

2/12/2010

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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.	
DATE 1/12/10	SIGNATURE

DATE: 30 November 2010
CASE NO: 29568/09

NOT REPORTABLE

In the matter between:

FIRSTRAND BANK LIMITED trading as WESBANK

RESPONDENT/

APPLICANT IN MAIN

VS

TOITJIE DU TOIT TRUST (REG.NO. IT 11801/98)

APPLICANT/

RESPONDENT IN MAIN

JUDGMENT

BOTHA J:

The applicant, the Toitjie du Toit Trust (the Trust), is the respondent in a sequestration brought against it by the respondent, First Rand Bank Ltd trading as Wesbank (the Bank).

The main application is opposed. The Bank's case against the Trust is based on deeds of suretyship that the trust signed in

respect of the indebtedness of companies in the du Toit Motor Group.

The Trust alleges that the quantum of the Bank's claim is suspect because of the occurrence of incorrect interest charges. It alleges that it has obtained the services of an expert, Mr Whelpton, to calculate whether the correct charges were in fact levied.

The examples of incorrect calculation that are mentioned in paragraph 67 of the answering affidavit in the main application were discussed with Mr Whelpton. Mr Whelpton expressed the opinion that in his experience an investigation invariably yields the result that over a long period of time a creditor makes mistakes with finance charges, mostly to the detriment of the debtor. In Mr Whelpton's view the mistakes justify a comprehensive investigation of the transactions of the principal debtors. To that end complete statements of account of all the principal debts are required in respect of all vehicles sold. In addition all documents issued between the Bank and the Toits Motor Group are required.

It is alleged that there is a reasonable likelihood that the errors revealed will be of such an extent that it will wipe out the Bank's claim, or significantly reduce it.

The Bank resisted the application. It pointed out that the relationship between the parties had been an ongoing one and that this kind of documentation had never been asked before. It made the point that Mr A.J du Toit, whom it described as the operating mind the Trust, had never before had reason to question the Bank's accounts. It alleged that such disputes as existed related to interest free periods. Those disputes were resolved in 2006.

It contended that the Trust could obtain the documents it required through the entities controlled by it.

In the replying affidavit the Trust pointed out that the entities controlled by it have been liquidated. The liquidators did not respond to requests to make documents available.

It also pointed out that Mr du Toit only became the controlling mind of the main debtors about a year before their liquidation.

Mr van Der Merwe, who appeared for the Trust, referred to paragraph 67 of the preliminary opposing affidavit in the main application where instances of incorrect interest charges were cited. He pointed out that they went beyond 2006.

He submitted that:

- (a) it must be accepted that the Trust could not obtain the documents from the companies in liquidation;
- (b) that it was not disputed that incorrect interest charges were levied;
- (c) that the Trust needed the documentation requested to prove that the Bank's claim was inflated.

He submitted that if the Bank had resorted to the procedure of issuing summons to assert its claim, the Trust would have had the right to insist on discovery.

Mr Carstensen, who appeared for the Bank, submitted that discovery in application proceedings is a rare and unusual phenomenon, only to be ordered in exceptional circumstances. He referred to **Saunders Valve Co Ltd v Insam Co (Pty) Ltd 1985 (1) SA 146 (T) at 149, Moulded Components and Rotomoulding**

**SA (Pty) Ltd v Coucouraks 1979(2) SA 457 (w) at 470 D and
Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd
2003 (6) SA 190 (SE) at 196-197.**

In my view the Trust has failed to prove that there are exceptional circumstances compelling the court to order discovery in this case.

If all is told what the Trust asks the court to allow, is nothing but a fishing expedition.

It appears that the total potential liability of the Trust is about R22 million. No particulars of the assets and liability of the Trust are given so as to enable the court to assess what reduction of the Bank's claim would bring it within the Trust's solvency margin.

The allegation that the investigation by Mr Whelpton might yield a result that might extinguish or significantly reduce the Bank's claim is vague and unsubstantiated. It is mere speculation. There was no attempt to illustrate it by means of an example based on such information as is at the disposal of the Trust, what the impact of incorrect interest charges could be.

The Trust is faced with a claim of R22 million. There is no basis for the court to accept that the extensive investigation envisaged by the Trust will yield a result that will avert the Bank's entitlement to an order of sequestration.

In the result the application cannot succeed.

It is dismissed with costs.



C. BOTHA
JUDGE OF THE HIGH COURT