

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 3522/2019

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ABSA BANK LTD

Plaintiff

and

BCF MICRO FINANCE 1 (PTY) LTD

1st Defendant

BCF MICRO FINANCE 7 (PTY) LTD

2nd Defendant

BCF MICRO FINANCE 4 (PTY) LTD

3rd Defendant

BCF MICRO FINANCE 2 (PTY) LTD

4th Defendant

BCF MICRO FINANCE 5 (PTY) LTD

5th Defendant

BCF MICRO FINANCE 8 (PTY) LTD

6th Defendant

THEA VAN VUUREN	7 th Defendant
MARTHINUS JOHANNES ELS	8 th Defendant
PAUL HENDRIK ZIETSMAN	9 th Defendant
MARTHINUS JOHANNES ELS N.O.	10 th Defendant
JANETHA ELIZABETH ELS N.O.	11 th Defendant
GERALDINE CHRISSIE POTGIETER N.O.	12 th Defendant
PAUL HENDRIK ZIETSMAN N.O.	13 th Defendant
MARTHINUS JOHANNES ELS N.O.	14 th Defendant
JANETHA ELIZABETH ELS N.O.	15 th Defendant
CHARLES GEORGE FRIEDRICH KROHN N.O.	16 th Defendant
MARTHINUS JOHANNES ELS N.O.	17 th Defendant

HEARD ON: 29 JULY 2022

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 23 SEPTEMBER 2022. The date and time for hand-down is deemed to be 23 SEPTEMBER 2022 at 14H30.

Introduction

[1] The plaintiff, as a creditor, is suing the defendants as sureties, under a written deed of suretyship annexed to the particulars of claim. On the first claim, the plaintiff advanced money to the principal debtor by way of overdraft facilities. The second claim pertains to a surety mortgage bond registered over immovable property known as Erf [....] L[....], Bloemfontein.

[2] The principal debtor is in liquidation. The defendants are various companies, their directors, trusts and trustees associated with the principal debtor.

Pleadings

[3] On the first claim, the plaintiff issued summons against the defendants with the exclusion of the seventh and ninth defendants, jointly and severally, for payment of R13,863,565.03 with interest thereon calculated at 10.25% per annum from 2 April 2019 and costs on attorney and client scale. Under the same claim they are sued as sureties for the limited amount of R1,584,000.00 together with interest and costs on the same scale. The second claim is for payment of the sum of R1,889,581.53 against all defendants, jointly and severally, together with interest at the rate and date as the first claim and the scale of costs. It is common cause that the defendants have defended the matter against them and filed a special plea and pleaded over. The special plea raises the defence of prescription. The other defence insofar as the second claim is concerned, is that the amount of money owed has been settled in full.

[4] The court will outline briefly the allegations as averred in the particulars of claim and plea. Plainly the plaintiff relies on the deed of suretyship and mortgage loan agreement. It is further alleged that the plaintiff complied with its obligations in terms of the agreements. Therefore, the principal debtor is indebted to the plaintiff in the amount set out in the certificate of balance. As a result, the amounts due are owed by the defendants in terms of the respective suretyships.

[5] On the other hand the defendants raise the defence of prescription to claim. The defendants aver that the payments were due and payable on 1 October 2014 alternatively on 27 January 2015. Summons were served against the defendants on

12 August 2019 which is more than four (4) years after the aforementioned dates. They also raise an issue disputing the amount owed in relation to the second claim. The assertion is that it has been paid in full and nothing is outstanding to sustain the claim. It is trite that all defences available to the principal debtor are also available to the sureties.

Duty to begin and onus of proof

[6] The parties could not agree on who carries the duty to begin leading evidence. This arose out of the defendants pleading a special defence that the first claim has prescribed. The other defence raised on the second claim was that payment has been made. On these two (2) defences, it is the defendants who are seeking a remedy. As the parties who are making allegations, the court after considering submissions from both counsel ruled that the duty to begin rests on the defendants.

[7] It is important to briefly discuss the underlying court decisions that informed the ruling made. The onus rests with a defendant who relies on the special defence of prescription. An excellent starting point would be **Gericke v Sack** where the court said: -

“That submission is without substance; it overlooks the fact that it was the respondent, not the appellant, who raised the question of prescription. It was the respondent who challenged the appellant on the issue that the claim for damages was prescribed - this he did by way of a special plea five months after the plea on the merits had been filed. The *onus* was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of the completion of the period of prescription”.¹

[8] Also in **Macleod v Kweyiya** the Supreme Court of Appeal once more considered the issue and quoted with approval the ratio in **Gericke v Sack** *supra*. The correct approach was stated in the following terms: -

¹ 1978 (1) SA 821 (A) at 827H-828A.

“This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case”.²

[9] The next point relied upon by the defendants was also decided in favour of the plaintiff by the court in the case of **Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd**.³ The court held that the onus rested with the defendant to prove the payment it had pleaded.

Analysis of evidence

[10] At the hearing only one witness namely Thea Van Vuuren gave evidence on behalf of the defendants. She is the 7th Defendant and was the director of the principal debtor involved in its day-to-day running. During January 2015 the board of directors decided to liquidate the principal debtor. At the time the principal debtor owned three (3) residential units at Morgan Heath, Bloemfontein. Other residential units belonged to different Trusts.

[11] The principal debtor owned an immovable property in the suburb of L[....], Bloemfontein. A mortgage bond for approximately R1,300,000.00 was registered over it. As a direct consequence of the voluntary liquidation, the Liquidators sold it sometime around June 2015. The total purchase price is unknown to her. Other properties belonging to various Trusts were also sold to pay off the overdraft facility.

[12] She confirmed that the plaintiff lodged a claim which was proved in the insolvent estate. There were other claims by different creditors. According to her the insolvent estate has not been finalised by the Liquidators. She testified that she does not know the amounts the immovable properties were sold for and what happened with the proceeds thereof. She could neither confirm nor deny whether the plaintiff was paid or not. Evidently she could not dispute the outstanding amounts claimed by

² 2013 (6) SA 1 (SCA) at para 10.

³ 1998 (1) SA 811 (SCA).

the plaintiff. Although her evidence is credible, it does not support the two defences relied on by the defendants.

[13] The version of the plaintiff was narrated by two (2) witnesses being Willem Adriaan Prinsloo and Suné Smit. The evidence of the former is that he is employed by the plaintiff as a manager of interest calculations. His ambit of work encompasses recalculation of interest and amounts owing to the plaintiff. On this specific matter he conducted recalculations regarding the overdraft facility and the mortgage loan account.

[14] That he is an expert in his chosen field, remains unchallenged. He explained the process of recalculations making use of the transaction history and statements which contains all debits, credits and interest. These are migrated to Exel spread sheets in order to determine the outstanding balance due to the plaintiff.

[15] He conducted the recalculations on the overdraft facility and the outstanding balance as at 2 April 2019 they correspond with the amount stated in the certificate of balance. The latter document is annexed to the particulars of claim. He also conducted an updated recalculation until 29 June 2022. The total amount owing to the plaintiff by the relevant defendants was the sum of R17,140,569.67.

[16] He undertook the same process on the mortgage loan account. Again he confirmed that the outstanding amount as at 2 April 2019 corresponds with the figure on the certificate of balance annexed to the particulars of claim. Further recalculation ending 29 June 2022 revealed that the outstanding amount is R2,411,675.23. According to the records at his disposal, the last payment received on the account was on 1 November 2014 in the amount of R12,019.66.

[17] Suné Smit works in the insolvency department of the appointed Liquidators to *wit* Honey Attorneys. She is closely associated with the administration of the insolvent estate of the principal debtor. She is aware that the plaintiff lodged a claim which was approved at the first meeting of creditors held on 6 May 2015. These included the overdraft facility and mortgage loan agreement. In total the claim proved consisted of twelve (12) separate accounts.

[18] When her testimony was probed further, she confirmed that the immovable property situated in L[...], Bloemfontein was sold on 15 September 2015 by the Liquidators. The mortgage bonds were not cancelled in order to effect transfer of the deed. Several dividends were paid over to the plaintiff in the sums of R3,137,514.08, R343,612.15 and R842 584.59 respectively. In turn, the plaintiff paid in the shortfall of R95,828.83 on 25 March 2020.

[19] She stated that it was the prerogative of the plaintiff to distribute the amounts of money received to various accounts in any manner deemed appropriate. The Liquidators made no stipulation in that regard. She stressed that the mortgage bond stood surety for debt on all other accounts.

[20] The court turns to consider whether there is any merit in the special defence of prescription itself. In **Nedcor Bank Ltd v Rundle** the court held that only on confirmation of the final account that the impediment ceases to exist.⁴ In the heads of argument, counsel for the defendants, correctly conceded that the plaintiff has proved that the claims were submitted before prescription and that there was an impediment which interrupted the running of prescription. The uncontested evidence of Suné Smit is to the effect that the final account has not been confirmed. In essence the issue pertaining to prescription is no longer a live controversy between the parties.

[21] The defendants do raise other miscellaneous issues like the correctness of the outstanding amount as per calculations presented by Willem Adriaan Prinsloo. Regrettably their protestations are not backed up by contrary evidence. The plaintiff is relying on the certificate of balance which is supported by evidence. This leaves the defendants with one arguable point in order to escape any liability substantially pertaining to the second claim. It is their insistence that full payment was made from the proceeds of the sale of the immovable property. According to them, the plaintiff could not have agreed to the cancellation of the mortgage bond covering the

⁴ 2008 (1) SA 415 (SCA) at para 11.

immovable property unless the full outstanding amount was received. This argument is found on fallacious ground and must fail.

[22] It is an undeniable fact that the defendants owed the plaintiff not only huge amounts but on different accounts too. Therefore, payment that is not in full and final settlement of the debt owed, can be allocated by the plaintiff as it deems fit. In the instant matter the plaintiff allocated it to other accounts. It does not come to the assistance of the defendant that the proceeds should have paid the mortgage bond and extinguished it. It was allocated to other accounts. The other reason why this argument must fail is because it was a continuing mortgage bond. It stood surety of debts from any cause whatsoever.

Costs

[23] For the foregoing reasons, it is the considered opinion of this court that the plaintiff has established that the defendants are indebted to in the amount set out in the particulars of claim. The defendants, as the losing parties must pay the costs on the scale provided for in the written agreements.

Order

[24] The following order is made: -

24.1.

a) **Claim 1 against the first to sixth, eighth and tenth to seventeenth defendants**

(i) The defendants must pay to the plaintiff the sum of R13,863,565.03, jointly and severally, the one paying the others to be absolved together with interest on the aforesaid amount at the rate of 10,25% capitalized monthly from 2 April 2019 to date of final payment.

(ii) Costs on attorney and client scale.

b) **Claim 1 against seventh and ninth defendants**

(iii) The defendants must pay the plaintiff the amount of R1,584,000.00, jointly and severally, the one paying the other to be absolved together with interest on the aforesaid amount at the rate of 10.25% capitalized monthly from 2 April 2019 to date of final payment.

(iv) Costs on attorney and client scale

24.2. **Claim 2 against all defendants**

(i) The defendants must pay the plaintiff the sum of R1,889,581.53, jointly and severally, the one paying the others to be absolved together with interest on the aforesaid amount at the rate of 10.25% capitalized monthly from 2 April 2019 to date of final payment.

(ii) Costs on attorney and client scale.

M.A. MATHEBULA, J

On behalf of the Plaintiff:

Instructed by:

Adv. J. Els

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On behalf of the defendants:

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