IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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DATE SIGNATURE

Case no: 14412/2014

In the matter between:

INVESTEC BANK LIMITED **Applicant**

And

MARUARONA: SHIBISHI SAMUEL **First Respondent**

LUJABE – CHITEPO: MATSHELISO **Second Respondent**

JUDGMENT

KATHREE-SETILOANE J:

[1] In this application, Investec Bank Limited ("the applicant") seeks:

(a) Judgment against the first respondent in respect of a debt arising out of a loan agreement under account number 2……, which was entered into between the applicant and the first respondent on 26 September 2008 ("the first loan agreement");

(b) Judgment against the second respondent as surety for the first respondent's indebtedness arising from the first loan agreement;

(c) An order declaring an immovable property owned by the first and second respondents executable for the indebtedness under the first loan agreement in terms of a mortgage bond registered in favour of the applicant on 27 November 2008; and

(d) Judgment against the first respondent in respect of a debt arising out of a loan agreement under account number 2……., which was entered into between the first respondent and the applicant on 19 April 2011 ("the second loan agreement").

[2] It is common cause that the National Credit Act 34 of 2005 ("the NCA") is applicable to the two loan agreements which were entered into between the parties.

[3] The act of default relied upon by the applicant at the hearing of the application as well as in its heads of argument is that the first respondent purportedly abused the applicant's systems to generate forged documents, which he then used to commit fraud by representing to a third party that payment had been made to such third party. However, in its founding affidavit the act of default which it relied upon was that the first respondent was in arrears in respect of the mortgage loan agreement.

[4] It bears mention that should it be found that the first respondent is in default of the first loan agreement, then he would automatically be in default of the second loan agreement as clause 4.3.2 of the second agreement makes it an event of default for the borrower to breach any other agreement entered into with the applicant.

[5] The first respondent denies that he has engaged in the fraudulent conduct relied upon by the applicant. In relation to the allegation that he was in arrears in respect of the mortgage loan agreement, the first respondent contends that he had, subsequently to the acceleration of the indebtedness under the loan agreements, paid the applicant all amounts that are overdue and, therefore, in terms of s 129(3) (a) of the NCA, he is entitled to continue making payments of the instalments under the agreements as they have been reinstated. He accordingly submits that there is no basis for the applicant to claim payment of the accelerated indebtedness on the two loan agreements.

[6] Section 129(3) (a) of the NCA provides:

'Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement (emphasis added).'

[7] It is common cause that the loan agreements have not been cancelled and/or terminated by the applicant, and that the applicant is claiming specific performance. Importantly in this regard, the applicant's s129 Notices in relation to both the first and second loan agreements state:

'Please note that you are entitled, at any time before termination of the credit agreement to re-instatement of the credit agreement by paying all amounts that are overdue, together with Investec's permitted default charges and the reasonable costs of enforcing the credit agreement up to the time of re-instatement .' (emphasis added).

[8] The first respondent alleges, in its answering affidavit, that as at July 2014, he had paid all the outstanding arrears to the applicant in respect of the first loan agreement in the amount of R207 000.00. The Applicant disputes this in its replying affidavit.

[9] The first respondent further contends that the payment of all the outstanding

arrears reinstated the mortgage loan agreement by operation of law - as envisaged by s 129(3) of the NCA. The Applicant disputes that the aforementioned payments reinstated the mortgage loan agreement in terms of s 129(3) of the NCA. The applicant argues, in this respect, that mortgage loan agreement is not capable of reinstatement in terms of s129 (3) of the NCA, because the act of default which it relies upon is the fraud perpetrated by the first respondent as against itself, and not the first respondent's failure to make payment of instalments and other amounts due to the applicant in terms of the first loan agreement in full. The contention thus advanced is that s 129(3) has no application to the current dispute, because the default relied upon is an act of fraud as opposed to the failure to pay timeously and in full. I disagree as there is simply no juridical basis for interpreting s 129(3) of the NCA in this narrow manner.

[10] Furthermore, on consideration of the applicant's founding affidavit, it is quite clear that the breach which it relied upon to claim the accelerated payment of the full amount outstanding in terms of the first loan agreement, was the first respondents':

'failure to make payment of instalments and other amounts due to the Applicant in terms of the first loan agreement timeously and in full and, as at 24 January 2014, [he] was in arrears in this regard in the sum of R112 762.42.

In consequence thereof, the full amount outstanding in terms of the first loan agreement immediately became due and payable by the First Respondent and consequently by the Second Respondent as surety.

The First Respondent accordingly and by reason of such failure and breach of his obligations with respect to the first loan agreement, similarly committed a breach of the second loan agreement.'

[11] That this was indeed the act of default upon which the applicant relied to claim payment of the total amount owing under the first loan agreement is evident from its s 129(1) notice, dated 3 February 2014, wherein it states as follows:

'We are instructed that you have failed to make punctual payment of your instalment in terms

of the above credit agreement and that accordingly your account is in arrears in the sum of R112 762.42, due as at 24 January 2014.

The above constitutes a breach of the terms and conditions of the credit agreement and entitles Investec to claim payment of the capital amounts outstanding and all interest accrued thereon together with all other amounts payable.'

[12] Although the applicant makes extensive reference in its founding affidavit to an act of fraud purported to have been committed by the first respondent, it does not rely upon that act to found its claim for breach of the terms and conditions of the first loan agreement. In a belated attempt to remedy the position, the applicant seeks for the first time, in its replying affidavit, to rely upon the purported act of fraud to found the first respondents breach when it states:

'The First Respondent's fraud is accordingly highly relevant to these proceedings as it constitutes a breach of the terms of the first loan agreement and, by virtue of the cross default provisions contained in the second loan agreement, it also constitutes a breach of the terms of the second loan agreement.'

[13] It is generally impermissible for an applicant to seek to make out its case in its replying affidavit (*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B; *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260). The applicant has, in my view, quite clearly failed, in its founding affidavit, to found its claim for breach of the first loan agreement on fraud, and it cannot therefore rely on that ground to claim the full outstanding payment on the first and second loan agreements. In any event, and in so far as the applicant relies on clause 8.18 of the first loan agreement to found its claim for breach on the act of fraud purportedly committed by the first respondent, clause 8.18, in my view, simply does not support its case. Clause 8 of the mortgage bond entitled "Default" provides:

'Should:-

8.1.1 the borrower fail to pay any amount payable in terms of this agreement timeously or in full;

…

8.1.8 the borrower fail to comply with the provisions of the Companies Act or the Close Corporations Act No 69 of 1984, if applicable, or any other law, or should the borrower be arrested on suspicion of a failure to comply with any law or should the borrower's auditor or accounting officer report that a material irregularity has taken place;

…

then and in such event:-

8.1.12 the Total Amount shall, without any further action by either party, be immediately due and payable, subject to the borrower's right to reinstate the agreement in accordance with Section 129(3) of the NCA (if the NCA applies). (emphasis added).'

[14] Clause 8.1.8 of the first loan agreement is of no application in the current matter, as the first respondent has not failed to comply with the Companies Act or the Close Corporations Act or any other law. Neither has he been arrested on suspicion of a failure to comply with any law, nor has his auditor or accounting officer reported that a material irregularity has taken place. More importantly clause 8.1.12 expressly makes any of the acts of default referred to in clause 8.1.1 to 8.1.11 subject to the borrower's right to reinstate the agreement in accordance with s 129(3) of the NCA.

[15] The question concerning whether the arrears on the two loan agreements have been paid in full by the first respondent, and whether the loan agreements have by virtue thereof been reinstated, can be answered with reference to the payment reconciliation as at 1 November 2015, which was handed up to court during argument by the applicant. It is clear from this payment reconciliation that the first respondent had made payment of all arrears outstanding on the first loan agreement. However, in respect of the second loan agreement the arrears outstanding were R6160.00. As submitted by counsel for the first respondent in argument, the first respondent was not aware of the arrears outstanding on the second loan agreement as at 1 November 2015, as due to the litigation he was not receiving statements from the applicant. This was common cause. The first respondent, however, undertook to

make payment of the outstanding amount immediately after the hearing.

[16] It is abundantly clear that at all material times, the first respondent had the intention to reinstate the first and second loan agreements and to continue with making instalment payments on them. The first respondent's arrears on both loan agreements are currently paid up and he has, therefore, reinstated the first and second loan agreements in terms of s 129(3) of the NCA. In the premises, the first and second loan agreements have been reinstated by operation of law. It is, accordingly, impermissible for the applicant to claim any "acceleration" of the full amount owing on these loan agreements (*Nkata v Firstrand Bank* 2014 (2) SA 412 (WCC) paras 37 and 38).

[16] In the result, I make the following order:

1. The application is dismissed with costs.

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F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the applicant:	Ms D Fisher SC
Instructed by:	Du Toit – Sanchez – Moodley Inc
For the first and second respondents:	Mr E Xavier
Instructed by:	Biccari Bollo Mariano Inc
Date of hearing:	19 November 2015
Date of Judgement:	19 April 2016