

IN THE HIGH COURT OF SOUTH AFRICA

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
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**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Saakno: / Case number: 985/08
 Datum verhoor: / Date heard: 25/11/2016
 Datum gelewer: / Date delivered: 19/6/2017

Case Number. 985/2008

In the matter between:

BUSINESS PARTNERS LIMITED

PLAINTIFF

and

AFRICA UNLIMITED

SAFARIS

1st DEFENDANT

ELIZABETH KEMP

2nd DEFENDANT

PETRUS JOHANNES KEMP

3rd DEFENDANT

JUDGMENT

COETZEE, AJ

- [1] Plaintiff claims payment of R 502,374.56 by way of the outstanding balance on a Loan Agreement, and R68,598.26 & R 152,833.34 in respect of amounts due

and owing in terms of a Royalty Agreement for arrears and future royalties. The claim was instituted against the first defendant, a close corporation (as principal debtor) which has, subsequent to the institution of the action, been liquidated as well as the second defendant (Elizabeth Kemp) and the second defendant's husband (Petrus Johannes Kemp) as sureties and co-principle debtors. The second defendant has, in the interim passed away. The trial proceeded only against the third defendant as surety and co-principle debtor.

[2] The trial commenced on 25 October 2016.

[3] At the commencement of the trial, Plaintiff submitted the following:

3.1 A certificate in terms of Section 15 of the Electronic Communications and Transactions Act, 25 of 2002 which contained full statements of the entries on both the Loan Agreement and the Royalty Agreement

3.2 A certificate in terms of the Loan Agreement reflecting the current outstanding balance as being R 678,552 63.

3.3 A certificate in terms of the Royalty Agreement reflecting the arrear royalties as amounting to R 212,299.00. The effluxion of time had the effect of

erasing the distinction between arear and future royalties.

[4] The Plaintiff called one witness, Tertius Louw (Louw), who had been involved in the initial transaction, and who identified the signatures of the parties to the Loan Agreement and the suretyship which the Third Defendant had signed. Louw was also able to identify the signature of Daniel Johannes Frey, the legal manager of the Plaintiff who had, on 13 October 2016, prepared the certificate in terms of section 15 of *the Electronic Communications and Transactions Act 25 of 2002*. This conclude the plaintiffs' case.

[5] Third defendant, in his plea and in evidence (in essence), denies liability on two grounds and avers that (a) the Plaintiff is precluded from claiming from the surety because it breached the terms of clause 5 of the Royalty Agreement and (b) Plaintiff failed to prove the amount claimed.

PLAINTIFF IS PRECLUDED FROM CLAIMING FROM THE SURETY BECAUSE IT BREACHED THE TERMS OF CLAUSE 5 OF THE ROYALTY AGREEMENT.

[6] Clause 5 of the Royalty Agreement provides as follows:

*"Indien die Lener nie sy begroting behaal nie sal Business Partners 'n mentor of Konsultant benoem en die Lener sal sodanige mentor of konsultant aanstel vir die termyn wat Business Partners na goeëdunke bepaal. Die Lener sal **die** koste van sodanige mentor of konsultant dra".*

- [7] It is common cause that the principal debtor did not achieve the targets and that Business Partners did not appoint a mentor. In this regard Mr. Tredoux, on behalf of the plaintiff submitted that there was, no obligation on Business Partners to appoint a mentor, just to nominate one. This submission, in my view, is correct.

- [8] Business Partners did not nominate a mentor and the reason therefor is unclear. Louw testified that the business of the first defendant never really got off the ground. He was of the view that, as there was no turnover due to no business, it follows that the budgeted amounts would not have been achieved, and it would not have been necessary for Business Partners to make the nomination.

- [9] Louw conceded in cross examination by Mr. van Rensburg on behalf of the second defendant that Business Partners did not fulfill their obligations under section 5 of the Royalty Agreement. I am

however of the view that this concession, as far as it refers to "not complying with the obligations under clause 5 of the Royalty agreement" is misconceived.

[10] Mr. van Rensburg, on behalf of the third defendant, contended that plaintiff's non-fulfilment of its obligations in terms of clause 5 precludes the plaintiff from claiming under the suretyship agreement as plaintiff's claim against the principal debtor would have been a claim for specific performance and plaintiff's non-performance would have been a good defense to the avail of the principle debtor. This contention can, in my view, only be correct if the wording of clause 5 is susceptible to an interpretation that the "obligation" demands a reciprocal obligation.

[11] In order to decide whether it is open to a defendant to raise this defense in any particular case it is necessary to decide whether the term of the agreement, is one to which the principle of reciprocity applies.

[12] The principles to be applied were set out by Corbett J in *ESE Financial Services) Pty) Ltd v Cramer* 1973(2) SA 805 (C) ([1973] 3 All SA 199 (C)):

For reciprocity to exist there must be such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and, in cases where the obligations are not consecutive, vice versa.

[13] From the evidence of Louw it is clear that the there was no turnover, hence, no obligation arose for the Plaintiff to appoint a mentor or consultant.

[13] Applying these principles I am of the view that the provisions of clause 5 does not constitute a reciprocal obligation and therefor I find that third defendants defence, in this regard, is devoid of substance.

PLAINTIFF FAILED TO PROVE THE AMOUNT CLAIMED.

[14] The defendant contends that certain amounts allegedly paid by the principal debtor were not credited to either the Loan Agreement and/or the Royalty Agreement.

[15] These amounts are the following:

- a) An amount of R 10 000,00 allegedly paid on 16 October 2008.
- b) An amount of R 10 000,00 allegedly paid on 16 January 2009.
- c) An amount of R 39 000,00 allegedly paid on 25 March 2009.
- d) An amount of R 9 000,00 allegedly paid on 20 May 2009.
- e) An amount of R 257 011,20 allegedly paid on during February by the liquidators of the principle debtor.

[16] From the statements attached to the certificates (see paragraph 3.1 *supra*) it appears that the following amounts were received:

- a) The payment of R 10 000.00 allegedly made on 16 January 2009 (see paragraph 15 (b) above) is reflected as having been received on 12 March 2009.
- (b) The payment of R 39 000.00 allegedly made on 25 March 2009 (see paragraph 15 (c) above) is reflected as having been received on 6 April 2009.
- (c) The payment of R 9 000.00 allegedly made on 20 May 2009 (see paragraph 15 (d)

above) is reflected as having been received on 2 June 2009.

(d) The payment of R 257 011.14 allegedly made during February 2011 (see paragraph 15(e) above) is reflected as having been received on 21 February 2011 and 13 October 2011.

[17] With regard to the alleged payment of R 10 000,00 made on 16 October 2008 third defendant testified that he was present when his deceased wife transferred the amount to her attorneys. There was no evidence that this amount was transferred to the plaintiff by the attorney.

[17] In view of the above I am of the view that the defendant did not disturb the *prima facie* proof of indebtedness.

[18] In argument Mr Tredoux, on behalf of the plaintiff, moved for judgment in the amounts set out in the certificates and for an amendment of the pleadings to adjust the claim amount accordingly. This application was not opposed by the defendant and is hereby granted.

IN THE RESULT I MAKE THE FOLLOWING ORDER:

- 1. THIRD DEFENDANT IS ORDERED TO PAY TO PLAINTIFF THE OF AMOUNT OF R 890,229.63.**
- 2. INTEREST ON THE ABOVE AMOUNT CALCULATED AT THE RATE OF 10.5% A *TEMPORE MORAE*.**
- 3. COSTS OF SUIT.**



**COETZEE WJ
ACTING JUDGE**

For the Plaintiff:

Adv. P Tredoux oio Van Dell Inc.

For the Defendant:

Adv. F G Janse van Rensburg oio Hugo Mathewson
& Oosthuizen.