

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 25761/2021

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED: YES/NO

2022

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In the matter between: -

ABSA BANK LIMITED

Plaintiff

AND

FANUEL JOHN MOTSEPE

Defendant

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 22 November 2022.

1. The plaintiff in this matter is Absa Bank Limited ('Absa'). It has instituted proceedings against Fanuel John Motsepe ('Motsepe') and seeks summary judgment against him. For the reasons which follow, the application is dismissed.
2. Absa alleges that on or about 20 February 2009 it concluded a written home loan agreement with Motsepe. It pleads that it is 'currently unable to locate the original loan agreement and copies thereof and is accordingly unable to annex a copy'. What it does annex to the particulars of claim is a 'comprehensive details' sheet which provides certain information.
3. Absa further pleads that pursuant to the loan agreement the debt was secured by registering a continuing covering bond for the sum of R1 200 000,00. A copy of the mortgage bond is attached to the particulars of claim.
4. Absa then pleads that it 'advanced R1 200 000,00 to the defendant's as the 'principal debt' [sic]. It then pleads that the 'principal debt as reflected in the loan agreement together with interest and costs thereon would be repaid to plaintiff in monthly instalments of R15 327,05, together with an interest rate of 5.65% below the prime lending rate.
5. The particulars of claim continues with the allegations that Motsepe is approximately 33.2 months in arrears in an amount in excess of R500 000,00. As of 19 May 2021 the defendant is, apparently, indebted to Absa in the sum of approximately R1 100 000,00.
6. Motsepe has filed a plea in which he mostly denies the allegations, although the mortgage bond is admitted.
7. Absa also seeks an order to issue a warrant of execution against the immovable property and that it be sold without a reserve price.

8. An affidavit by Ms Malan is filed in support of the summary judgment application. She is, according to her affidavit, a 'senior legal counsel in the legal department'.

9. She contends the following in her founding affidavit:

'I have perused all documents filed in the legal proceedings between the applicant and the respondent, account statement, the mortgage bonds, legal notices, as well as the account history which shows the full up to date history of the account since the credit agreement was entered into, such as the outstanding balance, interest, costs, and the respondent's full payment history, as well the current outstanding balances in the amount and the years.

On perusal of the documents, electronic account records and data available to me, I have acquainted myself fully with the facts in relation therein contained and I am able to swear positively to the facts contained in this affidavit'.

10. Her affidavit continues by, in essence, summarising the particulars of claim.

11. She continues in paragraph 10 of her affidavit to state:

'I respectfully submit that the particulars of claim disclose a valid cause of action and I herewith verify the facts, the cause of action, as well as the amount claimed against the respondent.'

12. The answering affidavit for the summary judgment application raises a number of defences.

13. The defendant raises two points *in limine*. It states that the application is fatally flawed for non-compliance with rule 32(2)(b) in that the application is not supported by an affidavit. This is because the affidavit of Ms Malan had been commissioned by a certain Mr van Schalkwyk of the firm Tim du Toit & Co. Inc. The evidence is that Tim du Toit & Co. is one of the firms of attorneys that is on Absa's panel of attorneys and that the provisions of regulation 7(1) of the Relations governing the Administering of Oath or Affirmation published under GN R1258 in GG3619 of 21 July 1972, as amended, and promulgated in terms of section 10 of the Justices of the Peace and Commissioner of

Oaths Act 60 of 1963 read with section 7 of the act would prohibit a person from the firm of Tim du Toit to be a commissioner of oaths for Absa.

14. Absa denied that this affidavit was commissioned contrary to the aforesaid legislation. This is because the firm dealing with this particular matter is Strauss Daly and the submission was that Tim du Toit has no particular interest in this litigation. I make no finding in this regard and, for the purposes of this judgment, I will accept that the affidavit was properly commissioned.
15. The second point *in limine* is that the affidavit 'consists completely of hearsay evidence, which is inadmissible.'
16. The basis for this is contained in paragraph 17 of the answering affidavit. It states this:

'No confirmatory affidavits have been provided from third parties responsible for compiling or uploading the account history on plaintiff's computer system, and importantly, Ms Malan did not state that she was authorised to certify and had executed a certificate in terms of section 15(4) of the Electronic Communications and Transactions Act 25 of 2002 ('ECTA'), certifying the facts in the Plaintiff's record to be correct and thus that she is able, on the basis thereof, to swear positively that the plaintiff will – having regard to the provisions of section 15(4) of ECTA – be able to prove the relevant facts at the trial of the action by producing the electronic record or an extract thereof.'
17. There is, in my view, certainly some force in this point. It is clear from the founding affidavit that Ms Malan merely had regard, on her version, to the records without stating why the contents of those records are within her personal knowledge.
18. Absa attempted to cure this difficulty and on 2 August 2022 filed a certificate in terms of section 15(4) of the ECTA in the name of a certain Anton Coetzee. He confirms that in his capacity as a business analyst with Absa he certifies that the 'detailed sheet and statement of account annexed to the plaintiff's particulars of claim' are true and correct and that same are printouts of data

messages utilised by the plaintiff in the ordinary course of business and litigation. But says the defendant in its heads of argument, the certificate is of no avail because it is impermissible in that no further evidence is permitted to be presented by the plaintiff. Reliance is placed on *Rossouw and another v Firstrand Bank Ltd*¹.

19. Mr Ellis contended that the *Rossouw* case is of no assistance because the certificate is not 'evidence' as it is simply there to confirm the amounts pleaded in the particulars of claim. That, to me, is quintessential the definition of evidence. In fact, section 15(4) says that the certificate is on its mere production admissible in evidence against any person as proof of the facts contained in such record, copy, printout or extract. Ironically, it is this very portion to which I have just referred upon which Mr Ellis relied in his submission in dealing with the further objection to the certificate; namely that it was not accompanied by a supporting affidavit. I need not decide this issue because, in my view, the certificate is, in fact, 'evidence' and should have been attached to the founding affidavit. After all, the evidence contained in the certificate is capable of being rebutted. The defendant had no such opportunity to do so in its answering affidavit.
20. If I am wrong in this regard, there is a further reason that I am disinclined to grant summary judgment.
21. The particulars of claim could not be clearer. It states that the amount of R1 200 000,000 was advanced. It states that the repayment of this, together with interests and costs amount to R15 327,05. However, when Mr Ellis was explaining to me the comprehensive details sheet, he mentioned that what makes up the R15 327,05 is the 'basic instalment' of R12 575,81 together with the service admin fee of R69,00, the life insurance of R1 336,83 and the property insurance of R1 345,41. On the face of it that might be true. Those are submissions from the bar and not made under oath by Ms Malan. There is clearly a discrepancy to that which is pleaded in the comprehensive detail sheet. It means I simply cannot grant summary judgment.

¹ 2010 (6) SA 439 (SCA) [34] - [36]

22. I have little doubt that the defendant is probably indebted to the plaintiff. But what that exact amount is may or may not be the subject of debate. From the bar I was also told that the amount advanced is not R1 200 000,00 but only R1 050 000,00 and that the amount of R1 200 000,00 was only the amount for which the bond was registered. That, too, may or may not be so, but those are all statements for the purposes of an affidavit to be made and not statements which are to be made from the bar.
23. Summary judgment no doubt has its place in our legal system but, it must also be remembered, that it is indeed a drastic remedy. In *First National Bank of SA Ltd v Myburgh and another*² the learned judge stated that:
'The court will grant summary judgment where a plaintiff has an unanswerable case. If the court has the slightest doubt, the court will not grant summary judgment.'
24. Given the aforesaid discrepancies and the unsatisfactory manner in which the founding affidavit dealt with these issues, I am not inclined to grant summary judgment.
25. I thus make the following order:

Order

26. The summary judgment application is dismissed with costs.

REINARD MICHAU

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 14 November 2022

Date of judgment: 22 November 2022

² 2002 (4) SA 176 (C) at para 9

Appearance

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