IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 17332/2010

DATE: 8 NOVEMBER 2010

In the matter between:

PRAESIDIUM CAPITAL MANAGEMENT (PTY) LIMITED Plaintiff

and

CHARLES STUART MACKAY-DAVIDSON Defendant

JUDGMENT

DAVIS, J:

This is an application for summary judgment which has been opposed. Briefly, plaintiff's claims arise against the defendant pursuant to a series of loans made by GBS Mutual Bank ('GBS') to Sapphire Finance (Pty) Limited ('Sapphire') during the period from June 2004 to June 2006. The loans were recorded in a series of acknowledgments of debt which were executed by Sapphire in favour of GBS. According to defendant, it is an important feature of this case, particularly given the application for summary judgment, that neither plaintiff or defendant was a party to the loans. The plaintiff sues as cessionary of GBS' claims. Defendant, in turn, is sued on the basis of being liable as a surety in respect of Sapphire's debts.

The dispute, in effect, turns on six acknowledgements of debt being:

1. An acknowledgment of debt for R1 000 000,00 on 10 June 2004.

2. An acknowledgement of debt in the amount of R2 000 000,00 on 20 August 2004.

3. An acknowledgement of debt in the amount of R500 000,00 on 28 April 2005.

4. An acknowledgement of debt in the amount of R1 000 000,00 on 1 August 2005.

5. An acknowledgement of debt in the amount R500 000,00 on 7 February 2006, which was payable on 20 February 2006.

6. An acknowledgement of debt for R500 000,00 on 6 June

2006.

The aggregate total of these amounts is R5 500 000,00.

The plaintiff avers that the full amount which is owing and payable by the defendant is in the amount of R3 175 243,07, this being the difference between an amount of R3 575 243,07, which it alleges was owed by Sapphire as at 1 April 2009, shortly before the plaintiff acquired the rights of GBS against Sapphire and the defendant and an amount of R400 000,00 paid by the defendant on 1 June 2009.

The defendant's role in these transactions is described in the particulars of claim as follows. On 12 May 2004 and at Cape Town, defendant, acting personally in writing, bound and interposed himself as surety for and co-principal debtor *in solidum* with Sapphire for its indebtedness generally to GBS, including any existing future and contingent indebtedness owed by Sapphire to GBS. This suretyship was regarded as the first deed of suretyship.

The material and express terms of this first deed of suretyship provided that the amount that GBS would be entitled to recover from the defendant there under, would be limited to R1 000 000,00, together with costs of recovery on the attorney and client scale, including collection commission. No cancellation or variation thereof would be of any force and effect unless recorded in writing and signed by and on behalf of GBS surety, and the first deed of suretyship would remain in force as a continuing suretyship subject to further terms thereof.

The particulars of claim then set out in identical format, save of course for the dates on which the contracts were concluded, a further series of suretyships; a second, third and fourth deed of suretyship which, in effect, have been the subject matter of this claim by plaintiff.

Defendant resists summary judgment essentially on two basis:

1. Defendant argues that plaintiff has not established, as it is required to do, that its deponents have personal knowledge of the balance owing by Sapphire under the loans, both at the time that the plaintiff acquired those claims and presently, that is after the collection of Sapphire's book debts in due course of its liquidation.

2. There is a material defence to the claims based essentially on prescription.

To this I shall return presently.

Mr Blumberg, who appeared on behalf of the defendant, raised a further defence. He submitted that the particulars of claim were excipiable for want of necessary averments, alternatively for being vague and embarrassing. In his view, the plaintiff effectively had lumped the six loans together and claimed an aggregate balance. This, he submitted, overlooked that each loan was a single and separate cause of action and for this submission he relied, for authority, on Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd 1995(4) SA 501 (C) 546E-H.

Mr Blumberg submitted that to sue on a loan, the party had to allege and prove that the payment of the loan was due. This required setting out when the amounts loaned fell due for repayment. With one exception, the terms of the acknowledgements of the debt did not provide when repayment was to be made. The particulars were, in effect, silent on this matter. In Mr Blumberg's view, as a result of the manner in which plaintiff had treated the loans and particulars, a series of central questions had not been addressed, including:

1. What were the repayment terms of each loan?

2. What amounts have already been repaid in respect of each loan?

3. Have any of the six loans been repaid in full, if so, which? In his view it appeared that capital payments around R2 million were made before April 2009. To which loans were these payments applied.

4. In respect of the loans that have not been settled, what portion of the loans constitutes capital and what portion interest?

It appears that this range of issues were raised as a further alternative to the two defences that I have mentioned, namely the lack of personal knowledge on the part of the deponents and secondly the issue of prescription.

It is perhaps necessary, although trite, to set out the test for summary judgment in order to evaluate this rather hotly contested application. In Maharaj v Barclays National Bank Ltd 1976(1) SA 418 (A) at 426A, Corbett, JA (as he then was), said the following:

"[o]ne of the ways in which a defendant may successfully oppose a claim for summary judgment, is satisfying the

Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed, or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. <u>All that the Court enquires into</u> is:

(a) whether defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it was founded,

(b) whether on the facts so disclosed, the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law.

If satisfied on these matters, the Court must refuse summary judgment either wholly or in part, as the case may be. The word 'fully' as used in the context of the Rule (and its predecessors), have been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant did not deal exhaustively with the facts in the evidence, relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit disclosed a *bona fide* defence ... At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading." (My emphasis).

More recently in Joob Joob Investments v Stocks Mavundla Zek 2009(5) SA 1 at 12 (SCA), Navsa, JA, in emphasising the test as articulated by Corbett, JA in Maharaj, noted that this judgment emphasised there must be an examination of whether firstly there had been sufficient disclosure by the defendant of the nature and grounds of the defence and the fact upon which it was founded, and secondly, that the defence had to be both *bona fide* and good in law. Thus:

"A Court which is satisfied that this threshold has been crossed, is then bound to refuse summary judgment. Corbett, JA also warned against requiring of a defendant the precision apposite to pleadings, however, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor."

With this test in mind, and it is important to emphasise its core principles in the evaluation of the facts of this case, I can now turn to what are in effect three sets of defences that have been raised.

I am prepared to assume that Mr Kantor, who appeared on behalf of the plaintiff, is correct when he submitted, employing a decision in Nedcor Bank Ltd v Beharding 2000(1) SA 307 (C) at 311C, that:

> "Although the deponent is a legal advisor, one must also bear in mind that since it would appear that the claim against the respondent had been established by reference to the books of account and records of the applicant, the legal advisor is probably in as good as a position as anyone else to swear to the facts of the case."

I leave open for more careful consideration the question as to whether this formulation is applicable to the particular facts of the case where a cession has taken place and further whether the standard formulation which is present in most affidavits deposed to a summary judgment, that is that the deponent avers that he or she has personal knowledge of the balance owing, is indeed a legal requirement.

I turn, therefore, to deal with the core defence which was raised, that is of prescription. Mr Blumberg submitted the defence of prescription is a genuinely triable one and that it, therefore, fits in with the test for summary judgment as I have outlined it. It appears that this submission was predicated on the following:

1. The defendant's obligation of the surety was accessory to Sapphire's principal obligation under the loan. Therefore, the defendant may raise any defence which Sapphire has against the plaintiff, including prescription. If it is genuinely in dispute, whether or not the loans against Sapphire, which the plaintiff acquired have now prescribed, this would unquestionably constitute a *bona fide* defence in the hands of the defendant and would thus justify the dismissal of the application.

   In Mr Blumberg's view, the agreement between GBS and plaintiff of 19 May 2009, did not change the accessory nature of defendant's liability. It did not found any independent cause of action which was separate and distinct from the suretyships to which I have already made mention. On the contrary, it preserved the plaintiff's rights "to pursue the defendant under his suretyship, although it placed certain limitations on the enforcement thereof"."

2. Prescription in respect of the loans underlying an acknowledgement of debt, with one exception, commenced running on the respective dates of the acknowledgement. Mr Blumberg made his submission on the basis that five of the six acknowledgements of debt, to which reference has been made, did not provide a time for the repayment of the loan. Where there is no agreement as to the time for the repayment of the loan, the loan must be considered at common law, to be "repayable on demand"."

In this connection Selekowitz, J, in the Oneanate, supra, at 546-547, in a very careful and considered judgment, said the following:

"A loan without agreement as to a time for repayment, is in common law repayable on demand. Although by no means linguistically clear, the phrase "payable on demand" is used in this context in our law to mean that no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred. When suing for repayment, there is no need to alleged a demand and such a demand is not part of the plaintiff's cause of action."

This approach has been followed in this Division, and, correctly so, in Stockdale & Another v Stockdale 2004(1) SA 68 (C) at para 15, where Traverso, AJP (as she then was) said:

> "It is a general rule of law that in all obligations in which a time for payment is not agreed, the debt is due forthwith. However, it is also clear that this may be qualified in the light of the particular circumstances of the case. *Voet* 12.1.19 says that in the case of a loan, the consumption where no time for repayment has been fixed, the money must be repaid not forthwith, but after the passage of a moderate time, so that in the meantime the borrower will have been able to enjoy at least some advantages out of the loan and the use of the money."

Section 12(1) of the Prescription Act, which is clearly of relevance to defendant's defence, provides that prescription commences to run as soon as the debt is due. If the law, as set out in Stockdale and Oneanate is correct, as the parties did not agree on a date for repayment, prescription must be deemed to commence as soon as the loan was concluded and, therefore, the debt was incurred. To the argument that this would place a party such as plaintiff in jeopardy, the answer is clear: the contract could have been drafted differently, the creditor could have protected itself by way of a difference set of contractual provisions. That did not occur and, therefore, the parties must be deemed to be bound by that which was agreed and by the law which was clearly application to such a situation.

It is not open now for the plaintiff in the case of summary judgment, to contend that the parties tacitly agreed that the loans were not due and payable. If that is the case, it is certainly not a position that can be argued at the stage of summary judgment. In addition, the plaintiff did not plead this particular averment. It avoided, therefore, a central allegation – that is when was each loan to be repaid. As cessionary, the plaintiff is not in a position to confirm any unexpressed component of the consensus between GBS and Sapphire, as it is a stranger to these arrangements.

Accordingly, if the dates of each of the principal debts is examined, save for one, they prescribed three years after the relevant acknowledgement of debt and on the following dates: 10 June 2007, 20 August 2007, 28 April 2008, 1 August 2008 and 9 June 2009. The one exception was a loan which was embodied in Annexure PC1E. In terms of clause 3 this loan of R500 000,00 was to be paid on 20 February 2006. *Prima facie* this loan would seem to have prescribed on 20 February 2009.

The question which may be asked, on the papers, is whether the running of a prescription was either interrupted by an acknowledgement of liability in terms of section 14 of the Prescription or suspended in terms of section 13(g) thereof by plaintiff proving a claim against Sapphire in liquidation. It might be because of the manner in which plaintiff has pleaded its case, there is no clarity as to which loan repayments were made by Sapphire. If Sapphire made payments in settlement of two of the six loans only, these payments cannot serve to interrupt prescription in respect of the other four, nor from the papers is it known when any such payments were made. Hence date on which prescription, if interrupted, commenced to run afresh in terms of section 14(2), remains uncertain.

Plaintiff contended that the May 2009 agreement, to which I have already made reference, served to interrupt the running prescription in respect of the principal debt. As Mr <u>Blumberg</u> submitted correctly, there are two difficulties with this submission:

1. It is open to more than one interpretation and the question of whether it constitutes an unequivocal acknowledgement by the defendant that he is liable to

the plaintiff for the full amount claimed, has to be answered in the light of the background circumstances. That would require evidence of a kind which is not available in summary judgement.

2. By 27 may 2009, five of the six loans have already *prima facie* prescribed, save that which is recorded in PC1F.

Mr <u>Kantor</u> submitted that the affidavit opposing summary judgment fell short insofar as the *bona fides of the defence* are concerned. It raised the question of acknowledgement of indebtedness, but then stopped short when this occurred. In his view, this was not surprising and was no doubt done advertently, as such a denial would ring hollow and untrue in light of the correspondence between the parties which was provided as an annexure to the particulars of claim and in which the existence of the debt is dealt with as a given by both parties. The affidavit had, therefore, been carefully crafted to avoid dealing with this issue on a factual basis, despite having raised it as an issue in the abstract.

I remain unconvinced that this criticism can be sustained in respect of the issue of prescription. Prescription is raised clearly in the opposing affidavit. Recall that the defendant does not have to deal exhaustively with the facts and the evidence relied upon to substantiate its defence at this stage. The question on these papers, is whether there is an issue which is triable in the manner set out in the Maharaj case. On the facts so disclosed, is there a defence which is both *bona fide* and good in law; that is: if these material facts are proved to be the case, is there a defence which is justifiable in terms of the law which must be applied to it?

There is, however, in my view, sufficient particularity provided in the opposing affidavit to support a conclusion that the threshold has been crossed and that a triable issue has been raised by the defence to justify a refusal of summary judgment.

There was some argument on the part of defendant as to the question of costs, but I do not consider that it would be appropriate to make any such order in this case.

In the result, summary judgment is refused. Plaintiff is granted leave to proceed by way of an action against the defendant. Costs are to stand over.

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DAVIS, J

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