsequently withdrawn respectively due to*

the deregistration of the first respondent and lack of all the necessary security documents), the first respondent failed to comply with the provisions of the aforesaid mortgage bond, in particular, failed to punctually pay the monthly instalments due and owing to the applicant by reason of which the full balance owing under the said mortgage bond is now due and claimable in terms thereof, and the first resident is consequently in breach of the terms and conditions of the mortgage bond.

7.5 *In the circumstances, the applicant's only effective remedy to recover the first respondent's indebtedness is to institute these legal proceedings, obtain an order declaring the above property executable, and then to proceed to execute against the said property as is envisaged in Rule 46(1)(a)(ii) of the Rules of the above Honourable Court...*

7.8 *To the best of the applicant's knowledge:*

7.8.1 *The aforesaid amount due by the first respondent to the applicant is a debt that was incurred by the first respondent in order to acquire the aforementioned immovable property and which property was not hypothecated as security for any other debt;*

7.8.2 *Total arrears due to the first respondent to the applicant as at 5 May 2017 amounts to* ***R1 115 978. 89*** *with the first respondent being 35 months in arears with their payments, as will be more fully appear from an extract of the applicant's record... In view of*

the aforesaid arears, and the fact that the first respondent has, on at least 5 occasion, being in arrears with its payments since registration of the aforesaid mortgage bond, no possibility exists that the first respondent's liability to the applicant may be liquidated within a reasonable period, without the applicant having to take legal action as is envisaged herein ...

7.8.3 the said immovable property is utilised for residential and not commercial purposes."

25. Further information placed before the court for consideration of whether the property be declared specially executable is that the monthly instalment payable by the first respondent in respect of the immovable property amounts to R31, 621. 52 and that the last payment made by the first respondent in respect thereof was on 18 August 2014 in the amount of R30.00.00. The remainder of the debit orders were retuned unpaid and notwithstanding the demand the respondents failed to pay any further instalments.

26. The fact that the first respondent has not made any attempt to make payments towards the monthly instalments for over a period of four years is worrying. The respondents seem to deny that the first respondent has not made payments over that period. They did not assist, however, by providing any kind of proof that payments have been made in the meantime. I have no way of assessing whether they will be able to satisfy the judgment order once granted in any way other than declaring the property specially executable. They have not provided any

information to demonstrate that the order declaring the property specially executable is not justified. The debt has been outstanding for far too long.

27. The respondents bemoaned the fact that they did not have adequate time to obtain bank statements to prove they have been making payments. It is difficult to comprehend why the respondents would not be able to provide bank statements, if they needed to, in order to show that they have been making payments. The notice of motion was served on the respondents in July 2017. The notice to oppose was served during October 2017. The answering affidavit was filed in January 2018.

28. In the circumstances, the respondents had ample opportunity to obtains and submit proof of payments if their case depended on that. They could even file a further affidavit if indeed it was indeed their intention to show that they had been making payments over the years. I accept that they have not paid since August 2014 as stated by the applicant. That being the case, I am of the view that an order declaring the property specially executable will be appropriate.

29. Turning to costs, I take into account that the mortgage bonds make provision for costs on an attorney and client scale in the event of breach resulting in this kind of litigation. Both parties sought costs on an attorney and client scale. I will grant costs in favour of the applicant on an attorney and client scale.

30. In the circumstances I grant an order in the following terms:

    (1) The respondents are ordered to pay the sum of R5 014 864.96, jointly and severally *in solidum* the one paying the other to be absolved.

(2) Interests on the aforesaid amount as follows:

(a) On the amount of R0.00-R3 500 000.00 at the rate of R8.50% per annum;

(b) On the amount of R3 500 000.00- to the maximum at the rate of R8.70% per annum;

(3) The first respondent's property described as **ERF 3469 NORTHCLIFF EXT 25 TOWNSHIP REGISTRATION DIVISION: I.Q. GAUTENG PROVINCE MEASURING 1010 (ONE THOUSAND AND TEN) SQUARE METERS HELD BY DEED OF TRANSFER T150498/2002 SITUATED AT 85 MALUTI AVENUE NORTHCLIFF EXT 25** is declared specially executable.

4. The respondents to pay the costs on a scale as between attorneys and client.

Gwala AJ
Acting Judge of the High Court of South Africa

Date of Hearing: 20 November 2018
Day of Judgment: 20 FEBRUAR 2019
For the Applicant: Adv S Cliff
For the Respondents: Adv L Marks