

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

05/05/2011
Case No: 59159/2009

In the matter between:

STANDARD BANK OF SA LTD Applicant/Plaintiff
And
BAREND DANIEL PIENAAR Respondent/ Defendant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2011-05-05
DATE SIGNATURE

JUDGMENT

MAVUNDLA, J.

[1] This is an opposed application for summary judgment against
the defendants, for:

- (1) payment in the amount of R3 755 624, 19;
- (2) interest at the rate of 13, 5%per annum, calculated daily and compounded monthly in arrears, from 25 July 2009 to date of final payment, both dates inclusive. from 25 July 2009;
- (3) Costs of suite; and
- (4) Further and/or alternative relief.

[2] The plaintiff's claim arises from a written agreement and an oral agreement. The terms of the written agreement are contained in annexure B. It is common cause that the plaintiff lent and advanced moneys to the defendant pursuant to an overdraft facility provided by the plaintiff to the defendant through a Business Current Account Overdraft Agreement, account number 330 504 290 held at Modimolle Branch.

[3] It is also common cause that an amount of R1 500 000. 00 was loaned and advanced to the defendant. The loan was advanced for purposes of working capital. There was no fixed term to pay the overdraft account but the facility would be reviewable and

payable in full on demand in the event the defendant defaulting in terms of the conditions applicable as set out in clause 10 of Part B of annexure B. The loan was subject to an interest rate of 3% per annum above the plaintiff's lending rate from time to time, which at the time of the signing of the agreement, the plaintiff's prime lending rate was 14.5% (fourteen point five percent) per annum.

- [4] The plaintiff has further alleged in paragraph 4.5 of the particulars of claim, that "In terms of a further oral agreement entered into between the Plaintiff and the Defendant during September 2008, the Defendant was afforded a temporary facility whereby the initial amount was increased to R3, 500, 000, 00 and which amount would be repaid within three months. The repayment of the temporary facility would then reduce the loan to the initial facility of R1, 500, 000."
- [5] According to the plaintiff's paragraph 6 of the particulars of claim: the defendant has breached the terms of the agreement and as the result the plaintiff has terminated the agreement.

The plaintiff further averred in his particulars of claim that the balance on the business current account was on 24 August 2009 the sum of R3, 755, 624. 19 plus interest thereon at the rate of 13.5% per annum, calculated daily and compounded monthly in arrears from 25 July 2009 to date of final payment, both dates inclusive. The plaintiff has attached annexure C which is a certificate of balance duly signed by a manager of the plaintiff.

- [6] The plaintiff has further alleged in the particulars of claim that, it has complied with the provisions of the National Credit Act and attached the certificate of compliance as annexure D. It has further averred that it is a registered credit provider in terms of s40 of the National Credit Act 34 of 2005 and in terms of s41 of the Act, registered to provide developmental credit. In this regard it attached a copy of the issued certificate as annexure E. It further accordingly is claiming the alleged balance in the amount of R3, 755, 624. 19 together with the ancillary relief.

[7] In resisting the summary judgment application the defendant contends that during the operative period of the agreement, i.e 3 March 2008 to date of summons, defendant did not breach the provisions of clause 10 of the agreement. It is submitted that this defence, if proven at trial, constitute a valid defence for purposes of summary judgment. It is contended that there are no factual circumstances pleaded to, substantiating the conclusion by the plaintiff, that defendant is in breach of the agreement, save pleading in general terms the alleged breach. It is submitted that the summons as they stand are vague and embarrassing and susceptible to an exception.

[8] The second defence raised by the defendant is that the written agreement itself precludes any other agreement unless in writing and signed by both parties. The plaintiff's reliance of the oral agreement, it is submitted is contrary to the Schiffrin principle enunciated in *Brisly v Drotsk¹*, the well known *caveat subscriptor locus classicus*. It is further submitted that the plaintiff

¹ 2002 (4) SA 1 (SCA).

does not disclose a cause of action pertaining to the alleged increase of the overdraft facility in an amount of R2million. 00.

[9] It is trite that in summary judgment applications, for the defendant to resist an order being granted against it, must satisfy the court that he has a *bona fide* defence to the action and disclose fully the nature and grounds of the defence and the material facts relied upon; *vide Breitenbach v Fiat SA (Edms) Bpk*².

[10] In the matter *Breitenbach v Fiat SA (Edms) Bpk*³ Colman J commenting about Rule 32(3)(b) said: "It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it require the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

² 1976 (2) SA 226 TPD at 229B-E;

³ *Supra* at 228B-C.

[11] It is worth mentioning that the relevant written agreement attached to the summons, it is stated, *inter alia*, at the following clause:

"13.4 Any agreed changes to this agreement will be made in writing and signed by both you and us in accordance with the Act. We will, no later than 20 (twenty) business days after the date of the agreed change to this agreement, Deliver to you a document reflecting the agreed amendment." It is this clause the defendant contends that it is a non-variation clause, which debars the plaintiff from relying on the alleged oral agreement.

[12] I find it appropriate to refer to the matter of *HNR Properties CC And Another v Standars Bank of SA LTD* 2004 (4) SA 471 (SCA) at 479C-E where the Supreme Court of Appeal said:

" In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shrifren en Ander* 1964 (4) SA 760 (A) this Court held that the terms in a written contract providing that all amendments to the contract have to comply with specified formalities is binding. The principle has been consistently reaffirmed, most recently by this

Court in *Brisly v Drotsky* 2002 (4) SA 1 (SCA). (A non-variation clause is not necessarily in a contract of suretyship by reason of the provisions of s6 of Act 50 of 1956—*Tsaperas and Others v Boland Bank Ltd* (*supra* at 725B-C—but that does not detract from legal force of such clause where it exists.⁰ Courts have in the past, often on dubious grounds, attempted to avoid the Shifren principle where its application would result in what has been perceived to be harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non—variation clause may involve a violation of the Shifren principle, for example, where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance. ⁹For an interesting discussion on the topic, see *Hutchison* 'Non-variation Clauses in Contract: Any Escape from Shifren Straitjacket' (2001 118 SLJ 720.) But nothing like that arises in the present case."

[13] The Shifren principle has overwhelmingly been found by the Supreme Court of Appeal to be still good law⁴. In view of the above authorities, it cannot be said that the second defence raised by the defendants is not arguable. Put differently, I am not persuaded that the case of the plaintiff is unanswerable⁵. I am of the view that the defendant has demonstrated that he is *bona fide* in wanting to defend the matter.

[14] I deem it not necessary to interrogate the first defence raised by the defendants. In my view, it is appropriate that the defendants be afforded an opportunity to have their entire defences ventilated in trial.

[15] In the result I make the following order:

1. That the application for summary judgment is dismissed;
2. That leave to defend is granted to the defendants;
3. That the costs of this application shall be costs in the cause.

⁴ Vide *Brisly v Drotsky* (supra) 26 paragraph [64].

⁵ Vide the authorities cited in *Nair v Chandler* 2007 (1) SA 44 at 46 paragraph [7].



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 05/05/2011

PLAINTIFF'S ATT : NEWTONS INC

PLAINTIFF'S ADV : ADV RETIEF.

DEFENDANT'S ATT : DR SH GREGAN ATT

DEFENDANT'S ADV : ADV J ROUX