Reportable

IN THE HIGH COURT OF SOUTH AFRICA

TRANSVAAL PROVINCIAL DIVISION

Dates:13,18 February 2009 Case 49747/07

18/2/2009

In the matter between

STANDARD BANK OF SOUTH AFRICA APPLICANT

And

HENDRIK ABRAM VAN VUUREN RESPONDENT

Summary Judgment – absence of mandatory section 129(1)(b) of the National Credit Act notice to debtor amounts to a bona fide defence and led to dismissal of the summary judgment.

A land claim has no effect on the validity of ownership or a mortgage bond on the property.

JUDGMENT

Van Rooyen AJ

[1] This is an application for a summary judgment based on a mortgage bond for R1655 363 against the Respondent. The application was filed on the 4th December 2007. Respondent's payments had stopped at the end of 2006. This matter has been postponed eight times: 11 January, 14 April, 30 April, 30 May, 13 June, 15 September, 29 September 2008, 5 November and 24 November 2008. I heard the matter on 13 February 2009. The Respondent opposed the granting of the summary judgment on several grounds. On the 25th January 2008 Hartzenberg J ordered that the summary judgment be postponed *sine die*, that Respondent undertakes to pay the arrears within four weeks and to pay the monthly instalments on the

due date and that if he failed to comply, the Applicant would be entitled to re-enrol the summary judgment application.

[2] After having filed his first answering affidavit on the 9th January 2008, the Respondent filed five supplementary answering affidavits on 23 January, 25 April, 13 June, 5 November, and 24 November 2008. Ms *Maritz*, for the Applicant, argued that it was impermissible for the Respondent to simply have kept on filing supplementary affidavits without having formally applied for condonation – see *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986(2) SA 357(T). Before I decide on her objection, it would be fair to summarize what the affidavit and supplementary affidavits of the Respondent aver. I should observe that although Respondent did instruct an attorney, the reasoning in the affidavits has many flaws which are typical of a layman's view of the law and I accept that he also drafted the affidavits. However, procedurally, I am inclined to be more tolerant of his attempts to explain the situation and that is why, I believe, a Court should lean over backwards to at least hear what he says, even if it is in six, rather repetitive, affidavits.

Affidavits of the Respondent

[3] In the initial 9 January 2008 affidavit Respondent states that the purchase price was R750 000 and that this was the amount which the Respondent had borrowed from the Applicant. Respondent had also paid off in excess of R74422 to the Applicant. He attached a bank statement to substantiate this.

[4] In the 23 January 2008 supplementary statement Respondent states that he was advised by his attorneys to elaborate on his defence and also adds that the Applicant had agreed to postpone the application to 25 January 2008. He now states that although the purchase price was R750000, the balance of the R1500000 was "disbursed" by his [mortgage] attorney, against whom he was contemplating legal action for the "misappropriation" of this balance. He then also disputes the unsigned standard terms and conditions of the bond as attached to the summons. They were not agreed to and were also not referred to in the mortgage document. The reference to the standard terms in the Summons is, accordingly, incorrect.

[5] In the 25 April supplementary affidavit he states that he had never consented to the Court order of 25 January 2008. The order states that he undertakes to pay the plaintiff the outstanding arrears of R222379 within four weeks. He had had discussions with his first attorney in this matter about such payment subject to conditions, but had not agreed that it could be made a Court order. The condition was that the Applicant should first inform him as

to how the R1,5 million was paid out. He also refers to the fact that on the 9th April 2008 he was served with a notice from the Commission on the Restitution of Land Rights that the claim against the property was valid and that transfer would take place to the Mekgareng Community. Respondent's view is that this may make the bond null and void.

[6] In the 13 June supplementary affidavit Respondent firstly requests the Court to accept this supplementary affidavit. He had been given late notice at approximately 15:30 on the 12th June 2008 that Applicant would proceed with the Summary Judgement application on the 13th June,[1] after the Applicant had agreed that it would not proceed. He also states that he never received a notice in terms of section 129 of the National Credit Act as alleged in paragraph 3 of the Summons. The notice had been served on an address, by attachment to the main gate, which was incorrect and not known to him. He, once again, refers to the possible invalidity of the bond as a result of its having been registered after the land claim had been filed. In any case, the Applicant and he had entered into an agreement that Applicant would not proceed with summary judgment if he paid R296671 plus R18573 over the following month. And, even if the amounts were not paid, Applicant would not proceed if he could provide a signed copy of the agreement between himself and the Government "thereafter". In a letter dated 30 May Government confirmed that it was proceeding. He, however, had no control over the Government's "procedures", but "an agreement had been reached". He informed the Applicant's attorney that he had a written confirmation to this effect by way of a fax on the 30th May 2008. In spite of his disputing the amounts owed, he had signed the acknowledgement of debt. Plaintiff's attorney had agreed not to use the acknowledgement in Court "if I can provide to them as described above". He was, however, willing to waive his objections against the summons if the sale to Government was concluded.

[7] In the 5 November supplementary affidavit he Respondent applies for condonation, stating that he never received the affidavit from Barbara van der Merwe (a paralegal in the employ of the Applicant's attorneys) dated 30 October 2008, in which she confirms that no amounts had been paid since 21 December 2006. He, once again, refers to the irregular service of the notice in terms of the National Credit Act. The registration of the bond after the land claim was filed, in Respondent's view, placed the bond and his ownership in jeopardy. Soon after the December 2006 down payment, Respondent and Applicant had agreed to place

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[1] Incorrectly stated to be 12 June 2008.

all further payments on hold pending the outcome of the land claim and the sale of the property to Government. Respondent repeats the terms of the agreement with the Applicant: he should either pay the arrears before 30 May 2008 or provide Applicant's attorney with proof of the purchase agreement between himself and Government. Applicant would also not use his affidavit confirming the debt if he could "deliver by 30th May 2008 proof from Government that [the] sale is still in effect, which [he] did". He attaches the letter from the Applicant's attorney confirming this agreement, and affidavits from his attorney confirming this agreement and from his attorney confirming the agreement with Government. He once again states that he would not pursue his remedies as to irregularities in the Applicant's case if, pending the conclusion of the sale with Government, the Applicant would not proceed with the application for Summary Judgment. On the 8th August the Government agreed that the Land Claims Court would rule on the land claim. Proof is attached. On the 26th September 2008 he sent a letter to Applicant's attorney informing them of this. They did not respond. On the 30th October Government agreed to expedite the purchase of the property. He submits that this Court should deny this application for the stated reasons.

[8] In his supplementary affidavit dated 24 November 2008 Respondent applies for a condonation by the Court for the filing of this affidavit. He states that the valuation by Government has been done and that a meeting was set with the valuator for the 24th November 2008 to finalize the documents. He then refers to comparable stands in the area and the amounts which they had realized. His property, in the light thereof, could bring in approximately R5 million. Respondent had done all he could to comply with the agreement with Applicant as to the agreement with Government.

[9] In the interests of fairness, I have decided to consider all the affidavits of the Respondent and, where necessary, grant condonation of the filing of the further affidavits by the Respondent. In granting this condonation, I am fully aware of the fact that the Applicant could not respond, within the ambit of Rule 32, to what Respondent averred in his affidavits. Yet, I believe that the Applicant's case appears sufficiently from a supplementary affidavit by Barbara van der Merwe from the Applicant's attorneys on the 30th October 2008 and the agreement not to pursue the matter upon payment of the arrears before 30 May or Respondent's providing a signed agreement with Government before 30 May. Ms van der Merwe confirms that the last payment on the bond had been made on the 21st December 2006.

Evaluation

[10] *Firstly* I need to clarify the effect of the land claim on the contract between Standard Bank and the Respondent. It is clear according to section 19 of the Expropriation Act 63 of 1975 that if a mortgage exists over a property which is expropriated, the amount borrowed is first of all paid out to the mortgagee. *Secondly*, the mere fact that there is a land claim does not affect the validity of ownership and any mortgage on the land. Any suggestion by the Respondent that his ownership or the mortgage is in jeopardy as a result of the land claim, is unfounded in law. *Thirdly* the Respondent has not abided by the agreement with the Applicant that he either pays the arrears before 30 May 2008 or provides the Applicant's attorneys with a signed agreement with the Government before 30 May 2008. It is common cause that Respondent did not pay the arrears before 30 May 2008. He, nevertheless, argues that he has provided the Applicant with sufficient evidence of the agreement with Government. However, as appears from an attachment to his 25 November 2008 affidavit, the contract has only been signed by him. Furthermore, the full land claim, which seems to involve all the owners, is subject to a review by the Land Claims Court. The matter has clearly not been resolved, otherwise it would have been brought to my attention at the present hearing of the application. Whatever the position is, the contract was not signed by *both* parties by 30 May 2008. I, accordingly, hold that the points raised by the Respondent in this regard are not justified in law. Had these been the only points raised by the Respondent, I would have granted Summary Judgment.

[11] However, the summons does suffer from an irregularity which affects its validity. Section 129(1) of the National Credit Act 34 of 2005 provides as follows:

> (1) If the consumer is in default under a credit agreement, the credit provider -
>
> (a) *may* draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
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> (b) subject to section 130(2), *may not* commence any legal proceedings to enforce the agreement before -
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> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
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> (ii) meeting any further requirements set out in section 130.

(emphasis added)

Although the Respondent did not raise this defence initially, it is clear as a matter of law that a section 129(1)(b) notice is a mandatory requirement. A reference to such a notice was included in the Summons and it is stated that it was served upon the Respondent. The notice was handed to a Sheriff and he affixed the notice, according to his return of service, to the main gate of the premises. The problem is, however, that he attached it to the main gate of a property other than the mortgaged property. There is, accordingly, no evidence that the notice in terms of section 129 reached the Respondent. This is a bona fide defence.

[12] A further matter which was raised by the Respondent in regard to the Summons is that it refers to a non-existent clause 12.1 in the Mortgage Bond. This clause incorporates the standard terms and conditions of loans secured by mortgage bonds. However, in so far as the present matter is concerned, the mortgage bond addresses foreclosure and the certificate as to the amount owing and it would seem irrelevant to the present proceedings that clause 12.1 is not in the mortgage bond. In the light of my decision on the National Credit Act, I need not, however, decide this point now.

ORDER

1.The Application for Summary Judgment is dismissed and Respondent is granted leave to defend.

2.Costs which pertain to the hearing on the 13th February 2009 must be paid by the Applicant.

3.The previous cost orders issued by the Court against the Respondent must, of course, be complied with by the Respondent.

4. In so far as costs are reserved in the 25 January 2008 Court order, the Costs of that day must be paid by the Applicant.

JCW van Rooyen

Acting Judge of the High Court 18 February 2009

For the Applicant: Salmé Maritz, instructed by Haasbroek & Boezaart, Pretoria

For the Respondent: Zjaan Schoeman, instructed by Van Rensburg - Moloto Attorneys, Pretoria