REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

20/11/2012

CASE NO: 1307/2012

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

2012.11.20
DATE

SIGNATURE

In the matter between:

NEDBANK LIMITED **(REG NO: 1951/000009/06)**	Plaintiff
and	
EXCEED PROPS 8 (PTY) LTD **(NO: 202/027482/07)**	First Defendant
STEFANUS LAWRENCE DE DRUIN **(ID NO:**	Second Defendant
JOHANNA HELENA ORTLEPP **ID NO:**	Third Respondent

J U D G M E N T

MAKGOKA, J:

[1] This is an opposed summary judgment application. In its simple summons, the plaintiff alleges that the first defendant (the company) has breached the terms of a

loan agreement between it and the first defendant. The loan agreement was secured by a mortgage bond registered in favour of the plaintiff over the company's immovable property. The second and third defendants have respectively executed deeds of suretyships in favour of the plaintiff and bound themselves as sureties and co-principal debtors with the company in respect of the first defendant's liability.

[2] The plaintiff claims payment of a sum of R2 814 905.80, together with finance charges and interest. The plaintiff further seeks an order declaring the company's property executable for the amount claimed, and for an order authorising the issuance of a writ of execution against the property. It also seeks costs on an attorney and client scale, as provided for in terms of the mortgage bond.

[3] The affidavit resisting summary judgment was deposed to by Mr. David Julius Ortlepp. Mr. Ortlepp was initially a director of the company from 20 July 2004 until 1 January 2005, when he transferred all his shares to the third defendant, to whom he was married – they were divorced on 14 March 2006. The essence and thrust of his affidavit is this. The third defendant was appointed a director of the company on 28 January 2005, and since 4 February 2005, the third defendant owned the entire share capital of the company. On 15 March 2005 the third defendant appointed her brother (the second defendant) as a director of the company. In this regard the deponent contends that the second defendant took advantage of the third defendant's vulnerability as a divorced person by causing the third defendant to appoint him as director of the company and then to sign deeds of suretyships and other documentation in terms of which the plaintiff advanced sums of money used by

the second defendant for his own purposes and in terms of which the plaintiff caused the property to be encumbered, to the detriment of the company and third defendant.

[4] But for the undue influence of the second defendant, the company and the third defendant would not have applied for any facilities from the plaintiff of their own volition for use by the second defendant who defrauded the company and third defendants. No funds were disbursed to the company by the plaintiff or received by the company from the plaintiff, either in terms of the initial loan or the further loan described in the documents attached to the summons. The moneys were disbursed directly to the second defendant or an entity under his exclusive control. Upon receipt of the funds from the plaintiff, the second defendant undertook to service all payment due to the plaintiff under the loan. The third defendant had nothing to do with the second loan arranged with the plaintiff in Bloemfontein by second defendant during June 2006. The second defendant had no authority to enter into such loan from the company.

[5] On these facts, the deponent contends that there is no lawful cause in terms of which either of the bonds relied upon by the plaintiff was registered against the property of the company.

[6] Mr. *Roux*, counsel for the plaintiff, correctly pointed out that the monies claimed by the plaintiff are due and payable in terms of the mortgage bond by reason of the company's' failure to punctually pay the instalments as provided for in the mortgage bond, which, notwithstanding demand, remain unpaid. I agree with Mr. *Roux* that the issues raised by Mr. Ortlepp have nothing to do with the plaintiff but with internal

governance issues in the company. I do not see how any of these could constitute a *bona fide* defence to the plaintiff's claim. A *bona fide* defence means a complete defence set up *bona fide* or honestly, which if proved at the trial, would constitute a complete defence to the plaintiff's claim: See *Bentley Maudsley & Co. Ltd v "Carburol" (Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88. In my view there is no such defence in the present case.

[7] I am quite aware of the drastic nature of the remedy of summary judgment. On the other hand, the court would be remiss in its duties if unmeritorious defences, clearly devoid of any *bona fides*, stand in the way of a plaintiff who is clearly entitled to relief. The ever-increasing perception that any defence, whatever its merits, is sufficient to stave off summary judgment, is misplaced and not supported by the trite general principles developed over many decades. See for example the well- known decision of the then Appellate Division in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A). See also generally, *Herb Dyers (Pty) Ltd v Mohamed and Another* 1965 (1) 31 (T) at 31H-32A-B; Caltex *Oil (SA) Ltd v Webb and Another* 1965 (2) SA 914 (N) AT 916D-H; *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA (C) at 303F-H; *Shepstone v Shepstone* 1974 (2) 462 (N) at A-H and *Breytenbach v Fiat SA (Edmis) Bpk* 1976 (2) 226 (T).

[8] Recently the Supreme Court of Appeal (SCA) restated the purpose of summary judgment procedure in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA). At paras 31 and 33 the following is stated:

> "... It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights"
>
> Having regard to its purpose and its proper application, summary judgment proceedings do not hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E."

[9] In the result I conclude that the defendants have not disclosed a bona fide defence to the plaintiff's claim. I therefore make the following order:

1. Summary judgment is granted against the first, second and third respondents, jointly and severally, the one paying the others to be absolved for:

    1.1 payment in the sum of R2 814 905.80;

    1.2 Interest on the amount of R2 814 905.80 at a rate of 7.10% per annum from 1 December 2011 to date of payment;

    1.3 The property situated Erf 18, Lukasrand Township, Registration Division JR, Gauteng Province, deed of transfer T87182/2003, also known as 504 Sibelius Street, Lukasrand, Pretoria, Gauteng province is declared specially executable;

    1.4 Costs of the suit on an attorney and client scale.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING	: 9 OCTOBER 2012
JUDGMENT DELIVERED	: 20 NOVEMBER 2012
FOR THE PLAINTIFF	: ADV J ROUX
INSTRUCTED BY	: *WEAVIND & WEAVIND*, PRETORIA
FOR THE 1ST, 2ND & 3RD DEFENDANTS	: ADV Z SCHOEMAN
INSTRUCTED BY	: *COUZYN HERTZOG & HORAK*, PRETORIA