IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No: 4322/2011
Date Heard: 31/05/2012
Date Delivered: 21/06/2012

In the matter between:

ABSA BANK LIMITED **APPLICANT**

And

MOHAMED GOOLAM HOOSEN DADA MIA **RESPONDENT**

JUDGMENT

SMITH J:

[1] The Applicant applies for summary judgment against the Respondent, *inter alia,* in the following terms:

a) payment of the sum of R 2 434 962.14; and
b) an order declaring erf 60807, East London, executable.

The Respondent has opposed the application on various grounds which I consider below.

[2] The Applicant's civil action arose out of the Respondent's alleged failure to effect regular payments in respect of an overdraft facility

granted to the latter during July 2008. The Applicant has secured the overdraft facility by registering a mortgage bond over the Respondent's immovable property. The Respondent's alleged failure to maintain regular payments in terms of the overdraft facility had caused the Applicant to give effect to a clause in the mortgage bond which provides, *inter alia,* that the full outstanding balance shall become due and payable if the Respondent is in default of his obligations in respect of the overdraft facility.

[3] The Respondent opposes the application on the following grounds:

a) The copy of the summons served on him does not comply with Rule 17(3) of the Uniform Rules of Court, in that it does not bear the Registrar's signature;

b) The deponent who made the affidavit in support of the application for summary judgment, one Yuven Pillay, is not qualified to do so;

c) The Applicant has failed to comply with Rule 18(6) of the Uniform Rules of Court, in that it did not annex a copy of the agreement relating to the overdraft facility;

d) The "*certificate of balance*" annexed to the summons relates to the Respondent's indebtedness in respect of the overdraft facility. There is no *prima facie* indication in the summons of Respondent's indebtedness to Applicant in respect of the

mortgage bond;

e) The notice in terms of s. 129 of the National Credit Act, no 34 of 2005 ("the Act") related to the Respondent's alleged default in respect of the overdraft facility. A similar notice was not given regarding the alleged default in respect of the mortgage bond terms; and

(f) The Respondent has a *bona fide* defence to the claim, in that he had agreed with the Applicant, (at the time represented by one Mpetshwa) that the latter would place a moratorium on monthly bond instalments, pending the sale of the property. The proceeds of the sale would have been used to reduce the Respondent's indebtedness to the Applicant. He contends that the Applicant has therefore instituted the civil action prematurely.

[4] The technical arguments which Mr *Cole* has advanced on behalf of the Respondent, and which are referred to in paragraphs (a) to (d) above, can be disposed of relatively easily. They simply do not have any merit and cannot be upheld:

a) First, the averment that the summons was not signed by the Registrar is simply factually incorrect. The original summons in the court file has indeed been duly signed and issued by the Registrar.

b) Second, Yuven Pillay, who deposed to the supporting affidavit on behalf of the Applicant, has stated that he has direct and full control over the records which reflect the extent of the

Respondent's indebtedness. This would have enabled him to swear positively to the facts contained in the Applicant's summons. This, in my view, constitutes sufficient compliance with the requirements of Rule 32 of the Uniform Rules of Court.

c) Third, the Applicant relies on the terms of the mortgage bond for its cause of action. It was the default in respect of the overdraft facility that entitled the Applicant to proceed on the basis of a "*certificate of indebtedness*". It was therefore not necessary for the Applicant to annex the agreement relating to the overdraft facility to its summons. In the event I am of the view that this point does not constitute a valid basis on which the Respondent can resist summary judgment.

d) Fourth, as I have stated, the Applicant's claim is based on the Respondent's alleged default in respect of the overdraft facility. The mortgage bond does not constitute a separate source of indebtedness, but was merely registered to secure the overdraft facility. The s. 129 notice of 1 September 2011 (and which it is common cause had been received by the Respondent) therefore constitutes due notice of the contemplated legal proceedings in terms of ss. 129 and 130 of the Act.

I am therefore of the view that none of these points constitute a valid basis for the Respondent's opposition to summary judgment application.

[10] The substantive defence proffered by the Respondent however deserves thorough consideration. The essence of this defence is that the

Respondent had agreed with the Applicant that a moratorium would be put on instalments pending the sale of his property. As a result the money was not due and payable, and the Applicant has therefore instituted the civil action prematurely. It is trite law that the inquiry at this stage of the proceedings is limited to a consideration as to whether, if these allegations are established at the trial, they will constitute a valid defence to the Applicant's claim. I am therefore not required at this stage to consider whether or not the defence is likely to succeed.

[11] Mr *Hodge*, who appeared for the Applicant, submitted that the Respondent has failed to set out sufficient facts to sustain a valid defence. I do not agree. The Respondent has, in my view, averred facts which, if established at a trial in due course, will result in a finding that the summons had been issued prematurely. Furthermore, the allegations set out by the Respondent in this regard are not as far-fetched as Mr *Hodge* made them out to be. It is apparent from the correspondence between the parties that there was some agreement relating to the sale of the property. At the very least, Mpetshwa appeared to have been aware that the Respondent had put the property up for sale, and had expected regular updates of progress made in this regard. In addition, the agreement relating to the overdraft facility had not been annexed to the summons. There is therefore no indication that such an arrangement would have offended the terms of that agreement.

[12] Mr *Hodge* also argued that the Respondent has not established that Mpetshwa had the necessary authority to agree to the moratorium on payments. While this issue will no doubt be properly ventilated, and decided at the trial (when the merits of the Respondent's defence will be adjudicated), it is not relevant for the purposes of the present inquiry.

[13] In the result I am satisfied that the Respondent has put up a *bona fide* and valid defence to the Applicant's claim, and the summary judgment application must therefore fail.

[13] In the result the following order shall issue:

1. The application for summary judgment is refused;

2. The Respondent is granted leave to defend the main action; and

3. Costs shall stand over for determination by the trial court.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Hodge
Attorneys for the Applicant	:	Messrs Joubert Galpin Searl C/o Wheeldon Rushmere & Cole 119 High Street GRAHAMSTOWN Tel: 046 622 7005 (Ref: Owen Huxtable/ Michelle)
Counsel for the Respondents	:	Advocate Cole
Attorneys for the Respondents		XG Manjezi C/o Mili Attorneys GRAHAMSTOWN (Ref: h. Lalla)
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