

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: 2738/2010
Date heard: 7 December 2010
Date delivered: 17 December 2010

In the matter between:

FIRSTRAND BANK LIMITED

Applicant/Plaintiff

and

HERMANUS ARNOLDUS VAN NIEKERK N.O.	First Respondent/Defendant
MARTHINNIS JAKOBUS MÖLLER N.O.	Second Respondent/Defendant
LIZELLE MÖLLER N.O.	Third Respondent/Defendant
MARTHINNIS JAKOBUS MÖLLER	Fourth Respondent/Defendant
LIZELLE MÖLLER	Fifth Respondent/Defendant

JUDGMENT ON APPLICATION FOR SUMMARY JUDGMENT

DAMBUZA, J:

1]This is an application for summary judgment in which the plaintiff seeks judgment against the defendants for payment of R966,652.80, interest thereon at 8.4% per annum, an order declaring executable an immovable sectional unit in respect of which it registered a mortgage bond, and costs of suit. The application is opposed.

2]According to the papers, on 4 March 2008 the plaintiff, being the First National Bank Limited (“the Bank”) lent a capital amount of R928,000.00 to

the Möller Trust (“the Trust”) of which the first to third defendants are trustees. To secure the loan a Sectional Covering Mortgage Bond was registered over the sectional unit which the Trust sought to buy with the loan amount; the unit is in a Sectional Title Scheme. The plaintiff pleads that the loan amount is now payable in terms of the loan agreement concluded by the parties as the Trust has failed to “*pay an amount or amounts*” due under the agreement. The fourth and fifth respondent stood surety for and bound themselves jointly and severally in *solidum* as co-principal debtors together with the Trust for performance by the Trust of its obligations under the loan agreement. The plaintiff’s claim against them is therefore in their capacities as sureties.

3]Subsequent to entering an appearance to defend, the defendants filed their affidavits in opposition of the application for summary judgment. They set out several defences; the first being a point *in limine* that the Trust should have been cited as such, the second being the failure by the plaintiff to attach an “*authorized resolution of the Trustees of the Möller Trust*” in respect of hypothecation of the property in question. At the start of the hearing of the application counsel for the defendants advised that the defendants were not persisting with the points *in limine*.

4]Regarding the merits of the application, although not specifically expressed as such, I can only conclude from the papers that the defendants dispute their liability under the loan agreement, the mortgage bond and the suretyship. They contend that the plaintiff failed in its duty to do a feasibility study of the development of which the unit is part. I am not satisfied that this constitutes a

bona fide defence as envisaged in Rule 32 of the Rules of Practice in the High Court. As submitted on behalf of the plaintiff the defendants (and therefore the Trust) purchased a sectional title unit in a sectional title scheme. A home loan agreement was concluded with the plaintiff for the purchase price thereof and a Sectional Covering Mortgage Bond was registered over the unit in favour of the plaintiff to secure the home loan. The Trust did not purchase shares in the development company. There could be no duty therefore on the Bank to conduct a feasibility study into the development scheme. This contention by the defendant does not disclose a defence which is *bona fide* and good in law. The contention by the defendants that they do not, in summary judgment proceedings, need to set out their defence in full does not assist them.

5]The defendants further allege that a certain Nel misled them into concluding the agreement. During argument it was common cause that Nel was employed by the company which developed the sectional scheme. There is however, no valid basis advanced for the allegation that Nel's representations were made on behalf of the plaintiff. The nature and/or content of the misrepresentation by Nel is also not clear from the papers. The most that I can conclude from the allegations is that developer for which Nel worked sold shares in a non-existent company and presented a false feasibility study. Even if I accept that such misrepresentations were made, for the same reasons set out above, these allegations do not, in my view, reveal a bona fide defence or a defence valid in law to the plaintiff's claim. So is the further contention by the defendants that the properties are over-valued by 33%. In

this regard the defendants rely, once more, on the plaintiff's failure in its duty to ensure that the unit price was in line with the security provided. It is common cause that the developer was liquidated. The defendants contend that the plaintiff was negligent in failing to obtain background information necessary regarding the liquidation. But, again, there is no proper basis laid or authority cited by the defendants for this contention. I am not aware of any legal principle in terms of which a Bank (plaintiff) advancing a loan for purchase of a new property bears the alleged duty and counsel could not refer me to any. In my view the fact that the development scheme was liquidated is no proper basis for repudiation of the defendants' obligations under the home loan agreement.

6] *Mr Scott* who appeared on behalf of the Bank correctly highlighted the fact that the defendants are currently owners of a valuable property as a result of the home loan agreement; but they are unwilling to pay for it as they are obliged to under the loan agreement. The loan amount which was initially R928,000.00 now stands at R996,652.80. Consequently I am satisfied, despite the absence of an allegation in the summons, as to the amount of arrears, that a proper case has been made for an order declaring the sectional unit executable.

7] The following order shall therefore issue:

- 7.1. Against the First, Second and Third Defendants in their capacity as co-trustees of the Möller Trust:

- 7.1.1 Payment of the amount of R996,652.80;
- 7.1.2 Payment of interest on the said amount of R996,652.80 at the rate of 8.4% per annum, calculated and compounded monthly with effect from 1 September 2010 to the date of payment, both dates inclusive;
- 7.1.3 An order declaring executable the following property, namely a Unit consisting of:
- (a) Section No. 204 as shown and more fully described on Sectional Plan No. SS539/2008, in the scheme known as KING'S VILLAGE & TERRACES in respect of the land and building or buildings situated at WALMER, in the Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth, of which section the floor area, according to the said sectional plan, is 74 (Seventy Four) square metres in extent; and
 - (b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said section plan;
- Held by Deed of Transfer No. ST19743/2008;

7.1.4 Costs of suit.

7.2. Against the Fourth and Fifth Defendants jointly and severally with the Möller Trust, the one paying, the others to be absolved:

7.2.1 Payment of the amount of R996,652.80;

7.2.2 Payment of interest on the said amount of R996,652.80, calculated and compounded monthly, at a rate of 8.4% per annum with effect from 1 September 2010 to the date of payment, both dates inclusive;

7.2.3 Costs to be taxed as between attorney and client.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv P.W.A. Scott SC instructed by Spilkins
Attorneys of Port Elizabeth

For the defendants: Adv A.C. Moorhouse instructed by Jacques Du
Preez Attorneys of Port Elizabeth