IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

7/3/2017
DATE

SIGNATURE

Date of hearing: 21 February 2017

Date of judgment: 8 March 2017

In the matter between:

Case number 80706/2016

FIRSTRANDBANK LIMITED

Applicant

and

DREW VAN COLLER

Respondent

JUDGMENT

BRENNER, AJ:

1. In this application for summary judgment involving the foreclosure under a mortgage bond, I granted judgment on 21 February 2017 in the following terms, namely:

    1. *Payment of the sum of R549 357,20;*

    2. *Payment of interest on the above amount at a variable rate of 11,25% per annum calculated daily and compounded monthly from 27 September 2016, to date of payment, in accordance with regulation 40 of the National Credit Act, 34 of 2005, as amended;*

    3. *An order declaring the respondent's immovable property described below as specially executable:*

        A unit consisting of:

        (a) Section Number 23 as shown and more fully described on Sectional Plan number SS 747/2005 in the scheme known as THE BATS in respect of the land and building or buildings situate at ERF 426 DASSIERAND TOWNSHIP, Local Authority: TLOKWE CITY COUNCIL, of which section the floor area according to the sectional plan is 43 (FORTY THREE) 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 sectional plan.

        ***HELD** by Deed of Transfer number ST 59361/2015*

        And

        An exclusive use area described as PARKERING P23 measuring 16 (SIXTEEN) square metres being as such part of the common property, comprising the land and building or buildings situate at ERF 426 DASSIERAND TOWNSHIP, Local Authority: TLOKWE CITY COUNCIL, as shown and more fully described on Sectional Plan number SS 747/2005, held by NOTARIAL DEED OF CESSION NO SK03591/2015;

    4. *an order authorizing and directing the Registrar of this Honourable Court to issue a writ against the respondent's immovable property described above;*

    5. *costs of suit on the attorney and client scale, to be taxed."*

2. These are the reasons for the order.

3. The property described in paragraph 3 of the above order will be referred to as "the property". On 20 May 2015, Drew van Coller ("van Coller") and FirstRand Bank Limited executed a written home loan agreement ("the loan agreement") in terms of which the property was mortgaged for R535 000,00. The mortgage bond was registered on 6 July 2015.

4. As at 13 October 2016, van Coller had fallen into arrear with the repayment of the agreed monthly instalments of R5 708,29, the arrears being R19 833,16. The Summons for the relief adumbrated above was served on 24 October 2016, at van Coller's chosen domicilium, on one T Ramulifho, occupier of the premises.

5. Van Coller served a notice to defend on 20 October 2016 and an application for summary judgment was served on 8 November 2016.

6. On 20 October 2016, van Coller's attorneys served a notice in terms of rule 35(12) and (14) on FRB's attorneys, ("the notice") calling for copies of the sale agreement for the property, van Coller's FICA documents, the bond application, the assessment under section 81(2) of the National Credit Act 34 of 2005 ("the NCA") and FRB's valuation report on the property. A reply to the notice was served on 10 January 2017, to which the documents required by van Coller were attached.

7. The opposing affidavit resisting summary judgment was served on 14 February 2017.

8. In limine, Counsel for van Coller argued that the Court should disabuse its mind of the documents discovered under the notice. He relied on rule 32(4) in support of this contention. His submission was correct. Rule 32(4) provides that no evidence may be adduced by the plaintiff otherwise than by the affidavit in support of summary judgment. I was therefore enjoined to have regard only to the particulars of claim, its

annexures, the summary judgment affidavit and the opposing affidavit, and I proceeded accordingly.

9. Several points were raised by van Coller.

10. Van Coller asserted that the particulars of claim were excipiable in terms of rule 17(3) because the summons had not been signed and issued by the registrar. After compliance was proved, the point was abandoned.

11. Van Coller averred that the deponent to FRB's summary judgment affidavit was neither authorised nor had personal knowledge of the facts germane to the matter. This point was ventilated in **Rees and another v Investec Bank Limited 1976 (2) SA 226 (T)**. This point was abandoned in argument.

12. Van Coller argued that, although the property fell within the jurisdiction of this Court, he did not reside within its jurisdiction. Accoring to his affidavit, he resided at 20 Joubert Street, Nelspruit, Mpumalamga. A court in whose area of jurisdiction the property is situate has the requisite jurisdiction to entertain actions pertaining to such property. See **Geyser v Nedbank Limited 2006(5) SA 355 (W).** This point was abandoned in argument.

13. The two remaining defences related to the alleged fraudulent scheme to which van Coller had been subjected in inducing him to buy the property in the first place, and to the averment that the advance of the loan constituted reckless lending within the purview of section 81(2) of the NCA insofar as no assessment was conducted under this section.

14. I refer to the defence based on the perpetration of a fraudulent scheme vis a vis van Coller. This is the gist of it:

"10.1 I bring to the courts attention that I together with a number of members of the public, consisting predominantly of rugby players for various rugby unions, are in the process of bringing an application to overturn and declare invalid what purports at this stage to be an illegal

scheme operated by a Mr Andre Gerrit Rossouw. Mr Rossouw played a pivotal role in the registration of the immovable properties in my name and in the names of the other individuals, who intend to launch the application within the next few months.....

10.3 I advise that the applicant together with all major Banks will be cited as respondents in the application, which will ultimately have a significant bearing on the applicant's current action under the above case number.

10.4 I advise that through the representations and conduct of Rossouw, he had caused 4 (four) mortgage bonds to be registered in my name.....

10.5 I furthermore do not deny that I am unable to currently pay such mortgage bonds as my current monthly income amounts to R20 501,98. The mortgage bonds and my other living expenses and basic necessities amounts to about R28 760,00 per month, which amount far exceeds the amount I am able to pay....."

15. The deeds office search which van Coller attached to his affidavit revealed that four sectional title units had been acquired by him, all on the same day, 9 April 2015, and that bonds were registered thereover in favour of various banks including FRB. The properties being sections 118 and 72 Villa da Bell, section 23 The Bats (the property in casu), and section 45 Onder Die Rantjie.

16. The purchase prices for this portfolio totalled R1 813 000,00. Section 118 Villa de Bell and section 45 Onder die Rantjie were mortgaged to SB Guarantee Co (RF) (Pty) Ltd, section 42 Villa da Bell was mortgaged to Absa Home Loans and section 23 The Bats to FRB. The total exposure under the bonds equated to the purchase prices save that the bond in favour of FRB was R10 000,00 less. In the result, van Coller exposed himself to loans totalling R1 803 000,00.

17. The registration of the bonds occurred over a period of less than one month, that is, between 11 June 2015 and 16 July 2015. It is significant to repeat that the loan agreement between FRB and van Coller was executed on 20 May 2015, before any of the bonds was registered.

18. There is no evidence to implicate FRB in the so-called chicanery allegedly perpetrated on van Coller. On his own version, he was the victim of an "illegal scheme" devised by Andre Rossouw. He fails to elaborate on the nature of this scheme. Even if this scheme was fraudulent, no inference can be drawn that FRB was complicit in same. The threat to cite the major banks in proceedings against Rossouw takes the matter no further. This does not constitute a bona fide defence to the claims against van Coller.

19. Concerning the defence of reckless lending, in terms of section 80(1)(a) of the NCA, the operative paragraphs of the affidavit pertaining to such allegations are quoted below:

"8.4 I have been advised, which advice I accept, that a credit provider prior to granting credit needs to assess a proposed consumer's general understanding and appreciation of the risk and costs of the proposed credit and understanding of his/her rights and obligations. In order to do so the credit provider needs to request specific information from the proposed consumer, such as the consumer's financial history and position.

8.5 I never provided any information in respect of my financial history to the applicant and I did not partake in an assessment as required by Section 81(2) of the Act at the time when the agreement was concluded. I, therefore, respectfully submit that, to the best of my knowledge, the applicant did not conduct an assessment as required by the above section when the credit was granted nor was I made aware of my rights, obligations and the risk and costs involved in entering into the loan agreement. Finally, the applicant could not have been in a position to properly assess my existing financial means at the time of granting the credit."

20. Section 81(1) of the NCA deals specifically with the prevention of reckless credit. It is necessary to quote its provisions in full, my emphasis included:

"81(1)When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

(a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing means, prospects and obligations; and

(b)Whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer.

(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if-

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment."

21. In the declaration section to the loan agreement, signed on 20 May 2015, post his purchase of the four properties mentioned above, van Coller confirmed having read and understood the terms of the agreement. Certain clauses are pertinent:

"5.11 The Customer hereby confirms that he/she has disclosed to the Lender all relevant information relating to existing credit agreements, suretyships and current credit applications submitted to any other credit provider.....

5.16 The Customer certifies that, to the best of his/her knowledge and belief, the information herein provided to the Lender is true, accurate and complete. The Customer further certifies that his/her marital and/or legal status has not changed and further that his/her financial status has not deteriorated since the date on which he/she submitted his/her application to the Lender. The Customer undertakes to notify the Lender in writing should his/her financial, marital and/or legal status change during the term of this agreement.

5.17 The Customer acknowledges that should he/she furnish the Lender with incorrect or false information, he/she may be denied the protection offered by the Act.

5.18 The Customer declares that he/she is able to afford the repayments as set out in this agreement.

22. Immediately above the signature clause the following confirmation appears:

"I confirm that I have read, understood and agree to be bound by the terms and conditions as stipulated in this agreement."

23. Rule 32(3)(b) of the Uniform Rules obliges a respondent in summary judgment proceedings to adduce a bona fide defence to the action by way of an affidavit which discloses

"fully the nature and grounds of the defence and the material facts relied upon therefor."

24. At page B1-223 of Erasmus, Superior Court Practice, the author states:

"If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides."

25. This much was stated in the case of **Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)**. At p228 the Court held as follows:

"It must be accepted that the subrule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence. It will suffice.....if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

26. As a useful starting point, judicial notice may be taken of standard commercial practice amongst banks regarding the lending of money. Their primary objective is to assess a potential borrower's affordability, via his income stream, taken with his average monthly expenses, to determine his ability to sustain payment of the monthly instalments.

27. Simple common sense dictates that banks are not in the business of committing commercial self-sabotage, and advancing money randomly, only to have to take steps immediately thereafter to recover same.

28. Van Coller asserts that he never provided any information in respect of his financial history to FRB and did not partake in any assessment as required by section 81(2) of the NCA. Nor was he made aware of his rights, obligations and the risk and costs involved in entering into the loan agreement. Yet van Coller does not deny signing the loan agreement, nor does he deny having read and understood its contents.

29. A full conspectus of this agreement outlines the precise nature of his rights, obligations and the risk and costs involved in entering into same. At clause 5.16 of the loan agreement, he admits having submitted an application to FRB.

30. He states that he provided no information about his financial history. He does not assert that he gave no information or documents to FRB. On matters which fall squarely within his personal knowledge, he does not specify what information and documents he did provide to FRB. He does not specify what FRB should have done but did not do before authorizing the loan.

31. He provides no proof that FRB was made aware or was in fact aware at any stage prior to the loan approval of the fact that he had bought and agreed to mortgage three other properties around the same time that he had acquired the property in casu. These purchases were all made on 9 April 2015, about six weeks before he signed the loan agreement. There is no suggestion that FRB could and should have known about them. This is information of a material nature which would have affected FRB's decision to make the advance in the first place.

32. The dubious deficiency in van Coller's version on this defence, read in the context of the loan agreement signed by him, make it inherently

improbable that FRB did not conduct the assessment as required by section 81(2) of the NCA.

33. Van Coller's allegations fall short of qualifying as a bona fide defence on the probabilities.

34. Van Coller attempts to gratuitously and unjustifiably shift the responsibility to FRB for his decision, in April 2015, to buy four properties, all to be encumbered for amounts exceeding R1,8 million in the aggregate, on a monthly income of some R20 000,00.

35. There is no warrant for FRB to have to bear the consequences of van Coller's conduct in this regard.

36. I refer to the dictum in **Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008(3) SA 371 (SCA),** at paragraph 13, which, while dealing with disputes of fact, traverses the consequences of bare allegations, (my emphasis included):

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader factual matrix of circumstances all of which needs to be borne in mind when arriving at a decision.

37. I quote from paragraph 25 F et sequitur, at page 232 of the case of **Majola v Nitro Securitisation 2012(1) SA 226 SCA:**

"The purpose of summary judgment is to "enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim." It is a procedure that is intended "to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights".

38. Van Coller was unable to prove a bona fide, genuine, prima facie defence on the merits. His opposing affidavit is devoid of any relevant factual substantiation for a case based on reckless lending by FRB.

39. The property in casu was not van Coller's primary residence, and this was undisputed. An order to declare the property specially executable was therefore warranted.

40. In the result, the order outlined above was duly granted.

T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG
7 March 2017

Appearances

Counsel for the Applicant:	Advocate A P Ellis
Instructed by:	PDR Attorneys
Counsel for the Respondent:	Advocate P P Ferreira
Instructed by:	Strydom and Bredenkamp Inc Attorneys