IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 7589/2016

15/12/2016

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

15/12/2016
DATE

SIGNATURE

THE STANDARD BANK OF SOUTH AFRICA Applicant

and

AUBREY SCHNEIDER 1st Respondent
STEPHEN ZAGEY 2nd Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] In its notice of application for summary judgment against the defendant, the plaintiff seeks an order in the following terms:

1.1 payment of the sum of R 1 234 260.91;

1.2 interest on the sum of R 1 234 260. 91 at the rate of 7.35% per annum, from 10 September 2014; and

1.3 costs.

[2] The plaintiff, Standard Bank of South Africa Limited, sues the defendants in the capacity as sureties for the debts incurred by an entity known as Simcha Properties 10 CC ("the principal debtor"), which was placed under voluntary liquidation in terms of section 352 (2) of the Companies Act[1] on 16 October 2012.

Factual background

[3] On or about 10 March 2006 the plaintiff, and the principal debtor concluded a home loan agreement in the amount of R1, 839, 174.00. The terms of agreement included, inter alia, the following:

3.1 that the amount of the loan was in the sum of R1,839, 174.00;

3.2 that interest will be charged at a variable interest rate of 1.9% below prime on the capital amount;

3.3 that in the event of the principal debtor defaulting on its instalments or committing an act of insolvency or falling into liquidation, then the full amount owing will become due;

3.4 that a certificate signed by any of the plaintiff's managers or branch administrators, will on its mere production be sufficient proof of the principal debtor's liability unless the contrary is proved.

[4] On the 19 November 2014 the plaintiff caused to be delivered to the defendants a notice in terms of section 72 of the National Credit Act.

[5] The plaintiff has issued summons against the defendants for payment of the capital amount (R1 234 260.91) of the loan. The defendants filed notice of intention to defend and as a result the plaintiff applied for summary judgement. On 24 February 2016 the defendants also caused

[1] Act 61 of 1973.

to be delivered to the plaintiff a notice in terms of Rule 23 (1) in which they raised several grounds excepting to the plaintiff's particulars of claim and on 22 February 2016 served a notice in terms of Rule 30(2) (b) for the plaintiff to remove certain cause of complaint as set out in the notice.

[6] In their affidavit resisting summary judgment, the defendants have raised several points *in limine*. I propose to deal with each point *in limine* raised and in the notice of exception, chronologically.

[7] The first point of complaint raised by the defendants is that the amount claimed by the plaintiff in its summons is incorrect. It is the defendants' contention that the amount claimed should have been reduced by amount of the dividend plaintiff received as a result of the liquidation of the principal debtor. According to the defendants the plaintiff appears to have received a dividend of R130 000.00 after the principal debtor was liquidated.

[8] In the particulars of claim the plaintiff alluded to the fact that the loan amount was secured by a mortgage bond. Even though the plaintiff in its particulars of claim have claimed an amount of R1 234,260.91, at the hearing of this matter the amount claimed was reduced to an amount of R1 104,260.91, proposed in the draft order. This reduction in the amount claimed does address the complaint by the defendants. I am therefore of the view that the complaint in this regard has become academic.

[9] Secondly, the defendants allege that the deponent to the plaintiff's affidavit in support of the application for summary judgment does not have authority to depose to the affidavit and has no direct personal knowledge of the plaintiff's cause of action. It is the defendants' contention that since they have never dealt with the deponent to the plaintiff's affidavit she cannot claim to have personal knowledge of the dispute between the parties. Secondly the defendants allege that Ms Wilson lacks the authority to depose to the affidavit in that she is not the manager who signed the certificate of balance.

[10] Rule 32(2) of the Uniform Rules of Court provides that the affidavit in support of an application for summary judgment must be deposed to by a person who:

11.1 can swear positively to the facts; and

11.2 who can verify the cause of action and the amount claimed.

[11] In the affidavit in support of the application for summary judgment, the deponent, Ms Danielle Jeanne Wilson ("Ms Wilson"), states, *inter alia*, that:

> "1. I am a Manager: Specialised Legal, Personal and Business Banking Credit division of the Standard Bank of South Africa...;
> 2. I confirm that I have been duly authorised by the Applicant/Plaintiff to institute these proceedings and depose to this affidavit...
> 3. I verify and confirm that I have through my position access to all the records and information in the possession of the Applicant/Plaintiff, pertaining to this matter...
> 4. I have perused the records in my possession and have acquainted myself with the contents thereof, and therefore the facts herein contained fall within my direct knowledge unless the contrary is indicated.
> 5. I therefore positively verify the facts and cause of action as set out in the particulars of claim and I verify the amount as set out in the certificated of balance.
> 6. I state that it is my opinion that there is no bona fide defence to the action and that notice of intention to defend has been delivered has been entered solely for the purpose of delay."

[12] Counsel for the plaintiff submitted that Ms Wilson has access to all the documents relating to the defendants'/principal debtor's account and is in a position to depose to the affidavit in support of summary judgment.

[13] In *Maharaj v Barclays National Bank Ltd*[2] the court stated, with regard to the requirements for an affidavit in support of a summary judgment application , at 423E-H, that:

> "The mere assertion by a deponent that he can swear positively to the facts (an assertion which merely reproduces the wording of the Rule) is

[2] 1976 (1) SA 418 (A).

not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words .... While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised.... The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts."

[14] Further, in *FirstRand Bank Ltd v Trustees for the time being Huganel Trust and Others*[3], Davis J emphasised the following three important points:

"1. While summary judgment is an order which will prevent a defendant from having his day in court, there are many cases where the plaintiff is entitled to relief on the basis that, *ex facie* the papers which have been filed, there is no justification for concluding that opposition can be regarded as anything other than a delaying tactic.

2. As Corbett JA emphasised in *Maharaj*, excessive formalism should be eschewed. Hence the substance of the dispute, together with the purpose of summary judgment, needs to be taken into account during the evaluation of the papers which have been placed before court in order to determine whether the summary judgment form of relief should be justified.

3. While a measure of commercial pragmatism needs to be taken into account, in that many of these summary judgment applications are brought by large corporations and, accordingly, it may well be that first-hand knowledge of every fact cannot and should not be required, each case must be assessed on the facts which were placed before the court. It follows therefore that the nature of the defence becomes the starting point. .... On an evaluation of both the claim and the defence, it could be concluded with justification that the deponent had sufficient

[3] 2012 (3) SA 167 (WCC).

knowledge to depose to the affidavit, which formed the basis of the factual matrix to sustain an application for summary judgment".

[15] I am satisfied that the deponent to the affidavit in support of the summary judgment application does have sufficient knowledge about the defendants' account in that she deposes to the fact that she has had access to the defendants' account, has gained knowledge of the coming and goings in this account and is one the people within the plaintiff best suited person to depose to an affidavit on behalf of the plaintiff. In this regard reliance is also placed on *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another*[4] where the court held that:

> "In the present instance the deponent to the founding affidavit is the 'Operations Manager Arrears Legal' which title clearly indicates knowledge of arrears in monies owing to plaintiff and legal responsibility therefore. In the present case the deponent does not ask the court to rely on inferences to be drawn. He states that the facts contained in the affidavit fall within his personal knowledge and are based on records and documents available to him. He is indeed pre-eminently the person who would have knowledge of the relevant facts".

[16] Nothing turns on the fact that the certificate of balance was signed by a different manager. Furthermore even though the plaintiff did not attach her authority to depose to the affidavit, I am of the view that this technical point raised by the defendants can easily be resolved. This point raised by the defendants has to fail.

[17] Some of the grounds upon which the defendants raised an exception to the plaintiff's particulars of claim as set out in the defendant's notice of exception dated 17 March 2016. Some of the grounds have been dealt with in the defendants' affidavit resisting summary judgement. I will not deal with those grounds which are repeated in the notice of exception as I have already dealt with them in the paragraphs above.

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[4] 2009 (3) SA 384 (GSJ) at para. 26.

[18] The first ground of exception raised by the defendants is that at paragraph 9 of the particulars of claim the plaintiff states that "on or about the 10th of March 20016..." I is the defendants' contention that the date as set out in paragraph 9 does not accord with the date on the surety agreement. I am of the view that it is clear that there was a typographical error. Where the plaintiff states the year as 20016 it is apparent that what is alluded to is the year 2016. And therefore of the view that this ground has no merit.

[19] The second ground raised by the defendant in the notice of exception is that plaintiff's particulars of claim do not comply with Uniform Rule 18(6) in that it failed to state that the loan agreement and the suretyship agreement attached are true copies of the original agreement. It is the defendants' contention that the plaintiff's particulars of claim are vague and embarrassing in that it lacks sufficient particularity and the defendants are unable to plead thereto.

[20] Where the excipient claims that the particulars of claim are vague and embarrassing, an attack is made on the pleadings as a whole in that although the particulars of claim might disclose a cause of action, there is some defect or they are incomplete.

[21] It is trite that an exception to a pleading on the basis that it is vague and embarrassing will not be upheld unless failure to do so may prejudice the excipient. Furthermore, the court must look at the pleading excepted to as it stands and cannot take into account any facts outside those stated in the pleading except those stated in the pleading and cannot refer to any other document. **Erasmus Superior Court Practice** at B1-151).

[22] In *Trope v South African Reserve Bank and Another*[5], *the court stated that:*

"An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the

[5] 1992 (3) SA 208 (T) at 211.

pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced *(Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393E-H). As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test – see the remarks of Conradie J in *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated".

[23] The defendants have also raised the point that the plaintiff did not comply with Rule 18(6)[6] in that it failed to annex a true copy of the agreement to the summons. It is the defendants' contention that the particulars of claim do not, therefore, disclose a cause of action nor does it comply with Rule 18(6) in that the plaintiff has not attached the loan agreement and has not fully set out the terms of the agreement.

[24] In its particulars of claim, the plaintiff sets out that for its cause of action it was relying on a home loan and suretyship agreements it concluded with the principal debtor and the defendants, sets out the amount loaned and secured and the interest charged. Furthermore, the plaintiff attached to its particulars of claim a copy of the agreement.

[25] I am of the view that the is no basis for the defendants' objection in that the particulars of claim set out the basis on which the plaintiff is seeking the relief claimed in that it has pleaded the conclusion of the loan and suretyship agreements, which is not denied by the defendants, has set out the amount claimed and the manner in which the interest can be ascertained. The defendant's objection ought to fail.

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[6] Rule 18(6) provides that: "A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of part relied on in the pleading shall be annexed to the pleading.

[26] I am of the view that the points *in limine* raised by the defendant and the grounds raised in the defendants' notice of exception ought to fail.

[27] The test for summary judgment is whether the defendant raises a defence which if tested at trial will lead to the defendant succeeding.

[28] In their affidavit, the defendants have admitted that they bound themselves as sureties for the principal debtor's indebtedness to the plaintiff. The defendants have pleaded that they have a bona fide defence to the plaintiff's claim. The first ground of defence raised by the defendants is that the plaintiff's claim has prescribed in terms of the provisions of section 11(d) of the Prescription Act[7]. It is the defendants' contention that after the principal debtor was liquidated the plaintiff's claim against the defendants became due and payable. Further it is the defendants' that failure by the plaintiff to enforce or to put into operation the acceleration clause as provided for in clause 42 of the agreement did not have the effect of preventing prescription from starting to run with regards to the plaintiff's claim against them. It is therefore the defendants' contention that since 2012, three years has elapsed and therefore the plaintiff's claim against them has prescribed.

[29] In this regard plaintiff relied on the decision in *Miracle Mile Investments 67 (Pty) Ltd v Standard Bank of South Africa Ltd*[8] where the court held that a suretyship is an accessory to the loan agreement and that therefore if prescription has run out with regard to the main loan agreement it also has run out with respect to the suretyship. It is the

[7] Act 68 of 1969.
[8] 2016 (2) SA153 (GJ).

plaintiff's contention that the suretyship has not started running in that the period all section 11(d) does not apply to debts relating to a mortgage bond.

[30] I am of the view that before prescription would start running, the defendants' liability in terms of the suretyship must have been due and payable. In terms of clause 4.2 of the suretyship agreement, before the plaintiff could enforce its rights in terms of the suretyship it had to demand payment from the defendants and put them on terms. This is done by the plaintiff's on 19 September 2014 when it sent the defendants a letter of demand in terms of section 72(1) of the National Credit Act. In terms of this letter the defendants were put to terms that failure to pay within 10 days of delivery of the letter the agreement would be cancelled and the full amount owing would become immediately due and payable. This means that 10 days after the letter was delivered to the defendant prescription started running. The date of delivery of the section 72(1) letter was 5 November 2014. This means that 10 days should have expired approximately around 20 November 2014. Therefore in terms of the defendants' argument that section 11(d) applies, from November 2014 to the date summons were issued and served on the defendants the period of prescription in terms of this section has not lapsed. It cannot be said that in this case prescription started running after against the principal debtor since the principal debtor sues the principal debtor was liquidated in 2012. Prescription in the case of the defendants would only start running once the plaintiff's claim in terms of the suretyship became due. Even though the defendants' liability was accelerated when the principal debtor was liquidated that debtor the debts will

become due and payable once the plaintiff had delivered a letter of demand to the defendants. I am of the view that the applicable period of prescription in this matter s 30 years as alluded to by the plaintiff.

[31] The second ground relied upon by the defendants as a defence against the plaintiff's claim is that the plaintiff failed to comply with the provisions of section 80 of the National Credit Act in that it had granted reckless credit to the defendants.

[32] According to the defendants the home loan and the conclusion of a suretyship agreement with them amounted to reckless credit which is prohibited in terms of section 80 read with section 119 of the Act.

[33] Section 80 (1) of the Act reads as follows:

> "(1) A credit provider is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)-
>
> (a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or
>
> (b) the credit provider, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-
>
> (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) coming entering into that credit agreement would make the consumer over-indebted".

[34] The provisions of the Act dealing with reckless credit do not apply where the consumer is a juristic person. Furthermore credit was not granted to the defendants but to the principal debtor.

[35] The defendants have not, in their affidavit resisting summary judgment, alluded to valid grounds in support of their assertion that they have a bona fide defence to the plaintiff's claim and that they have not entered an appearance to defend solely for the purpose of delay.

[36] It is not in dispute that the defendants have not satisfied the plaintiff's claim in terms of the suretyship agreement. I am satisfied that the defendants have entered appearance to defend merely in order to delay the plaintiff's claim. I see no reason why summary judgment in favour of the plaintiff should not be granted under the circumstances.

[37] In the result the following order is made:

That summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally the one paying the other to be absolved, for:

1. payment of the sum of R 1 104 260.91;
2. interest on the amount of R 1 104 260.91 at the rate of 7.35% per annum from 10 September 2014;
3. Costs as between attorney and client to be taxed.

N P MNGQIBISA-THUSI
Judge of the High Court

Appearances:

For the Plaintiff: Adv R Raubenheimer

Instructed by: Vezi & De Beer Inc

For the Defendant: Adv C Cothill

Instructed by: Garrat Hugo & De Souza Attorneys