18/6/2010

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

18/6/10 DATE

SIGNATURE

CASE NUMBERS: 42393/09 &42395/09

In the matters between:

THE STANDARD BANK OF SOUTH AFRICA LTD	PLAINTIFF
And	
CORNELIUS MICHAEL SMITH	DEFENDANT
And	
THE STANDARD BANK OF SOUTH AFRICA LTD	PLAINTIFF
And	
JOHAN STRYDOM	DEFENDANT

JUDGMENT

TLHAPI, J:

[1] These are applications for summary judgment. Plaintiff's claim arose out of deeds of suretyship entered into by the parties on the 12 May 1998 and 12 May 2005. It was agreed between the parties that judgement in the first application would be applicable to the second. This judgment shall therefore only deal with facts in the application under Case Number: 42393/09.

[2] In respect of the first matter the defendant bound himself as surety and co-

principal debtor for the payment when due of all the debts of EPW Farming Enterprises CC ('the CC'), later converted into a company known as Schumba Rest Lodge (Pty) Ltd ('the company'). According to the plaintiff the National Credit Act 34 of 2005 was not applicable to the transaction entered into by the parties. As at the 25 July 2009 the defendant was indebted to the plaintiff in respect of three separate accounts in the amount of R125 000.00 (account 411374540), R892 493.62 (account 411310143) and R1 500 000.00 (account 411246801), respectively. The total amount claimed was R2 517 493.62 plus interest at a rate of 11,5% per annum compounded monthly from 25 July 2009 to date of payment and costs on attorney/own client scale. Annexed to the summons was the Deed of Suretyship, letter of demand and the certificates of balance making up the total amount.

[3] The defendant opposed the application on the following grounds:

3.1 The particulars of claim did not disclose a cause of action in that the plaintiff failed to allege whether the agreement was concluded orally or in writing; and, when and where such agreement was entered into; and, by whom the parties were represented when the agreement was concluded. The summons was therefore an irregular step in terms of Rules 18(6) read with Rule 18 (12) and Rule 30 of the Rules of court.

3.2 Paragraph 7 of the particulars of claim alleged that demand for payment was made on sums as set out in 5.1 to 5.3 of the particulars of claim whereas such clauses do not appear in the said particulars; Furthermore, that the Deed of Suretyship dated the 12 May 2005 and relied upon by the plaintiff was not annexed to the summons, instead a different one, dated 12 May 1998 was annexed. The summons were therefore vague and embarrassing or excipiable;

3.3 The pleadings were not technically correct;

3.4 The deponent to the affidavit for summary judgment failed to state that she had verified the facts relied upon in order to bring the application. It was unclear from the affidavit whether the plaintiff relied upon one or more causes of action as mentioned in paragraphs 6.1 to 6.3 of the particulars of claim and the cause of action based on the suretyship. The affidavit referred to the verification of a cause of action in the singular. It was therefore unclear which of the causes of action had been verified. Furthermore, the deponent only stated that she was in 'possession' of the files and failed to verify that she had acquainted herself of the contents of the files and documents, consequently, on her own version, she could not claim to have personal knowledge of the matter;

3.5 The affidavit supporting summary judgement and dated the 27 October 2009 referred to a notice of application to which it was annexed. The notice of application served on the defendant was dated the 30 November 2009 and this could not have been the one referred to in the affidavit signed by the deponent on the 27 October 2009.

3.6 The defendant was entitled to be released from the suretyship in that the plaintiff had acted to his prejudice by extending large amounts of credit to the company and the following reasons are given:

3.6.1 During 1998 to 2003 the defendant and one Mr Strydom conducted farming operations under the CC, holding 90% and 10% members interest respectively and during which time their accounts and facilities were held with the plaintiff at its Brits branch. They were the only ones who were entitled to act on behalf of the CC and were signatories to its accounts. The CC became dormant during 2003 when the farming operations ceased to exist and at that time all liabilities with the bank were settled.

3.6.2 The plaintiff was aware that the defendant had resigned as member of the CC when during 2005, Mr Strydom, Mr Kirchner and a Mr Hofmeyer used the dormant CC to purchase land for the purpose of opening a spa in the bushveld near Nylstroom. Kirchner and Strydom had acquired a 75% and 25% members interest in the CC respectively. The CC was then converted into the company. The said company ran up huge debts with the Plaintiff for which fresh suretyships were signed by Strydom and Hofmeyer and a bond registered over the property, and the plaintiff was aware that this all was done without the knowledge of the defendant.

[4] In order to succeed the court must be satisfied that the plaintiff's claim was clear and that the defendant had failed to present such fact to enable the court to conclude that there was reasonable probability of something emerging at trial which would enable the defendant to properly defend his case, Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd 1998 (1) SA 679 (O) at

683 H-J and Visser v Incorporated General Insurance Ltd 1994(1) SA 472 (T) at 478H.

[5] The purpose of utilizing a combined summons is to present detailed particulars as to the cause of action. In a combined summons the particulars of claim constitute pleadings, the requirements of which are governed by the provisions of rule 18 (6) and as such have to comply with the rule, which is peremptory. The plaintiff cannot avoid the consequences of its failure to conform to the rule. The surety dated the 12 May 2005 was also referred to as such in the letter of demand dated 30 July 2009. This letter preceded the issue of summons on the 29 October 2009. The defendant admits to being surety but explained that subsequent to him relinquishing interest in the CC and company , a fact of which the plaintiff was aware of, fresh suretyships were entered into with other individuals for debts the defendant was not aware of. Although in my view, this allegation alone cannot be said to absolve the defendant, in considering the application for summary judgement the court cannot be uncertain regarding the details relating to the contract which was entered into, especially where more detail was required to be given in terms of rule 18(6). The defendant, in this instance correctly submitted that an irregular step was taken and that ordinarily it would succeed if it engaged the process as envisaged under rules 18(12) and 30 of the Rules ofCourt.

[6] It would be difficult, given the lack of particularity, to determine the issue whether plaintiff had acted to the prejudice of the defendant, regarding transactions subsequent to the paying off of the debts of the farming operations of the CC. By its nature, an application for summary judgement if granted has severe consequences for the defendant. If the plaintiff was aware

that all the debts of the CC had been paid off, that the CC had become dormant and that subsequently the defendant had sold his interest in the company to Kirchner and then resigned as director, it becomes more important for the plaintiff to show in its particulars of claim that the defendant bound himself regardless of such facts, as surety for the debts of the company in respect of the new obligations created. Having regard to the defences raised by the defendant on the merits there is reasonable probability in my view, that defendant may properly defend his case.

[7] In the premises, the following order is made:

1. The applications is dismissed;
2. Defendant is granted leave to defend the action;
3. Costs in the cause;

TLHAPI V V

JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE PLAINTIFF : EDWIN JAY INCORPORATED

COUNSEL FOR THE PLAINTIFF : Z SCHOEMAN

ATTORNEYS FOR THE DEFENDANT : MATHYS KROG ATTORNEYS

COUNSEL FOR THE DEFENDANT : J E FERREIRA