IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 170/2012
Date Heard: 19 June 2012
Date Delivered: 6 December 2012
NOT/REPORTABLE

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD Plaintiff

and

WILLEM CHRISTIAAN LODEWYK SCHOONBEE	1st Defendant
THOMAS KRUGER ALFONSO SCHOONBEE	2nd Defendant
WILLEM CHRISTIAAN LODEWYK SCHOONBEE	3rd Defendant
SOUTVLEI BESPROEINGS PROJEK CC	4th Defendant

JUDGMENT

GOOSEN, J:

[1] The plaintiff instituted action against the defendants in respect of various claims based on *inter alia* a loan agreement concluded with the first respondent as well as suretyship agreements concluded with first to fourth defendants relating to monies loaned and advanced to the WCL Schoonbee Trust of which the first to third defendants are (were) trustees. The WCL Schoonbee Trust was sequestrated finally during 2009.

[2] After summons was issued and the *dies* expired plaintiff applied for judgment by default. That application was withdrawn when the defendants filed notices of intention to defend the action. Thereafter the plaintiff applied for summary judgment.

That application is opposed and was postponed on a few occasions before it came before me.

[3] The claims against the defendants set out in the particulars of claim are the following:

CLAIM 1

This is a suretyship claim against the first and second defendants in which it is alleged that the said defendants concluded unlimited suretyship agreements in favour of the plaintiff as security for an agricultural production loan granted by the plaintiff in favour of the WCL Schoonbee Trust in the sum of R2 million. It is alleged that by reason of the Trust's default that the defendants are indebted to the plaintiff in the sum of R2,426,514.92, an amount supported by a certificate of balance dated 25 October 2011. The plaintiff, relying upon separate deeds of suretyship concluded by the third and fourth defendants respectively in respect of the Trust's indebtedness to it, claims the same amount, on a joint and several basis, from the third and fourth defendants respectively.

CLAIM 2

This claim is formulated in similar terms to claim 1 and is also based on deeds of suretyship concluded by each of the first to fourth defendants in favour of the plaintiff in relation to a separate agricultural production loan granted by the plaintiff to the WCL Schoonbee Trust. In this instance the claim is in the amount of R3,876,112.61, as evidenced by a certificate of balance dated 25 October 2011.

CLAIM 3

This claim is founded on a written loan agreement concluded between the plaintiff and the first defendant in an amount of R563,132.00 which was secured by a mortgage bond registered against Erf 3060, Parsonsvlei, Port Elizabeth. By reason of the first defendant's alleged default in the repayment of the loan the plaintiff seeks payment of the sum of R643,937.03 being the balance due as at 24 October 2011 as well as an order declaring the aforementioned immovable property executable.

[4] In the affidavit opposing summary judgment the first defendant, on behalf of the defendants, does not deny the allegations upon which the plaintiff's claims are founded. He points out that the WCL Schoonbee Trust was finally sequestrated on 26 November 2009. With reference to the liquidation and distribution account lodged by the Trustees of the insolvent estate during December 2011, a copy of which is annexed to the papers, and correspondence from the Trustees it is alleged that the plaintiff received payment out of the insolvent estate of an amount of R4,902,042.73. It appears that this payment was effected in February 2012 after the issue of summons in this matter. It is further alleged that the fourth respondent disposed of an immovable property owned by it, the farm Brakfontein in Somerset East, and that from the proceeds of that sale an amount of R3,734,500.00 was paid to the plaintiff by way of reduction of the fourth respondent's indebtedness to the plaintiff. The allegation is made that although the property was bonded in favour of

Standard Bank there was no mortgage bond outstanding in respect of the property. It is appropriate to point out in this regard that the documents annexed to defendants' papers only reflect payment to plaintiff of an amount of R3,518,723.31 plus an interest payment of R2,882.34.

[5] Based on these allegations however it is accordingly alleged by the defendants that the plaintiff has been paid in full and that the defendants are not indebted to the plaintiff as is alleged. The further allegation is made that the defendants have from time to time sought to get the plaintiff to account to it in respect of the amounts paid to it out of the insolvent estate and otherwise so as to establish whether or not the defendants are indeed indebted to the plaintiff as alleged.

[6] As indicated the application was postponed from time to time. One such postponement was to enable the plaintiff to consider the allegations advanced by the defendants in their opposing affidavit and to obtain further certificates of balance from the relevant official of the plaintiff in support of its claims. These certificates of balance are filed as annexures to heads of argument filed on behalf of the plaintiff. The first certificate of balance dated 17 May 2012 reflects that in respect of bank account 82619468, which is the account number allocated to the agricultural production term loan granted to the WCL Schoonbee Trust (the subject of claim 1), the Trust was indebted to the plaintiff in the sum of R3,809.04. The other certificate relates to the first defendant's indebtedness in respect of claim 3 and indicates a balance outstanding at 17 May 2012 of R669,194.73 together with interest on that sum. In *Rossouw & Another v First Rand Bank Ltd* 2010 (6) SA 439 (SCA) it was

held that the production of a more recent certificate of balance at the hearing of a summary judgment application is not barred by Rule 32 (4). The court said (at paragraph 48):

> "The certificate did not, as the court *a quo* considered, amount to new evidence which would be inadmissible under Rule 32 (4). To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on facts already before the court that the court would otherwise have to perform itself. Such calculations are better performed by a qualified person in the employ of a financial institution. To the extent that such a certificate may reflect additional payments by the defendant after the issue of summons, or payments not taking into account when summons was issued, this constitutes an admission against interest by the bank, and the bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether *a quo* or on appeal) perform a useful function and are not hit by the provisions of Rule 32 (4)."

[7] As indicated the payments effected to the plaintiff were made after summons was issued. In the circumstances the plaintiff was entitled to present a certificate reflecting a balance due based upon such payments as were received after the issue of summons.

[8] In argument before me the plaintiff accordingly amended the relief it sought. Based on a calculation taking into account the amounts payable to plaintiff as indicated in the liquidation and distribution account and the amounts that the defendants allege have been paid to the plaintiff, the plaintiff, at the hearing of the matter, sought, in respect of claim 1, payment of the amount of R3,809.04 as being the balance still due in respect of that claim as well as the payment against the first defendant of the claim of claim 3. In respect of the second claim the plaintiff effectively abandoned such claim.

[9] The total claims advanced by the plaintiff in its particulars of claim amount to some R6,946,564.56. The total claim is therefore, leaving aside the reasonable

escalation thereof by reason of accumulated interest, slightly less than R7 million. The defendants allege that the plaintiff has received payment of an amount of approximately R8,4 million by way of payments made by the Trustees in the insolvent Trust as well as from the proceeds of the sale of the farm Brakfontein. According to the defendants payment of an amount of R3,518,723.81 was paid into a bond account held by the plaintiff in July 2010. It is not stated what the balance was on the said bond account at the time. Accordingly it cannot be determined what amounts were allocated to the outstanding indebtedness of the defendants based upon the loans advanced to the WCL Schoonbee Trust, if any. The evidence presented by the defendants regarding payment of the amounts due in respect of the trusts indebtedness to the plaintiff in this regard *prima facie* supports the contention that the full debt may have been extinguished by such payments. Whether such payments have indeed been made in reduction of the indebtedness of the defendants upon which the plaintiff relies need not, of course, be determined at this stage. Nor is it necessary to make any findings as to the veracity of the allegations in this regard. All that need be decided is whether the allegations made by the defendants if established at trial would constitute a defence against the plaintiff's claims. If so, then the defendants have established a *bona fide* defence and summary judgment ought to be refused. The fact that the plaintiff has reduced its claim in respect of claim 1 and has abandoned claim 2, apparently on the strength of the allegation raised by the defendants in opposing the application, strengthens this view.

[10] Claim 3 is however upon a different footing. The defence raised by the first defendant in respect of claim 3 is difficult to fathom. It is alleged that " ... had the

applicant disclosed that a substantial amount of money had been repaid to them as set out above, I would have obtained consent from my fellow respondents, having regard that we are family members, to have the amount claimed by the applicant in respect of claim 3, be settled in full from the proceeds of the excess amount already paid to the applicant." This is in fact not a defence at all. At best for the first defendant it is alleged that there is an amount paid to the plaintiff which is in excess of the amount due to it in relation to the indebtedness of the WCL Schoonbee Trust and that he would have sought "consent" from family members to have this utilised to settle his indebtedness to the plaintiff. Even assuming that there is such an excess amount the first defendant has, as a matter of fact, not obtained the consent of the remaining defendants and there is no indication that he has sought or that he will obtain such consent. In the circumstances no *bona fide* defence to claim 3 is disclosed by the first defendant and the plaintiff is entitled to judgment against the first defendant in respect of that claim.

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

In respect of claims 1 & 2 as against first to fourth defendants –

(a) The application for summary judgment is refused;

(b) The first to fourth defendants are granted leave to defend said claims;

(c) The costs of the application for summary judgment shall be costs in the cause.

In respect of claim 3 as against the first defendant –

(a) Judgment in favour of the plaintiff is granted in the sum of R643,937.03 together with interest thereon at the variable rate of 7.25% per annum charged by the plaintiff from time to time from 25 October 2011 to date of payment thereof;

(b) The mortgaged property being Erf 3060, Parsonsvlei in Nelson Mandela Metropolitan Municipality, Division of Port Elizabeth, is declared executable;

(c) Costs of suit on the scale as between attorney and client.

GG GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE PLAINTIFF: Ms T Zietsman, instructed by Pagdens Attorneys

FOR THE DEFENDANTS: Mr V Naidu, instructed by The Justice Centre, Port Elizabeth