

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 1236/2007
Case Heard: 27/06/2008
Date delivered: 04/07/2008

In the matter between:

Tiger Consumer Brands Limited

PLAINTIFF

and

Johannes Lodewyk Steyn

1st DEFENDANT

Bernnita Steyn

2nd DEFENDANT

Leach Auto CC

3rd DEFENDANT

Firststrand Bank Limited

4th DEFENDANT

Standard Bank of South Africa

5th DEFENDANT

The Registrar of Deeds

6th DEFENDANT

JUDGMENT

Olivier J:

1. In its summons the plaintiff, Tiger Consumer Brands Limited, alleges:

- 1.1. that the first and second defendants, Johannes Lodewyk Steyn and Bernnita Steyn, are indebted to it in the amount of R1 065 024.83 in their capacities

as sureties and co-principal debtors of Motogo Distributors CC;

1.2. that the first and second defendants sold their immovable property to the third defendant, Leach Auto CC;

1.3. that

"33. *The Sale Agreement was entered into and the transfer of property took place with the intention of defrauding the Plaintiff and the other creditors of the First and Second Defendants.*

34. *The Third Defendant accepted transfer of the property with knowledge of the fraud.*

35. *The First and Second Defendants are unable to make payment of any amounts due to the Plaintiff.*

36. *As a result of the foregoing fraud, Plaintiff is unable to recover its claim from the First and Second Defendants."*

1.4. that the purchase price of R900 000,00 was paid by the third DEFENDANT, who then took transfer of the property;

- 1.5. that a mortgage bond was registered over the property by the third defendant in favour of the fourth defendant, Firststrand Bank Limited; and
 - 1.6. that a mortgage bond which had been registered over the property by the first and second defendants in favour of the fifth defendant, Standard Bank of South Africa Limited, was cancelled.
2. The plaintiff claims, **inter alia**, payment of the amount of R1 065 024.83 by the first and second defendants, as well as an order;

"Setting aside the sale and transfer of the immovable property known as Erf 171, Kuruman held under title deed T156/2000 as between the First and Second Defendants to the Third Defendant."
 3. The plaintiff joined the fourth defendant on the basis of it being an *"interested"* party and claims no relief against it.
 4. The fourth defendant excepted to the plaintiff's particulars of claim on the basis of it being vague and embarrassing to such an extent that the fourth defendant is unable to plead thereto.
 5. Although the fourth defendant's notice of exception is ten pages long and comprises of no less than 24 paragraphs and subparagraphs, its rather prolix contents can be deciphered and unravelled to boil down to basically two complaints:

- 5.1. The first complaint is that the plaintiff had failed to
"make it clear ... whether or not it is the true intention of the Plaintiff to unwind the transaction in totality such that the Excipient is repaid the full amount of the loan advanced by it to the Third Defendant and in respect of which the mortgage bond by the Third Defendant has been executed unto and in favour of Excipient".
- 5.2. In its notice of exception the fourth defendant also claimed to be embarrassed by a difference between the description of the creditor in the deed of suretyship and the description of the plaintiff in the combined summons.
6. In the heads of argument on behalf the fourth defendant no mention was made of the second complaint, and in my view wisely so, and it will therefore for the purposes of this judgment be regarded as having been abandoned.
7. I am of the view that the first complaint is also devoid of any merit.
8. The contention seems to be that the plaintiff should have detailed "*the consequence which an order as prayed will have on the Excipient*". There is no obligation on the plaintiff to do so. The legal effect of an order setting aside the sale and transfer in circumstances such as these can be easily determined by the reference to any textbook on contract.

9. In fact, the fourth defendant contradicts itself by stating (also in its notice of exception) that the effect of the order “*will be to unwind the legal and commercial procedures which have occurred in consequence of the transaction, such that the Excipient ought to be repaid the loan amount advanced by it to the Third Defendant*”. If this would according to the fourth defendant be the legal effect of such an order, why should the plaintiff have explained it to the fourth defendant in its particulars of claim?
10. It is so that the setting aside of the transfer would impact upon the fourth defendant’s security for the loan granted to the third defendant. Such an order would mean that the third defendant in effect never acquired ownership of the property, or the right to hypothecate it as security for a loan.
11. Should the plaintiff then also succeed in its claim against the first and second defendants and have the property attached in execution, the fourth defendant would have no security for the repayment of the amount of the loan. This has, however, not yet happened and the fourth defendant’s remedies in this regard would clearly be against the third defendant and/or the first and second defendants, and not against the plaintiff (compare **Menqa and Another v Markom and Others** 2008 (2) SA 120 (SCA) at 130).
12. The fourth defendant’s references to a “*cause of action against the Fourth Defendant*”, “*the whole cause of action in respect of the Fourth Defendant*” and the possibility that the relief claimed by the plaintiff “*is intended to deprive the Fourth Defendant of the benefits of the mortgage bond*” are misconceived. The

plaintiff is not claiming any relief against the fourth defendant and the relief claimed by it is not "*intended*" (in the sense of being aimed at) to deprive the fourth defendant of anything, but rather to have the consequences of the transaction between the first and second defendant and the third defendant undone as far as the plaintiff is affected thereby.

13. The relief claimed against the first and second defendant's and the third defendant may affect the fourth defendant's rights in terms of the mortgage bond, and possibly its rights regarding the loan agreement apparently concluded between it and the third defendant, but it was certainly not incumbent upon the plaintiff to address those rights in its particulars of claim.
14. The allegations in the particulars of claim are sufficiently clear to enable the fourth defendant to resist the setting aside of the sale and transfer (should it have a basis for such a defence) or to take steps against the third defendant (either by way of a third party joinder or in a separate action) to recover the money advanced to the third defendant.
15. The plaintiff therefore correctly joined the fourth defendant in its action (without claiming relief against it), but it had absolutely no obligation to take or explain steps to recover the loan amount or any damages that the fourth defendant may suffer in the event of the property being attached in execution.
16. It follows that I am of the view that the exception should be dismissed. There is no reason why costs should not follow the result and none was suggested to me.

17. The following order is therefore made:

The exception is dismissed with costs.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff: Adv W H Coetzee
Instructed by: Engelsman Magabane Inc. KIMBERLEY

For the fourth defendant: Adv J Schreuder
Instructed by: Elliott, Maris, Wilmans & Hay, KIMBERLEY