IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 5176/10

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DATE: 18/06/10

DELETE WHICHEVER IS NOT APPLICABLE

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

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In the matter between

SLIP KNOT INVESTMENTS 777 (PTY) LTD APPLICANT

versus

WARREN PHILLIP BRUCKMAN RESPONDENT

JUDGMENT

WILLIS, J:

[1] This is an application against the respondent for payment of a sum of R9 629 039, 23 together with interest and costs premised on a loan agreement concluded between the applicant and a Close Corporation styled Cook Run Bruckmann Investment CC (commonly referred to by the parties and by counsels as "CIB") secured by the suretyship signed by the respondent. It is common cause that the respondent, a health consultant and one Peter Cook established a Close Corporation having this name with the view to developing townships on the particular property.

[2] It is common cause that there was a loan agreement signed by CIB and also that the respondent as members of CIB signed a wad of documents agreeing to the loan and also undertaking to be sureties. Essentially when we went in to court this morning for the hearing of argument there were three defences proffered on behalf of the respondent:

1. There is a factual dispute as to whether or not the moneys allegedly lent

in advance were in fact lent in advance and that CIB received such sums of money

2. That the suretyship agreement was signed by persons who were married in community of property and failed to comply with Section 15(2)(h) of the matrimonial property Act number 88 of 1994 as amended.
3. If the agreement was valid the suretyship is regulated by the National Credit Act 34 of 2005 as amended and is reckless and forced to be set aside in terms of Section 83 of the National Credit Act.

[3] Mr Ellis, who appears for the respondent abandoned the respondent's defence in the last two respects and in my view he did so correctly. It is clear that the Matrimonial Property Act does not apply when the Act in question is performed by a spouse in the ordinary cause of his profession, trade or business (see Section 15 (6) of the same Act). Mr Ellis fairly conceded that the case of *Amalgamated Bank of South Africa versus De Goede and Another* 1997 4 SA 66 (CC) presented him with certain insurmountable difficulties. In my view, he entirely correctly abandoned the point. Furthermore, he correctly abandoned the point with regard to the so-called reckless nature of the transaction in question.

[4] It is trite that factual disputes in motion proceedings must be determined in accordance with the principles set out in the cases of *Stellenbosch Farmers' Winery (Pty) Limited v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G and *Plascon-Evans Paints Ltd v Van Riebeecks Paint (Pty) Ltd* 1984

(3) SA 623 (A) at 634H-635C. These are that where, in motion proceedings, the applicant seeks final relief and there is no referral to oral evidence, it is the facts stated by the respondents together with the admitted or denied facts in the applicant's filing affidavit which provides the factual bases for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald and not credit worthy, or the respondent's version raises obviously fictitious disputes of facts which are palpably implausible or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected. These rules have been re-affirmed in innumerable cases and very recently by the Supreme Court of Appeal in the case of *National Director of Public Prosecutions* v Zuma 2009 (2) SA 277 (SCA) at paragraph [21]..

[5] In my view the factual dispute here is certainly not a real or genuine one. The denials by the respondent are a bald and uncreditworthy. The version (such as it may be) raises obviously fictitious disputes. It is palpably implausible and far-fetched. As I have already indicated, the respondent acknowledged having signed the loan agreement in question. The paper-trail (which is highly improbably denied) in respect of the flow money clearly indicated the moneys were lent in advance.

[6] Most tellingly, in the founding affidavit of the applicant, the following allegation is made at paragraph 29, " in the circumstances the full amount advanced in terms of the loan agreement, together with interest thereon,

calculated at the aforesaid rate is due, owing and payable by the first and second respondent". This critically important allegation is not dealt with in the answering affidavit. Accordingly, it seems to me that one cannot find that there is a real and genuine dispute of fact. The applicant is entitled to the relief which it seeks in the notice of motion.

[7] Accordingly, an order is made in terms of prayers 1 (including 1.1 and 1.2) and 2 of the notice of motion dated 10 February 2010.

Counsel for the Applicant: JF Pretorius

Counsel for the Respondent: Advocate P Ellis

Attorneys for the Applicant: Sim and Botsi Attorney Inc

Attorneys for the Respondents: Lombard and Partners

Date of hearing: 18 June 2010

Date of judgment: 18 June 2010

Judge: N. P. Willis