Sneller Verbatim/lks

IN THE HIGH COURT OF SOUTH AFRICA

JOHANNESBURG CASE NO: 99/31140

2000-11-27

(1) REPORTABLE ~~YES~~ NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 12/2/2001 SIGNATURE

In the matter between

CREDIT GUARANTEE INSURANCE CORPORATION OF AFRICA LIMITED Plaintiff

and

BERDEN UNIFORMS (PTY) LIMITED Defendant

JUDGMENT

WILLIS, J: The plaintiff claims R650 000 together with interest and costs from the defendant. The interest claimed by the plaintiff is interest at the rate of 20,25% per annum from 24 December 1996 to date of final payment. The plaintiff alleges that this was the applicable rate of interest for the relevant period. This fact is disputed by the defendant and accordingly plaintiff submitted that it would be

content to claim to claim interest at the *mora* rate of 15,5% from the date of service of the summons which was 15 December 1999.

Apart from the identity and description of the parties, the following facts are common cause:

1. Pursuant to an agreement the Standard Bank loaned and advanced to the defendant the sum of R650 000 on or about 24 December 1996 as a separate and distinct loan on a short term loan account.
2. That the defendant has failed and/or neglected and/or refused to pay to the Standard Bank the balance on the said loan on the short term loan account or any part thereof with interest thereon.
3. That on or about 26 November 1996, the plaintiff issued a short term export master guarantee to the Standard Bank.
4. In terms of the master guarantee the plaintiff agreed that in the event of the Standard Bank sustaining a loss in respect of the guaranteed debt relating to one or more transactions in terms of which goods were to be shipped by the fruit exporter in respect of whom a credit limited had been issued for inclusion under the guarantee, the plaintiff would indemnify the Standard Bank to the extent of the amount of loss subject to the maximum amount stated in each individual credit limit held on each approved exporter.
5. The said loan advanced by the Standard Bank to the defendant on a short term loan account together with interest thereon, constituted a guaranteed debt contemplated in definition 7 of

master policy and related to a transaction in terms of which goods were to be shipped by the defendant who was an approved exporter as contemplated in definition 3 of the master policy and in respect of which a credit limit had been issued for inclusion under the master guarantee.

6. The defendant failed to pay the guaranteed debt or any part thereof within three months from the due date.

7. On or about 18 December 1997 the plaintiff paid to the Standard Bank an amount of the loss as contemplated in definition of the master guarantee.

The plaintiff alleges that on or about 14 December 1999, and in writing, the Standard Bank ceded to the plaintiff all its rights, title and interest in and to any claim of whatsoever nature which it might have against the defendant arising out of the failure by the defendant and/or its export customer to repay the Standard Bank the monies loaned and advanced to the defendant by the Standard Bank as a separate and distinct loan in the sum of R650 000 on the short term loan account together with interest thereon. This fact was disputed by the defendant.

The plaintiff called Mr Roger John Baker who is employed as a senior manager of the Standard Bank who confirmed that he had signed the document annexed to the plaintiff's particulars of claim as Annexure "C". This is the cession by the Standard Bank of South Africa Limited to the plaintiff of the Standard Bank's claim for R650 000 together with interest thereon against the defendant.

This evidence was not seriously challenged during cross-examination and indeed there is no reason to disbelieve Mr Baker that he did indeed so sign the document. There was no evidence led on behalf of the defendant and accordingly I accept as a proven fact that the cession was so signed.

Mr van Rooyen, who appeared for the defendant, essentially submitted that as a matter of law the cession was meaningless by reason of the fact that there was in fact no debt owing by the defendant to the Standard Bank to be ceded. I shall deal with this aspect later.

Accordingly, if one has regard to the common cause facts, together with the evidence of Mr Baker which I accept, it is clear that the Standard Bank lent money to the defendant in an amount of at least R650 000; that the defendant has not repaid this sum of money and that the Standard Bank ceded its claim against the defendant to the plaintiff.

The defendant, in its plea, sets out the following defence. I refer to paragraphs 3.2 and 3.3 of the defendant's plea:-

"3.2 During or about November, December 1996 and at Johannesburg, the Standard Bank of South Africa Ltd ("Standard Bank") duly represented by one Charles Nyemba ("Nyemba") and the defendant, duly represented by John Connelly, entered into an oral agreement ("the agreement").

3.3 The material terms of the agreement were *inter alia* the following:

3.3.1 Standard Bank would advance an amount of no more than R880 000 to the defendant on an export advance account.

3.3.2 The funds from the export advance account were to be utilised by the defendant in respect of financing certain export clothing items destined for approved export trade partners on the African Continent as part of an export incentive initiative promoted by the Department of Trade and Industry of the Republic of South Africa.

3.3.3 The defendant would only repay the advance by Standard Bank aforementioned on receipt of payment from its clients in respect of the exported goods. In such circumstances the defendant would be obliged to also effect payment of interest on such monies lent and advanced by Standard Bank to it for the export finance.

3.3.4 Standard Bank had to obtain short term insurance from the plaintiff in order to receive indemnification from the plaintiff in the event of the defendant defaulting in the repayment of such monies as advanced to it by Standard Bank by reason of a default on the part of the defendant's export client.

Standard Bank had to claim from the plaintiff in the event of a default in the envisaged circumstances aforementioned."

It should be pointed out at this stage that, as I have already mentioned, no evidence was led on behalf of the defendant at all and accordingly I am not in a position to decide the truthfulness or otherwise of these particular allegations.

The short term export finance master guarantee issued by the plaintiff to the Standard Bank of South Africa Ltd provides, *inter alia*, as follows:

"Credit Guarantee (i.e. the plaintiff) agrees that in the event of the lender sustaining a loss in respect of the guarantee debt relating to one or more transactions in terms of which goods are to be shipped by the approved exporter in respect of whom a credit limit has been issued for inclusion under this guarantee, Credit Guarantee will indemnify the lender to the extent of the amount of the loss subject to the maximum amount stated in each individual credit limit held on each approved exporter."

The lender referred to in the aforementioned quote is defined as being the Standard Bank. It is common cause that the defendant was a so-called approved exporter and that the credit limit applicable was at least R650 000.

In other words, it may safely be accepted that the payment by the plaintiff to the Standard Bank, which, it is common cause, occurred, was made in terms of this short term export finance master guarantee. In other words, in my view, it may safely be accepted that

the plaintiff, in making its payment, indemnified the Standard Bank to the extent of its loss. The significance of this fact will appear later in the judgment.

Mr Nyemba, who glories in the title of Relationship Manager for the Standard Bank, testified that he had been involved in discussions with the defendant concerning the establishment of a so-called short term export finance facility. He testified that essentially he had absolutely nothing whatsoever to do with the settlement of the terms and conditions of a document which appears as Annexure "A" to the plaintiff's particulars of claim.

It is common cause that this document came into the hands of the defendant and also that the defendant did not sign its acceptance of this particular document. The document provides for an expiry date of this facility as being 28 February 1997. The document also contains the following wording:

> "Your application forms have been forwarded to our International Division, Foreign Trade Services for the attention of Craig Cassidy who will liaise with Credit Guarantee Insurance Company for finalisation of the advance."

There is a document which appears in the bundle handed to me by the plaintiff which was prepared by Mr Liebenberg, the manager of Managed Accounts at the Standard Bank and addressed to Credit Guarantee Insurance Company. It alludes to the fact that -

> "Regrettably, however, our Commercial ... and International Division did not follow certain formalities given inter alia the novelty of the scheme. This also only became apparent later

and naturally since rectified within the SESA".

It goes on to say:

> "Mr G Cassidy [i.e. the person referred to in the documents appearing as Annexure 'A' to the particulars of claim] at our International Division dealt poorly herewith, he has since been moved on."

It is of course correct that the truthfulness of what appears in this particular document was not proven. Nevertheless, taking into account that Mr Nyemba really on his own version of events was little more than a go-between or marketing or public relations person for the Standard Bank, as well as the fact that the document, Annexure "A" to the particulars of claim, was not pertinently signed by the defendant, I cannot accept that the terms and conditions appearing in Annexure "A" were those applicable to the agreement concluded between the plaintiff and the defendant.

Nevertheless, if one takes into account the common cause facts then, as I have already said, it is clear that money was lent and advanced by the Standard Bank to the defendant. It is absolutely trite that in the absence of any specific agreement monies lent by one party to another are repayable within a reasonable time. It is furthermore trite that when it comes to an overdraft given by a bank to one of its customers, that overdraft is ordinarily repayable on demand in the absence of a specific agreement.

Given the fact that the precise terms of the agreement concluded between the Standard Bank and the defendant are not clear but the fact of a loan nevertheless is, then it seems to me that the

common law has to apply and that at the very least the loan given by the Standard Bank to the defendant would be repayable within a reasonable time. It is common cause that this loan was given in December 1996 and we are now nearly four years down the line from then. This, in my view, is more than a reasonable time in which the defendant could have repaid this loan to the Standard Bank.

With regard to the cession, as I have already indicated, I accept the truthfulness of Mr Baker's evidence and accept that a cession was indeed signed by the Standard Bank and properly executed, ceding the Standard Bank's claim in respect of the loan to the defendant to the plaintiff.

The only question that then has to be answered is the legal one contended for by Mr van Rooyen, who appeared for the plaintiff, namely that the cession was ultimately meaningless because there was nothing which, as a matter of law, could be ceded. His submission essentially amounted to this: the payment made by the plaintiff to the Standard Bank had the effect of extinguishing the loan which the defendant owed the Standard Bank and accordingly there was nothing left to cede.

In my view, there is no merit in this submission as a matter of fact. As I have already indicated, the short term export finance master guarantee provides that the plaintiff would indemnify the lender, i.e. the Standard Bank, to the extent of the amount of the loss. In other words, the payment that was made was made to the Standard Bank and was not made with any intention whatsoever to extinguish the debt that existed between the defendant and the Standard Bank.

Accordingly, in my view, the plaintiff has succeeded in proving its claim for R650 000. I have already indicated that the plaintiff abandoned its claim for interest in excess of the *mora* rate and claimed interest only from the date of service of the summons. This it is entitled to as a matter of law and I need not be further concerned with this particular issue. There is no reason, in my view, why the ordinary rule that costs follow the result should not apply in this particular case.

Accordingly the following order is made:

1. The defendant is to pay the plaintiff the sum of R650 000.
2. The defendant is to pay interest on the aforesaid sum at the *mora* rate of interest, currently 15,5% per annum, from 15 December 1999 to date of final payment.
3. The defendant is to pay the plaintiff's costs of suit.