

4/6/2010

IN THE NORTH GAUTENG HIGH COURT  
REPUBLIC OF SOUTH AFRICA

JUDGES: YES/NO.

4.6.10

SIGNATURE

Case No: 4984/2010

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

SILVER J W

1<sup>st</sup> Defendant

SILVER M

2<sup>ND</sup> Defendant

**JUDGMENT**

**SAPIRE, A J:**

This is an application for Summary Judgment. The Summons commencing action claimed payment of the sum of R1 320 106,67 cents alleged to be the balance of monies due and owing by the Defendants to the Plaintiff as at the 2<sup>nd</sup> of December 2009 in respect of monies lent and advanced by the Plaintiff to the Defendants secured under four mortgage bonds viz

- (a) Mortgage Bond Number B60722/1990 for the sum of R150 000,00
- (b) Mortgage Bond Number B18363/2002 registered in the Deeds Registry for R420 000,00 and
- (c) Mortgage Bond Number B48912/2007 for R863 000,00 and
- (d) Mortgage Bond Number B15713/1996 for the sum of R270 000,00.

All the bonds were registered successively over immovable property being Erf 766 Dowerglen Extension 3 Township.

The Summons further alleges that the amount claimed is inclusive of interests up to the 2<sup>nd</sup> of December 2009. The full amount is now due by reason of the Defendants' failure notwithstanding demand to pay instalments on due date.

There is a further allegation that the Plaintiff has complied with the provisions of the National Credit Act, No 34 of 2005 in particular with the provisions of 129 and 130 of the said Act. A copy of the Notice given in terms of Section 129 is attached.

The Summons was duly served on the two Defendants who gave Notice of Intention to Defend and the present application for Summary Judgment was then initiated by Notice of Application for Summary Judgment.

The claims made in the application are for the amount stated in Simple Summons namely R1 320 106,67, payment of interest and an order declaring the property mentioned executable. The Plaintiff also seeks an order of costs on an attorney and client scale.

The Application for Summary Judgment is supported by Affidavit attested to by one Nazreen Schroeder who describes herself as a manager of the Plaintiff. She claims to have access to the books and accounts relating to the Defendants facilities with the Plaintiff. She says she has in fact availed herself of such access on her computer.

This she says makes the facts contained in her Affidavit matters of her own personal knowledge and belief.

On this basis she swears positively to the facts verifying the Plaintiff's cause of action against the Defendant and especially the amount claimed.

She makes no reference to the mortgage bonds which are also before the Court. One of the mortgage bonds namely B60722/1990 secures an advance made by the United Building Society to the Defendants. There is no allegation either in the Summons or in the Applicant's Affidavit explaining the connection between the United Building Society and the Plaintiff.

Also before the Court is a copy of a letter addressed to the Defendants and a relevant registered letter certificate. The notice given in this letter relates to ABSA Bank as a creditor in respect of Bond Account Number 59189247 which apparently relates to 766 Dowerglen Extension 3. This is the property referred to in the Bonds.

Although in the Summons mention is made of four Bonds only three are attached. There is no copy of the Bond No B15713/1996 which is referred to in the Particulars of Claim which is referred to in the Summons. This in itself would militate strongly against the granting of Summary Judgment.

The manner in which the claim has been described makes it impossible to ascertain how much is owing in respect of each of the Bonds referred to and as one of the Bonds from the allegations contained in the Summons is not a debt owing to the

Plaintiff nor has notice been given of any debt claimable by the United Building Society.

The Respondents who were the Defendants have filed an Affidavit opposing the grant of Summary Judgment. The First Defendant who is the deponent to the Affidavit has incorrectly stated that the registered slip refers to 13 Lukwart Avenue. Perusal of the Certificate of Posting reveals the incorrectness of the Defendants allegation. He also claims that the Notice was addressed to him only. This is plainly incorrect. He claims further that no notice of the letter came to his attention or that of the Second Defendant. She, the Second Defendant, has filed a Confirmatory Affidavit. The First Defendant in his Affidavit observes that paragraph 1 of the Simple Summons relies upon three bonds. According to the First Defendant the Summons relates to three bonds. This does not appear to be correct.

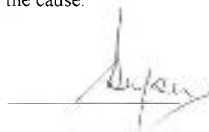
I have observed that the Summons refers to four bonds. The First Defendant also points out that one of the Bonds has United Building Society as the creditor. Clearly the Plaintiff cannot in the absence of allegations indicating how the indebtedness owing to the United Building Society is now owing to the Plaintiff.

In the Affidavit the First Defendant has stated that he and the Second Defendant are over indebted and that they have approached a debt councillor for debt review in terms of Section 86 of the Act. This procedure appears to be current and incomplete.

The Summons in this matter was however served on the Defendants on the 9<sup>th</sup> of

February 2010 and the Plaintiff's claim is therefore not subject to the debt review procedure. This notwithstanding in view of the confusion relating to the bond and the identity of one of the creditors I am not disposed to grant Summary Judgement because it is impossible to ascertain the amount owing under each particular bond.

Leave to defend is accordingly granted and costs will be costs in the cause.



S W SAPIRE

ACTING JUDGE

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