IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2182/2017

In the matter between:

NEDBANK LIMITED Plaintiff

and

DANIEL DE WET DU PLESSIS N.O. 1st Defendant
DANIEL DE WET DU PLESSIS 2nd Defendant
JAN FREDERIK TAUTE DU PLESSIS 3rd Defendant

HEARD ON: 03 AUGUST 2017

JUDGMENT BY: PIKE, AJ

DELIVERED ON: 19 OCTOBER 2017

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[1] This is an opposed application for summary judgment. The plaintiff instituted action against the three defendants herein by way of combined summons, seeking relief against the defendants jointly and severally, in the following terms:

"1 Payment of the amount of R361 517.12;

2. Interest on the aforesaid amount of 21% per annum, compounded daily and capitalised monthly from 25/01/2017 to date of final payment (both days inclusive);

3. An order declaring the following immovable property executable for the said sum, plus interest and costs:
THE FARM GRASVELD 1128
DISTRICT BRANDFORT
PROVINCE FREE STATE PROVINCE (*sic*)
IN EXTENT 128,4798 (ONE HUNDRED AND TWENTY EIGHT, COMMA FOUR SEVEN NINE EIGHT) HECTARES
HELD BY DEED OF TRANSFER T8260/1977

4. Attorney and client costs as provided for in the agreements of loan and bond;

5. Further and/or alternative relief."

[2] After the defendants gave notice of their intention to defend this matter, the plaintiff instituted application for summary judgment against all three defendants for the relief set out in the particulars of claim.

[3] On 20 May 2011 the plaintiff and the first defendant, Daniel De Wet Du Plessis NO, in his capacity as only trustee of the Baruk Business Trust IT224/2009, entered into an overdraft facility agreement. Thereafter a renewal of the aforesaid agreement was concluded between the parties. In paragraph 6 of the particulars of claim it is averred that the renewal agreement was signed on 4 October 2017. However, I accept the date on which the said agreement was concluded to be 4 October 2013, as the copy of the relevant agreement was annexed as Annexure A2 to the particulars of claim, which indicates the date of signature as 4

October 2013. The date of 2017 was therefore clearly a typing error.

[4] As security for the payment of the first defendant's obligations to the plaintiff in terms of the aforesaid facility agreement the third defendant consented to the registration of a first covering mortgage bond in the sum of R450 000 and an additional amount of R113 000 over the abovementioned immovable property. The said bond was subsequently registered in favour of the plaintiff at the registrar of deeds, Bloemfontein, on 25 July 2011 under mortgage bond number B4695/2011.

[5] The second and third defendants bound themselves jointly and severally, as surety and co-principle debtors *in solidum* for the repayment on demand of all or any sum or sums of money which the first defendant may from time to time owe or be indebted to the plaintiff. The second and third defendants renounced the benefits of excussion and division. The second defendant bound himself as aforesaid on 20 April 2011 and again on 3 November 2011. The third defendant bound himself as aforesaid on 20 April 2011 and again on 17 November 2011.

[6] The plaintiff's cause of action is based upon the written renewed overdraft facility agreement, which contains the following material terms and conditions:

6.1 In the event of any breach by the first defendant, the plaintiff will be entitled to claim immediate repayment of all amounts owing under the agreement, together with interest thereon.

6.2 A certificate signed by a manager of the plaintiff, whose capacity or authority will not be necessary to prove, which will, upon the mere production thereof, be binding and be *prima facie* proof of the contents of such certificate and of the fact that such amount and interest is due and payable in any legal proceedings and will be valid as a liquid document.

6.3 No amendment, alteration, addition, variation or consensual cancellation will be of any force or effect, unless reduced to writing and signed by the parties.

6.4 No waiver of any of the terms and conditions of the agreement will be binding or effectual for any purpose, unless expressed in writing and signed by the said party.

[7] The plaintiff alleges in its particulars of claim that the defendants did not make prompt payments on the due dates, are therefore in arrears and due notices were given to all the defendants at their chosen domicile addresses. The defendants persevered in not paying any of the outstanding amounts, therefore the full amount outstanding became due and payable, which amount plaintiff derived from the certificate of balance.

[8] The second and third defendants' liability emerge from the fact that they bound themselves as co-sureties and the third defendant consented to the registration of a first covering mortgage bond, as mentioned above, hence the prayer to declare the immovable property specially executable.

[9] The second defendant filed an opposing affidavit on behalf of all three defendants and raised the following defence:

Due to the drought the defendants were not able to service the loan account. On 29 September 2016 the second defendant received a phone call from Andile Mlozana from the plaintiff's head office in Bloemfontein requesting a meeting as the defendants had missed some payments. On 3 October 2016 a meeting was held at the offices of the plaintiff in Bloemfontein. At the meeting the second defendant represented the trust, himself and the third defendant, and the plaintiff was represented by Andile Mlozana as well as Arnold Du Toit. At this meeting the second defendant advised the plaintiff that he had acquired property in Vista Park and was in the process of selling same, whereafter he would settle the amount owing to the plaintiff. Mr du Toit responded by stating that the plaintiff was not in the business of ruining emerging farmers and was therefore prepared to grant an indulgence regarding the payment of the debt on condition that the proceeds of the aforesaid sale would be used to repay the amount owing to the plaintiff. A verbal agreement was consequently concluded in terms of which the defendants were granted an extension on all payments until the said property situated in Vista Park was sold, which extension included all arrears as well as the full capital amount outstanding. According to the defendants a binding and valid agreement, which constitutes a complete defence to the plaintiff's claims, exists between the parties.

[10] The defendants aver that the summons is consequently contrary to the verbal agreement, and therefore is not only premature, but also unconscionable and/or immoral and against public policy.

[11] Additional to the defendants' above stated defence it is further the defendants' case that the summons is defective or open to exception or that the summary judgment application is defective. The defendants also aver that the requisite notices in terms of the provisions of the National Credit Act had not been addressed to the first defendant at his chosen *domicilium citandi et executandi* address. I will return to these aspects.

[12] According to Rule 32(3)(b) of the Uniform Rules of Court a defendant may satisfy the court by affidavit that he has a *bona fide* defence to the action. Such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor. 'Satisfy' does not mean 'prove'. What the rule requires is that the defendant sets out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. (See ***Breytenbach vs Fiat SA (Edms) Bpk*** 1976(2) SA 226 (T)).

[13] The leading case in this regard is ***Maharaj v Barclays National Bank*** 1976 (1) SA 418 (A) at 426C where Corbett JA (as he then was) determined the ambit of the rule of disclosure as it applies to the remedy of summary judgment, in the following terms:

> "The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal

exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence."

[14] In order to counter the above principle the plaintiff needs to proof that he has an unanswerable case. If there is a possibility that the defendants have a valid defence, leave to defend should be granted. (See ***Maharaj vs Barclays National Bank Bpk***, *supra* at 425 H.) In ***Soil Fumigation Services Lowveld CC vs Chemfit Technical Products (Pty) Ltd*** 2004(6) SA 29 (SCA) at 35 B – C the court found as follows:

"With regard to the court's overriding discretion to refuse summary judgment even where the defendant's affidavit does not measure up to the requirements of rule 32(3)(b), it has been said that, in view of the extraordinary and stringent nature of the summary judgment remedy, that discretion may be exercised in the defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is good."

[15] I agree with the approach as set out by Howard, J in ***Bonnet en andere vs Snaar Dorpsontwikkelaars (Edms) Bpk en andere*** 1978(4) SA 212 (D) op 217 C – E regarding the approach to be followed when a real difficulty as to a matter of law arises:

"Die advokate is dit eens dat die hof nie verplig is om moeilike regsvrae in sulke verrigtinge (summiere vonnis verrigtinge) op te los nie. Volgens gevestigde praktyk word summiere vonnis slegs toegestaan indien al die geopperde

> verwere klaarblyklik onaanvaarbaar is. Anders gestel, om 'n aansoek om summiere vonnis met welslae te bestry, op regsgronde of andersins, is dit slegs nodig om 'n beregbare en beredeneerbare verweer ('a fairly triable and arguable issue') op te werp ..."

[16] Mr Zietsman, on behalf of the plaintiff, both in his heads of argument and supplementary heads of argument, submitted that the defendants' defence is in defiance of the so called Shifren principle. (See ***SA Sentrale Ko-op Graan Maatskappy Beperk v Shifren*** 1964 (4) SA 760 (A).

[17] Mr Tsangarakis, on behalf of the defendants, in his heads of argument and during oral argument, contended that the defendants' defence is effectively one of *exceptio dolis generalis,* which means that a defence is available where the plaintiff did not act in good faith. Although the *exceptio dolis generalis* was rejected as a defence in ***Bank of Lisbon and South Africa Ltd vs De Ornelas and another*** 1988(3) SA 580 (A), he submitted that it derived from a pre-constitutional era. He contended that the provisions of section 39(2) of the Constitution, 108 of 1996, obliges the courts to develop the common law, in appropriate circumstances, to promote the spirit, purport and objects of the Bill of Rights.

[18] Mr Tsangarakis also referred me to the judgment in ***Crown Restaurant CC vs Gold Reef City Theme Park (Pty) Ltd*** 2008(4) SA 16 (CC) at 18 G tot 19 C:

> "[3] The applicant applied unsuccessfully to the Supreme Court of Appeal for leave to appeal the judgment of the High Court. Hence, the present

application in which, for the first time, the applicant seeks to have the *ecxeptio dolis generalis* reintroduced as a defence, contending that this equitable remedy is in line with constitutional values. ...

[4] Msimeki AJ was called upon to deal only with the waiver defence and did so. He was not invited to develop the common law of contract to promote the spirit, purport and objects of the Bill of Rights, nor to address any of the other constitutional issues now raised by the applicant. On the limited basis on which the case was presented to him, the learned judge arrived at the correct conclusion.

[5] This court has stated repeatedly that it is generally undesirable for it to sit as a court of first and last instance. ...

[6] In respect of the development of the common law of contract, the High Court and the Supreme Court of Appeal have a vital role to play. ..."

[19] Mr Tsangarakis pointed out that although the constitutional court failed to come to the assistance of the applicant in the above matter, it merely held that the defence of an *exception dolis generalis* should rather have been proffered in the court *a quo.*

[20] Mr Tsangarakis furthermore submitted that the defendants do not rely exclusively on the defence of *exceptio dolis generalis,* in that additional thereto, they also raise the following defence as set out in ***Juglal NO and another vs Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*** 2004(5) SA 248 (SCA) at 258 D - F where the court held as follows:

"Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect (see the authority cited in ***Sasfin (Pty) Ltd vs Beukes*** *1989 (1) SA 1 (A) at 8 C to 9 G*) it follows that the tenancy of a proposed transaction towards such a conflict can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that the court refuses to give effect to his conduct but the contract itself will stand."

[21] The Supreme Court of Appeal, already in ***Brisley vs Drotsky*** 2002 (4) SA 1 (SCA) at 18 C – D, to a large degree, recognised the above principle:

"Aangesien die verskansingsklousule opsigself nie ongeldig is nie, vind die Sasfin-beginsel geen direkte toepassing nie. Op die veronderstelling dat die Sasfin-beginsel uitgebrei kan word om die afdwing van kontraksbepalings (wat nie *per se* in stryd met die openbare belang is nie) te verhoed, sal sodanige toepassing noodwendig beperk moet word tot gevalle wat analoog is aan Sasfin, synde gevalle waar die afdwinging van die verskansingsklousule so onbillik sal wees dat dit as 'inimical to the interests of the community' beskryf kan word."

[22] This principle has also been discussed and applied in the full bench judgment in ***Nyandeni Local Municipality vs Hlazo*** 2010(4) SA 261 (ECM) as follows:

"[63] The result that the municipality, on the facts of this case, may not rely on *bona fides* to escape the entrenchment clause, does not, however, put an end to mr. Bothma's submission that if its operation on the facts of this case nevertheless offends public policy, then clause 14 may not be enforced. *Bona fides* may not be the peg on which to hang public policy, but there may be another valid rule of law protected by public interest which may legally justify a departure from the Shifren principle, and it is to this issue that I now turn my attention...

[83] In the present case it is not suggested, nor can it be said, that the infringement clause is *per se* contrary to public policy. The municipality's case is that its operation, on the facts of this case, offends public policy. In such a case the test is to determine public policy at the time the court is asked to enforce the term, having regard to the prevailing circumstances and the effect of the order at that time...

[89] If the operation of the clause in the prevailing circumstances and on the facts of the case, at the time the court is asked to enforce the clause, is so manifestly unreasonable that it offends public policy, then it is voidable on the grounds of unfairness. This involves, as Moseneke DCJ (in ***Barkhuizen vs Napier*** 2007 (5) SA 323) observed, an objective assessment of its impact on the parties, and does not involve the court's own views of the matter, or that of the parties...

[126] ...I therefore believe that the facts and circumstances of this case justify the departure from the Shifren principle."

[23] Upon application of the principles dealt with above, I am satisfied that the defendants have a *bona fide* defence to the action.

[24] In view of my finding on the merits of the defendants' defence, I deem it unnecessary to deal with the other defences referred to in paragraph [12] supra.

[25] Regarding costs there is no reason why the usual order pertaining to costs in an unsuccessful application for summary judgment should not be granted in this matter.

[26] I, accordingly, make the following order:

1. The application for summary judgment is dismissed;

2. The defendants are granted leave to defend the action;

3. Costs of the application are costs in the main action.

EA PIKE, AJ

On behalf of plaintiff:	Adv PJJ Zietsman
Instructed by:	Hill McHardy & Herbst
	Bloemfontein
On behalf of defendants:	Adv S Tsangarakis
Instructed by:	C/o Blair Attorneys
	Bloemfontein