



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

CASE NO: 21651/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO ☒ YES ☐ NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO ☒ YES ☐ NO

(3) REVISED ☒

4/9/2020 *[Signature]*

IN THE MATTER BETWEEN:

ABSA BANK LIMITED

PLAINTIFF/APPLICANT

AND

MOLEPO NSIZWA CROMET

DEFENDANT/RESPONDENT

JUDGMENT

FABRICIUS J

- [1] In these opposed proceedings which can be decided on the contents of the affidavits, and written heads of argument, the plaintiff seeks to amend its summons in terms of a notice per Rule 28 (1) of 2 December 2019.
- [2] The facts are straightforward. The parties had concluded a written loan agreement for the purchase of an immovable property. A covering land was registered in favour of plaintiff. Defendant subsequently failed to pay the relevant instalments.
- [3] Plaintiff issued a summons dated 5 March 2013- it alleged in par 5 thereof that the original loan agreement had been mislaid but attached a blank copy containing the exact nature and working.
- [4] Such loan agreement was thereafter discovered and plaintiff seeks to amend the relevant allegations relating thereto, together with details relating to the exact amounts and interest due. The notice of amendment is dated 2 December 2019 and the application is dated 21 January 2020.
- [5] Defendant opposed the said application on a number of grounds, including the fact that he had annexed a copy of the said agreement in his opposition to an application for summary judgment, that a new case is now introduced, that the quantum and interest claimed is incorrect, amongst others.
- [6] It is not necessary to deal with each and every ground of opposition for the simple reason that the original cause of action remains the same, ie. Defendant's breach of a loan agreement. Plaintiff now merely seeks to plead the specific terms of the original agreement and the amounts due in line therewith, such as the correct interest rate.

- [7] All of defendant's objections can be raised in his plea, and the amendment does not deprive him of any of his rights. It is not for me at this stage to enter into a debate regarding correct calculations of amounts due.
- [8] Similarly, any other complaint that defendant may have, can be raised in a plea in due course.
- [9] It is important to remember that litigation is not a game: a court must try to achieve justice, and this can only be done if the dispute between parties is properly ventilated at a trial, and where all relevant information and facts are placed before the trial court. No injustice is caused to the defendant by allowing the amendments sought. The practical rule is that amendments will be allowed on that basis. The general principles pertaining to this topic are to be found in:
Commercial Union Assurance Co Ltd v Waymark No 1995 (2) SA 73 (TK)
 which were approved by the Constitutional Court in Affordable Medicine Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at par 9.
- [10] A technical approach is to be avoided. One should aim at an expeditious and inexpensive approach to determine cases on their real merits. After all, as I have said, the core function of a Court is to dispense justice without being hamstrung.
See: Eke v Parsons [2015] ZACC 30 at par [39] and [40]
- [11] As far as the defendant's objections are concerned, I could find no recognisable prejudice of the sort that would lead to a refusal of the amendment. In my view the objections are at this stage without merit. Some of the amendments sought are in fact in defendant's favour, such as the correct interest rate. Unnecessary costs were incurred by this substantive application for leave to amend. Plaintiff should not be burdened with these costs.

[12] The following order it therefore made:

12.1 Plaintiff is granted leave to amend its particulars of claim dated 5 March 2013 in the respects indicated in its notice of intention to amend dated 2 December 2019. The amendment application is granted as follows:

1. By deleting the amount 'R4 408 105.04' in paragraph 1 thereof and replacing it with the amount 'R5 125 456.62'.
2. By deleting the rate of '8.5%' in paragraph 2 thereof and replacing it with the rate '6%'.
3. By deleting the date '15 December 2012' in paragraph 2 thereof and replacing it with the date '2 August 2019'.
4. By the inclusion of the following at the end of prayer 4, namely:
 - 1) A Unit consisting of:-
 - a) **Section no 4** as shown and more fully described on sectional plan no **SS899/2003** in the scheme known as **LAS PALOMAS** in respect of the land and building or buildings situated at Portion 180 of the farm Bothafontein no. 408 J.R township, **City of Johannesburg Metropolitan Municipality, measuring 43 (Forty Three) square meters 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 under deed of transfer number **ST151886/03**

- 2) and an exclusive use area, described as **YARD NO.5 measuring 2068 (Two Thousand and Sixty Eight)** square meters being as such a part of the common property comprising the land and scheme known as **LAS PALOMAS** in respect of the land and buildings situated at portion 180 of the farm Bothafontein no. 408 J.R. township, City of Johannesburg Metropolitan Municipality, as shown and more fully described on sectional plan **SS899/2003** held by notarial deed of cession no. **SK7570/03**.

The plaintiff is further granted leave to amend its particulars of claim dated 5 March 2013 as follows:

1. by the deletion of paragraph 2 and removing annexures A and B and replacing it with the following paragraph 2 and attached annexure A:
2. On or about **05 June 2008** and at **MIDRAND**, the Plaintiff (represented by a duly authorised representative therein) and the Defendant, concluded a written mortgage loan agreement (**'the Loan Agreement'**); A copy of the Loan Agreement (**"A"**), is attached hereto, comprising of the Mortgage Loan Quotation and Agreement and the terms and conditions. The Plaintiff prays that the content thereof be incorporated these particulars of claim as if verbatim quoted.

2.1 The material end express, alternatively tacit, further alternatively implied terms of the Loan Agreement are inter alia, the following:

- 2.1.1 on **5 June 2008** the Plaintiff agreed to advance the sum of **R4 000 000,00 (Four Million Rand)** to the Defendant as a home loan (**"the Principal Debt"**);

- 2.1.2 all amounts owing to the Plaintiff in terms of the Loan Agreement would bear interest (which would be calculated daily, compounded monthly) from the date advanced or any other payments being made by the Plaintiff, at the interest rate/s, and calculated in the manner determined in the Loan Agreement;
- 2.1.3 The interest would vary from time to time linked to the prime rate of the Plaintiff and the monthly instalment be adjusted accordingly.
- 2.1.4 the Principal Debt was to be repaid by the Defendant to the Plaintiff in 360 **(Three Hundred and Sixty)** monthly instalments of **R41 144.50 (Forty One Thousand One Hundred and Forty Four Rand and Fifty Cents)** per month, to be adjusted according to the variable interest rate;
- 2.1.5 payment of all amounts received by the Plaintiff from or on behalf of the Defendant would be used by the Plaintiff, firstly to satisfy any due or unpaid interest, secondly to satisfy any due or unpaid costs, fees and charges, and thirdly to reduce the amount of the Principal Debt;
- 2.1.6 the Defendant would be in default under the Loan Agreement, inter alia, if he failed to pay any amount payable to the Plaintiff under the Loan Agreement on the due date therefor,

2.1,7 in the event that the Defendant is in default under the Loan Agreement the Plaintiff is entitled to:

2.1.7.1 restrict activity or suspend all or part of the loan; and/or

2.1.7.2 Claim payment of the overdue amount; and/or

2.1.7.3 commence legal proceedings to enforce the Loan Agreement, including exercise the Plaintiff's rights in terms of any collateral held, if applicable in terms of the National Credit Act, if the Plaintiff had given a default notice to the Defendant and the Defendant had been in default under the Loan Agreement, and/or

2.1.7.4 Claim payment of the full outstanding balance and costs; and/or

cancel the agreement and claim payment of the full outstanding amount plus interest and costs.

2.2 the Plaintiff was entitled, at its election and without affecting any other rights which it may have in terms of the Loan Agreement or otherwise, to recover from the Defendant payment of all amounts owing under the Loan Agreement, including the overdue amounts and/or immediate repayment of the balance of the Principal Debt owing to the Plaintiff, together with accrued but unpaid interest, default administration charges and the

reasonable attorney and own client costs of enforcing the Loan Agreement;

2.3 a certificate signed by any of the Plaintiff's managers, whose appointment need not be proved, specifying the amount which the Defendant owed the Plaintiff, and stating that such amount was due, owing and payable by the Defendant to the Plaintiff, would be sufficient proof of any amount due and/or owing by the Defendant in terms of the Loan Agreement, unless the contrary could be proved;

2.4 the Defendant agreed and consented that the Plaintiff may, without further notice to the Defendant, cede all or any part of its rights and/or delegate all or part of its obligations under the Loan Agreement either absolutely or as collateral to any person;

2. by deletion of paragraph 4.

3. By deletion of paragraph 6-11 and the inclusion of a new paragraph 6-11:

6. The Defendant, in breach of the terms and conditions of the Loan Agreement, failed to pay the monthly amounts due in terms thereof and as at **2 August 2019** the arrear amount owing thereunder was an amount of **R1 494 784.50 (One million four hundred and ninety four thousand seven hundred and eighty four rand and fifty cents)**.

7. On **15 January 2013** and **11 September 2019** the Plaintiff (through its attorneys of record) addressed letters of default and notices in terms of Section 129(1) (as read with

Section 130) of the NCA ("the Default Notice") to the Defendant, informing the Defendant that, inter alia:

- 7.1 the Defendant had failed to make payment of the full monthly instalment amounts due under the Loan Agreement and was consequently in breach of the Loan Agreement;
 - 7.2 the Defendant was required to remedy their breach of the Loan Agreement by making payment of the arrears and all overdue amounts under the Loan Agreement to the Plaintiff ("**arrears**");
 - 7.3 should the Defendant fail to remedy their breach of the Loan Agreement and pay the arrears and overdue amounts, the Plaintiff would be entitled inter alia, to enforce the Loan Agreement and/or cancel the Loan Agreement and/or to recover from the Defendant the full balance outstanding under the Loan Agreement together with interest on the outstanding balance to date of final payment, as well as any and all legal costs and other reasonable costs incurred by the Plaintiff in enforcing its rights under the Loan Agreement and recovering any amount due and/or payable by the Defendant in terms of the Loan Agreement.
8. Copies of the Default Notices and proof of service are attached as annexure "E" to "I".
 9. Notwithstanding the Default Notices, the Defendant failed and/or refused and/or neglected to remedy his breach of the Loan Agreement.

10. On or about **12 September 2019** the Plaintiff notified the Plaintiff inter alia that:

10.1 the Defendant was in breach of the Loan Agreement;

11. Notwithstanding the plaintiff's demand in terms of the NCA as pleaded hereinafter, the Defendant failed and/or refused and/or neglected to make payment of the amount as set out in the Plaintiff's demand.
12. The Defendant is presently indebted to the Plaintiff under the Loan Agreement, in the amount of R5 125 456.52, being the balance of the total Principal Debt, together with interest at the rate of 6% per annum from 2 August 2019 to date of payment; both dates inclusive, as reflected on the certificate of balance annexed hereto marked "B1". A copy of the recalculation of the amounts owing is attached hereto as annexure "B2".
13. In the premises:
the Defendant, in breach of the terms and conditions of the Loan Agreement, failed to pay the monthly instalments due in terms thereof to the Plaintiff and as at 2 August 2019 the arrear amount was R 1 494 784.50;
14. in terms of the Loan Agreement, the Plaintiff was entitled to claim all amounts which became due, owing and payable by the Defendant;

15. the mortgage bond was registered over the Property to secure the Defendant's indebtedness to the Plaintiff;
16. the mortgage bond registered in favour of the Plaintiff was registered as security for the said indebtedness by the Defendant to the Plaintiff;
17. accordingly, the Plaintiff is entitled to seek an order against the Defendant as set out in its prayers.

4. By renumbering paragraphs 12-17 as paragraphs 18-23.
5. By renumbering paragraphs 18-27 as paragraphs 24-33.
6. By the inclusion of the following at the end of old paragraph 14 (new paragraph 21) and of the inclusion of annexures H and I:

And annexures H and I

7. By deleting the amount 'R4 408 105.04' in old paragraph 17.1 (new paragraph 24.1) thereof and replacing it with the amount 'R5 125 456.62'.
8. By deleting the rate of '8.5%' in old paragraph 17.1 (new paragraph 24.1) thereof and replacing it with the rate '6%'.
9. By deleting the date '15 December 2012' in old paragraph 17.1 (new paragraph 24.1) thereof and replacing it with the date '2 August 2019'.

- 12.2 Defendant is to pay the costs of this application on an attorney and client scale.



H FABRICIUS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: NO ORAL HEARING

DATE OF JUDGMENT: 4 SEPTEMBER 2020

APPEARANCES:

FOR THE APPLICANT: ADV R SCHOLTZ

**INSTRUCTED BY: LOWNDES DLAMINI ATTORNEYS C/O RIAAN BOSCH
ATTORNEYS**

FOR THE RESPONDENT: MS K E MOLEMA

INSTRUCTED BY: KEDIBONE MOLEMA ATTORNEYS