

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG- PRETORIA

CASE No 56840/2009

DATE: 19 FEBRUARY 2010

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

BLACK BEARD, ANTHONY JAMES

APPLICANT

V

ROUND SQUARE PROPERTY DEVELOPMENTS (PTY) LTD.

FIRST RESPONDENT

ACCESS VALET AND CAR WASH CC

SECOND RESPONDENT

TAUTE MICHAEL NO

THIRD RESPONDENT

TAUTE ALLINDA SALOME NO

FOURTH RESPONDENT

JANSE VAN RENSBURG GERHARDUS JOHANNES

FIFTH RESPONDENT

JANSE VAN RENSBURG ALLINDA SALOME

SIXTH RESPONDENT

TAUTE MICHAEL

SEVENTH RESPONDENT

Application: Money Judgment on Motion

Coram Sapire AJ

01 02 2010

JUDGMENT

The applicant moves for judgment in terms of his notice of motion which has the following prayers:

1. An order rectifying the suretyship agreement attached as Schedule A to annexure “**AJB1**” to the founding affidavit, by replacing the words “To: Finspire Capital (Pty) Ltd” with the words “To: A J Blackbeard” where it appears before clause 1 of this document.
2. Judgment against the first to seventh respondents, jointly and severally, the one to pay the others to be absolved, in the amount of R 573 125, 40 plus additional interest on the aforesaid amount at a rate of 5,5 % per month calculated on a daily basis in arrears and capitalised monthly, to be calculated from 15 September 2009 until date of payment of the amount.
3. Judgment against the respondents for further penalty interest to be payable on the amount outstanding from time to time to be calculated at an interest rate of 2 % per month as from 15 September 2009 until date of payment thereof.
4. An order declaring the property known as portion 442 (a portion of portion 120) of the farm Zwartkop 356, registration division JR, Gauteng, measuring 5422 m² and held in terms of deed of transfer T133505/07 attachable and executable for the payment of the aforesaid debts. This order will be subject to the right of the prior mortgage bond holder, being ABSA Bank Limited.
5. Costs of suit on the scale as between attorney and own client, including 10 % collection commission on all amounts to be collected.
6. Further and/or alternative relief.”

At the commencement of the hearing the Applicant indicated that prayer 1 was not persisted in, and accordingly the issue of rectification was not argued or further considered.

Furthermore I was informed by Applicant's counsel that prayer 4, could not be granted as the bond on which Applicant relied ranked after other bonds registered against the property mortgaged. The consent of a prior bondholder in favour of whom a non prejudice clause in the bond operated had not yet been obtained.

The applicant is an attorney, employed by Van Zyl Smith Inc. a firm of attorneys. He, alleges that he lent and advanced R350 000 for a period of three months to the first Defendant on terms and conditions set forth in a written agreement a copy of which is attached to the founding affidavit.

The 1st Respondent is the principal debtor in terms of the loan agreement and has subscribed thereto as such.

The 2nd Respondent is a close corporation, and one of those alleged to have bound itself as surety for, and co principal debtor with, the 1st Defendant, in respect of its obligations under the loan agreement.

The 3rd Respondent is Michael Taute cited as Trustee of the Taute Family Trust. The trust it is alleged bound itself as surety in respect of the loan.

The 4th Respondent is Allinda Salome Taute who is also cited as a Trustee of the same Taute Family Trust.

The 3rd and the 4th Respondents it is alleged were authorised to act on behalf of the Trust in binding the Trust as surety for the 1st Respondent. In support of this allegation a copy of a resolution passed at a meeting of the Trustees held on the 4th day of December 2008, is attached to the founding affidavit. A copy of the Trust Deed establishing the Trust has not been placed in evidence and no allegations have been made in regard thereto from which it can be assumed or deduced that the Trust had the power to bind itself as surety for the obligations of a third person such as the 1st Respondent. Although this point was not raised by the Defendants I am satisfied that I cannot grant the relief claimed by the Applicant against the Taute Family Trust in the absence of such evidence.

Furthermore the resolution on which the applicant relies to establish the authority of the 3rd and 4th Respondents, reveals that it was not subscribed to by all the Trustees, and that there is a third trustee who has not subscribed to the resolution or been joined. This point was raised by the Respondents and is a further reason for not granting any relief against the Trust.

The 5th Respondent is also sued as a surety in respect of the loan as are the 6th and the 7th Respondents who

are the same persons as the 3rd and 4th Respondents, save that they are cited in their personal capacities.

The Loan Agreement clearly describes the Applicant as the lender and the 1st Respondent as the borrower. The body of the Agreement is preceded by a pre-amble in which it is recorded that the purpose of the Agreement is to record that the borrower supported by the sureties has the need to borrow From the Lender and the “Lender is willing and able to borrow (sic) the capital” to the borrower subject to the conditions set out there under. Only the syntax is incorrect.

The Respondents and especially the 1st Respondent resist the granting of the judgment against the 1st Respondent on the grounds that the 1st Respondent did not borrow any money from the Applicant but from a company known as Finspire Capital (Pty) Ltd. This argument is advanced notwithstanding that the 1st Respondent has subscribed to the Agreement which clearly records that the loan emanated from the Applicant.

The position of Finspire in relation to the loan is referred to in the paragraph dealing with repayment. Here it is provided that repayments are to be made to the Lender into the account of “the Agent for the Lender, Finspire Capital (Pty) Ltd, ABSA Bank Limited account number 9[...].” It cannot be accepted that the 1st Respondent and the individual by which it was represented, or any other of the respondents for that matter, did not read the Agreement from which it is clear that the Lender was the Applicant and Finspire was his Agent, principally to receive payments on behalf of the applicant. The Respondents’ argument that the fact that some payments were made to Finspire supports the allegation that Finspire not the Applicant was the lender cannot be maintained.

Any misunderstanding which may have arisen is explained by the circumstances surrounding the application for the loan. The Applicant is an attorney who is employed by the firm which acts on behalf of Finspire, Finspire being a company which lends money to borrowers from time to time. When the original application for bridging finance was made by the 1st Respondent Finspire to whom the application was made could not accommodate the 1st Respondent as it did not have sufficient funds available at that time. The Applicant presumably from knowledge he had as an employee in the firm of attorneys representing Finspire became aware of the 1st Respondent’s application and he himself agreed to make an advance to the 1st Respondent from his own funds. Quite clearly the loan was to have been for a short duration and accordingly carried a high rate of interest.

I do not accept that the 1st Respondent was under any illusion as to the origin of the moneys it took on loan. The only reason for any mistake on its part could have been only because it did not pay proper attention to

the wording of the document to which it subscribed which provided for the loan. Moreover there does not appear to be any reason why the identity of the lender should be of any consequence or for the Applicant to have misrepresented the position or to have deceived the 1st respondent in this regard.

The loan I find to have been made by the Applicant to the 1st Respondent and that the amount owing and overdue for payment is as alleged and claimed by the Applicant.

The question of the sureties has now to be considered. I have already indicated that judgment cannot be granted against the Trust.

The liability if any, of the sureties stems from a Deed of Suretyship attached to the Loan Agreement. The suretyship is an annexure thereto referred to as Schedule “A”. The document is addressed to “Finspire Capital (Pty) Ltd (collectively and individually “the creditor”)”. The meaning of this is not clear and the document was obviously tendered for use where more than one creditor is referred to.

The document proceeds to record that on behalf of Round Square Property Developments (the debtor), those subscribing to the suretyship bind themselves as sureties to each of the creditors. Reading this benevolently it means that the signatories bind themselves sureties for the 1st Respondent to Finspire Capital (Pty) Ltd. There is an obvious discrepancy to be found here as the creditor in the main agreement is the applicant yet the suretyship clearly is in favour of Finspire. It does not in my view assist the Applicant that Finspire is its agent at least for the collection of moneys. The difference between the suretyship and the principal agreement can be accounted for by the haste in which the documents were drawn and the apparent carelessness in their drafting by the Applicant himself. In any event the Deed of Suretyship is in the first place signed by the 2nd Respondent, secondly by the Taute Family Trust, thirdly by Michael Taute, fourthly by G J Janse van Rensburg, fifthly by A S Janse van Rensburg who is the same person as Allinda Salome Taute. For this purpose she apparently used her maiden name.

The signatories in terms of the Agreement purport to bind themselves jointly and severally to each of the creditors, who as we have seen is Finspire Capital (Pty) Ltd. The Applicant has elected not to proceed with its claim for rectification and in the absence of rectification the surety's liability cannot be founded on this document. The Applicant attempted to meet this problem by arguing for a cession by Finspire to the Applicant of its claim against the 1st respondent which would by operation of law vest the Applicant with the rights against the sureties as well. It is futile so to argue for the Applicants evidence is that Finspire did not lend the money in the first place. There is therefor no place for a cession in its case on the facts.

In the cases, however, of the 5th and 6th Respondents their liability also arises under a mortgage bond which

was registered in favour of the Applicant. From the terms of the mortgage bond it is to be inferred that the Loan Agreement was the obligation which it was sought to secure and as such the mortgagors namely the 5th and 6th Respondents are liable to the Applicant for the obligation undertaken by them in terms of the bond.

The other question which I have to decide is the question of interest. I have no difficulty in granting judgment for interest at 5.5 % per annum provided for in the Agreement. My misgivings relate to the further 2 % per month payable in respect of arrear instalments. Clearly the interest on arrear instalments is a form of penalty which may be treated in terms of the Conventional Penalties Act. I have considered reducing the rate in terms of the powers I have under that Act but have decided that in view of the Respondents' attitude, that such reduction should not be made. The loan was intended for a short period, and the failure of the 1st Respondent to honour its obligations has occasioned considerable distress to the Applicant.

The Respondent does not deny that it is indebted but persists in asserting that indebtedness is owing to Finspire, despite a disclaimer from that company by its directors. No explanation is forthcoming as to why the Respondents have not tendered to pay either Finspire or the Applicant the amount demonstrably overdue

In the premises judgment will be granted against the 1st, 5th and 6th Respondents for:

1. Payment of the sum of R573 125,40;
2. Interest on the said amount calculated at the rate of 7.5 % per month from the 15th of September 2009 to date of payment;
3. Costs of the application.

SAPIRE, A J

NORTH GAUTENG HIGH COURT

PRETORIA

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