IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3723/2006

In the case between:

OOS VRYSTAAT KAAP BEDRYF BEPERK Plaintiff

and

JAN HENDRIK VERSTER N.O. 1st Defendant

ELIZABETH CATHARINA VAN DER LINDE N.O. 2nd Defendant
(in the capacity as Trustees of WYNDHAM TRUST,
NR IT1900/97)

JAN HENDRIK VERSTER 3rd Defendant

JUDGEMENT: MOLEMELA, AJ

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HEARD ON: 19 OCTOBER 2006

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DELIVERED ON: 9 NOVEMBER 2006

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[1] This is an application for summary judgment against the three defendants jointly and severally. The first and second defendants are being sued in their capacity as the trustees of

the Wyndham Trust, Nr IT 1900/1997. For convenience I shall hereafter refer to the first and second defendants jointly as "the trust".

[2] The cause of action as stated in the summons is founded upon an agreement entered into on 7 June 2005 between the plaintiff and the trust ("the agreement") as well as a deed of suretyship entered into between the plaintiff and the third defendant on the 27th February 2003.

[3] In terms of the agreement, the trust, which was at that stage involved in farming operations, had applied for and been granted credit facilities by the plaintiff, a co-operative society of which both the trust and the third defendant were members. The third defendant had, in terms of the above-mentioned deed of suretyship, bound himself as surety and co-principal debtor in respect of the trust's indebtedness to the plaintiff.

[4] An opposing affidavit has been filed by the 3rd defendant both in his personal capacity and in his capacity as the duly authorised trustee of the trust.

[5] The question for determination is whether a *bona fide* defence has been disclosed for purposes of Rule 32(3)(b) of the Uniform Rules. Rule 32(3) provides as follows:

> "32(3) Upon the hearing of an application for summary judgment, the defendant may –
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> (a) give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given, or
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> (b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or any other person who can swear positively to the fact that he has a *bona fide* defence to the action; such

> affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[6] In view of the fact that there is a dispute as to whether the defendant's affidavit adequately discloses the nature and grounds of the defence and the material facts relied upon therefor as required by Rule 32(3)(b), I shall, quote a few paragraphs from the defendant's opposing affidavit.

[7] Paragraph 2 thereof provides as follows:-

> "Iedere en elke bewering soos gemaak deur die Eiser in hulle Dagvaarding en Aansoek om Summiere Vonnis soos aangevul deur die beëdigde verklaring van Petrus Barend Dippenaar word ontken, tensy sodanige bewering uitdruklik erken word."

[8] Paragraph 3 thereof reads as follows:-

> "Ek ontken ten sterkste dat verdediging hierin deur die Verweerderes aangeteken is bloot in 'n poging om afhandeling van hierdie aksie te vertraag. Ek doen voorts aan die hand dat die Verweerders wel oor 'n bona fide verweer teen die Eiser se eis beskik en welke vollediglik hieronder uiteengesit word."

[9] What follows after paragraph 3 can be summarized as follows:-

(i) that the 3rd defendant entered into the agreement in his capacity as the trustee of the trust;

(ii) that he had previously entered into a similar agreement in his own personal capacity;

iii) that the agreement is to be read in conjunction with "the statutes" of the plaintiff company;

iv) that in terms of the statutes there was an arrangement in terms of which the trust would, be entitled to the value of certain amounts which would grow in value from time to time as a result of purchases made by the trust and delivery of harvests by the trust, which amounts would stand as a loan account in favour of the trust as against the plaintiff;

v) that this arrangement was applicable to all members of the plaintiff;

vi) that in terms of the statutes the credit accruing to the trust would, upon cessation of farming operations or liquidation of the trust, be utilised for payment of any amount that might be owed to the Plaintiff by the trust;

vii) that the statutes were applicable to both the third defendant and the trust as members of the plaintiff;

viii) that due to the fact that the trust had not been a member of the plaintiff for a long time, it had not yet become entitled to a credit loan account;

ix) that the last delivery of products by the trust from farming operations was done before 30 June 2005 and that no products had been delivered by the trust since 30 June 2005;

x) that the total loan accounts owed by the plaintiff and its holding company to the 3rd defendant amounted to a total of R257 497,58;

xi) that in terms of the statutes the plaintiff should have utilised the credit of R257 497,58 to settle any amounts owed by "the member" to the plaintiff;

xii) that the third defendant ceased farming operations in 2003 and the trust in September 2005;

xiii) that when he terminated his involvement in farming operations for own account, the amount due to him was retained due to his suretyship;

xiv) that when the trust stopped its farming operation he had instructed one Ms Van Huyssteen of the plaintiff to utilise his personal credit loan account for purposes of liquidating the trust's indebtedness towards the plaintiff;

xv) that Ms van Huyssteen had undertaken to make enquiries and confirm the value of his loan account and the utilisation thereof;

xvi) that Ms van Huyssteen had never reverted to him;

xvii) that he is entitled to receive payments of the values of his loan account so as to utilise it to liquidate the trust's indebtedness or his own indebtedness arising from his suretyship;

xviii) that he, in his personal capacity, has a counterclaim against the plaintiff.

[10] It has been argued on behalf of the plaintiff that:-

(i) the trust has not raised any *bona fide* defence whatsoever;

(ii) none of the defendants has disputed any indebtedness as it had not been averred that the amount claimed was wrongly calculated, that purchases were not made, that wrong debits appeared on the statement, or that credits were not reflected or that interest was incorrectly calculated;

iii) the third defendant was bound by the clause, in the agreement, that provided that the statements submitted by the plaintiff would serve as conclusive proof of indebtedness unless objected to within three months from date of receipt of the statement;

iv) that the defendants had not attached the statutes, which meant that fundamental facts had not been placed before the court, thus impacting negatively on the defendants' *bona fides.*

v) that the defence of set-off could not apply as it had been waived in terms of the agreement.

[11] It was argued on behalf of the defendants that:-

(i) the trust had disputed indebtedness and that its denial was supported by the annexures attached to the opposing affidavit;

(ii) that the plaintiff had, in its dealings in with the defendants, not made any distinction between the trust and the third defendant;

(iii) that the agreement incorporated the statutes and consequently the provision in the statutes regarding utilisation of credits to settle outstanding balances had to be adhered to.

[12] Although the defendant's affidavit is somewhat confusing towards the end one cannot say it is completely lacking of the material facts relied upon with regards to the *bona fide* defence that is being raised. What comes out very clearly is the defence of a set-off. Although there is no express denial of indebtedness, a denial can be gathered towards the end of the opposing affidavit. In this regard it is to be borne in mind that "affidavits in summary judgment matters are customarily treated with a certain degree of indulgence." (see **KOORNKLIP BELEGGINGS (EDMS) BPK v ALLIED MINERALS LTD** 1970 (1) SA 674 C at 678. In **HERBERT v STEELE** 1953 (3) SA 271 at 274 the learned judge had the following to say:

> "Her affidavit is very cryptic and leaves much to be desired, but it has been held that the affidavit under Rule 21 should not be looked at with the same strictness as a pleading. It is enough if an intention to set out what would be a defence can be gathered from its terms."

[13] The defendants are bound by the terms of the agreement. Clause 7 and 8 thereof provide that if an objection has not been lodged within three months of receipt of a statement reflecting an amount that is owed, then that statement shall constitute conclusive proof of indebtedness. In the case of **BEKKER & ANOTHER v OOS-VRYSTAAT KAAP KOöPERASIE BPK** 2000 (3) ALL SA 301 it was held that such a clause was valid. Insofar as the defendants have at no stage disputed the amounts reflected in the statements dispatched in the statements dispatched to them, then such statements are acceptable as conclusive proof of their indebtedness.

[14] With regards to the defence of set-off, it was argued that the defendants had, in terms of clause 4 of the contract, waived such a defence. I was duly referred to the judgment of Lichtenburg, J in **<u>HERRIGEL NO v BON REAS CONSTRUCTION</u>** 1980 (4) SA 669 (SWA). I agree with the aforesaid judgment. However, what is distinguishable in principle between the aforesaid case and the present is the fact that the agreement entered into by the parties must in this instance be considered in conjunction with the statutes of the plaintiff. Section B of the statutes provides as follows:

> “”I the undersigned being the Applicant whose details are set out in paragraph A hereinabove, hereby apply for credit facilities subject to the conditions mentioned hereunder, and the provisions of the company’s statute (as amended from time to time) and client financing policy (as amended from time to time)”.

Under Section C of the agreement, dealing with the applicable conditions, clause 1.2 provides as follows:

> "The provisions of the company's statute and client financing policy as amended and applied from time to time form part of this agreement as if specifically incorporated and repeated therein, and to which provisions I bind myself."

[15] It has been averred by the defendant that the statutes provide that when a member ceases to engage in farming operations or is sequestrated/liquidated, any credit accruing to such a member should be utilised to liquidate that member's debt. Save to assert that the statutes had not been annexed to the defendants' opposing affidavit, this averment was not denied by the plaintiff. In any event as the statutes had been incorporated into the parties' agreement, the plaintiff also had a responsibility to ensure that they are attached to its summons.

[16] Insofar as the agreement states that it will be applied subject

to the statutes, the agreement does not in my view take precedence over provisions of the statute. The two documents therefore exist side by side and consequently the clause regarding waiver exists side by side with the clause providing that a member's credits should be utilised in liquidation of such a member's outstanding debt. The facts of this case are thus clearly distinguishable from those in the case of Herrigel. This then means that the third defendant's defence of a set-off can be regarded as a *bona fide* defence. In this regard it is to be borne in mind that in a summary judgment application a defendant only needs to satisfy the court that he has a *bona* defence and need not prove his defence.

[18] The question now is whether the trust has disclosed a *bona fide* defence seeing that it was the 3rd respondent who had the credits and not the trust. It has been argued on behalf of the defendants that usage of the same account number for

the trust and the third respondent in all the statements and in all the certificates of indebtedness serve to show that the plaintiff in its dealings with the defendants did not distinguish between the trust and the third defendant. This argument is not without merit. The statements are the documents on which the claim is based. They reflect the same number for both the trust and the third defendant. The same applies to the certificates of indebtedness. Considering that both the trust and the third defendant were members of the plaintiff, I find myself having a doubt as to whether the plaintiff, in its dealings with the defendants, made any distinction between the trust and the third defendant. Obviously if such a distinction was not made then I would have to accept that the defendant's averment, viz that his own credit could be used to liquidate the trust's indebtedness, constitutes a *bona fide* defence of a right of set-off.

[19] I therefore consider the present case to be one where the court has to exercise its judicial discretion and refuse

summary judgment.

[20] I make the following order:

20.1 Summary judgment is refused;

20.2 First, second and third defendants are granted an opportunity of defending the action;

20.3 Pleadings to be exchanged as if the notice of appearance to defend was filed on the date of this order.

20.4 Costs reserved for consideration at the trial.

[20] Authorities considered:

- **DISTRICT BANK LTD v HOOSAIN AND OTHERS** 1984 (4) SA 544 (C);
- **MAHARAJ v BARCLAYS NATIONAL BANK LTD** 1976 (1) SA 418 (A) 426 D;
- **GILINSKY AND ANOTHER v SUPERB LAUNDERERS AND DRY CLEANERS (PTY) LTD** 1978 (3) SA 807 (C) 810 A;

- **ARE ND & ANOTHER v ASTRA FURNISHERS (PTY) LTD** 1974 (1) SA 298 (K) 304A;
- **BREITENBACH v FIAT SA (EDMS) BPK** 1976 (2) SA 226 (T) 228 E – 229 A;
- **STANDARD MERCHANT BANK LTD v ROWE AND OTHERS** 1982 (4) SA 671 (W) 680 G – H;
- **MARSH AND ANOTHER v STANDARD BANK OF SA LTD** 2000 (4) SA 947 (W);
- **BEKKER v OOS-VRYSTAAT KOöP BPK** 2000 (3) ALL SA 301 (A);
- **SOUTHERN CAPE LIQUORS (PTY) LTD v DELIPCUS BELEGGINGS BK** 1998 (4) SA 494 (K) 501;
- **HERRIGEL NO v BON ROADS CONSTRUCTION (PTY) LTD AND ANOTHER** 1980 (4) SA 669 (SWA);

- **NICHAS & SON (PTY) LTD v PAPENFUS** 1969 (2) SA 494 O at 496 E – H;
- **NICHAS & SON (PTY) LTD v PAPENFUS** 1970 (2) SA 316 O at 319 H;
- **INTERNATIONAL SHIPPING CO LTD v F C BONNET (PTY) LTD** 1975 (1) SA 853 D at 854 F;
- **BOWMAN NO v HOWE** 1980 (2) SA 226 (W) at 229 A – C.
- **TRINITY ENGINEERING (PVT) LTD AND ANOTHER v ANGLO-AFRICAN SHIPPING CO (PVT) LTD** 1986 (1) SA 702 at 705 A.
- **The Law of South Africa, Christie, 5th edition, page 477.**

M. B. MOLEMELA, AJ

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