



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No A28/13

In the matter between:

SOUTH AFRICAN LAND ARRANGEMENTS CC First appellant

GUIDO LOUIS MARC MARIEN Second appellant

ANNE JOSEPHA LOUIS DELAET Third appellant

and

NEDBANK LIMITED Respondent

Court: GRIESEL *et* SAMELA JJ

Heard: 13 September 2013

Delivered: 19 September 2013

JUDGMENT

GRIESEL J:

[1] This is an appeal against a judgment of the magistrate of Somerset West who granted summary judgment in favour of the respondent, Nedbank Limited (as plaintiff) against the three appellants herein (as defendants) in respect of three separate claims. For

convenience, I refer to the parties by their respective designations in the magistrate's court.

Factual background

[2] The claims arise from a series of agreements between the plaintiff and the defendants over a period of time:

(a) On 28 July 2009, the plaintiff entered into a written loan agreement in terms of which it granted the first defendant, South African Land Arrangements CC, a loan facility in an amount of R1,25 million.

(b) On 11 November 2009, the plaintiff granted the first defendant a 'permanent increase in overdraft facilities' on its cheque account from R300 000 to R365 000.

(c) On 6 September 2010, the overdraft facility was, by agreement, increased to R667 000 on a temporary basis until 30 September 2010.

(d) As security for the loans, a mortgage bond was registered over the first defendant's property, 'Portion 9 of Farm no 689 Stellenbosch', for an amount of R2 million.

(e) In addition, the second and third defendants bound themselves as sureties in favour of the plaintiff in respect of the first defendant's indebtedness to the plaintiff - the second defendant for an unlimited amount and the third defendant for an amount limited to R1,55 million.

[3] In the particulars of claim, the plaintiff alleged that the first defendant committed a breach of the loan agreement in that it failed to pay one or more instalments in respect of the loan agreement by due date. In the circumstances, the full outstanding balance of the loan, amounting to R1,19 million, had become due. Moreover, the first defendant exceeded the limit of the overdraft facility and was indebted to the plaintiff in an amount of some R725 000 (in round figures) as at 20 January 2011. These were the amounts claimed from the three defendants jointly and severally (but limited in the case of the third defendant to R1,55 million), together with interest at the applicable rates, as well as an order declaring the first defendant's property executable.

[4] The defendants gave notice of their intention to oppose the action, whereupon the plaintiff applied for summary judgment. In a fairly terse opposing affidavit, the second defendant raised the following defences to the plaintiff's claims:

(a) The amounts claimed by the plaintiff are not yet due and payable by virtue of a further agreement entered into by the parties on 28 June 2010, which agreement entailed a restructuring of the defendants' various loan, overdraft and suretyship obligations in terms of which such obligations were allegedly reduced to nil.

(b) The failure by the plaintiff to honour such agreement gave rise to an unliquidated counterclaim for damages in an amount of R2,8 million on the part of the first defendant, which exceeds the plaintiff's claims against the defendants.

[5] The magistrate rejected the defences advanced on behalf of the defendants and granted summary judgment as prayed, hence this appeal.

Further evidence on appeal

[6] The appellants are hamstrung by the fact that the further agreement on which they relied did not form part of the record before the magistrate at the hearing of the application for summary judgment. In order to overcome this *lacuna*, the defendants accordingly applied *in limine* for leave to supplement their papers by adducing further evidence on appeal in the form of a copy of the agreement in question. This was opposed on behalf of the plaintiff. It is accordingly necessary to consider this application before turning to deal with the merits of the appeal as such.

[7] Although a court is in terms of s 22(a) of the Supreme Court Act, 59 of 1959, empowered to receive further evidence on appeal, the court's powers should be exercised sparingly and further evidence on appeal should only be admitted in exceptional circumstances.¹ It is incumbent upon an applicant for leave to adduce further evidence, *inter alia*, to satisfy the court that it was not owing to any remissness or negligence on his or her part that the evidence in question was not adduced at the trial.² Furthermore, inadequate presentation of the litigant's case at the trial will only in the rarest instances be remediable by the adduction of further

¹ *Colman v Dunbar* 1933 AD 141 at 161; *S v N* 1988 (3) SA 450 (A) at 458E; *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) para 43; *De Aguiar v Real People Housing* 2011 (1) SA 16 (SCA) paras 9-12.

² *Simpson v Selfmed Medical Scheme & another* 1995 (3) SA 816 (A) at 824J.

evidence at the appeal stage.³ It is thus clear that the test is a stringent one.

[8] In *S v De Jager*,⁴ Holmes JA summarised the relevant requirements as follows:

- ‘(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
- (b) There should be a *prima facie* likelihood of the truth of the evidence.
- (c) The evidence should be materially relevant to the outcome of the trial.’

Discussion

[9] As for the reason why a copy of the document relied on was not placed on record, the plaintiffs were unable to say more than it was ‘in error’ not attached to the opposing affidavit. I am not persuaded that this amounts to a reasonably sufficient explanation as to why the evidence sought to be adduced was not placed before the trial court.

[10] Be that as it may, and even if this hurdle could be overcome, I am in any event not satisfied that such evidence is ‘materially relevant to the outcome of the trial’. In this regard, it is apparent from the document relied on that it was intended as a credit restructuring agreement in terms of which the first defendant would be replaced by another entity, Seasons Find 593 CC (‘Seasons Find’), as principal debtor; the first

³ *R v Carr* 1949 (2) SA 693 (A) at 699.

⁴ 1965 (2) SA 612 (A) at 613B.

defendant's overdraft facility and commercial loan would be reduced to nil; the suretyships of the second and third defendants would be cancelled and the first defendant's existing credit facility would be replaced with a new consolidated facility in favour of Seasons Find in an amount of R1,85 million. In terms of clause 21 of this document, the restructuring agreement was intended to supersede and replace all previous 'facility letters' entered into between the parties.

[11] However, it is further apparent that this restructuring agreement was subject to a number of 'conditions precedent', *inter alia*, provision of security in the form of suretyships for the liability of Seasons Find by the third defendant and World Focus 263 CC in an amount of R1,85 million and registration of a first covering bond in an amount of R2 million over 'Portion 9 of Farm no 689 Stellenbosch', which property had apparently been sold by the first defendant to Seasons Find. There is no indication or allegation to the effect that any of these conditions had been fulfilled; on the contrary, all indications are that they had *not* been fulfilled. In fact, the second defendant says so himself: in his opposing affidavit, he alleged that the plaintiff had breached the restructuring agreement and had 'blocked' the first defendant's access to its available funds and accounts. It also, in breach of the agreement, closed all the banking facilities for Seasons Find. As a result of the plaintiff's alleged breach, the sale between the first defendant and Seasons Find 'fell through and the first defendant suffered damages in the amount of R2,8 million, being the difference between the price at which the property was sold, under pressure of legal threats from plaintiff, to another buyer and the initial purchase price of Seasons Find'.

[12] It is thus clear, on the defendants' own case, that the restructuring agreement never came into effect, with the result that the defendants remained liable to the plaintiff under the original set of agreements. This is borne out by the fact that on 6 September 2010, i.e. *after* the restructuring agreement on which the defendants seek to rely, the plaintiff agreed to increase the first defendant's existing overdraft facility to R667 000.⁵

[13] In these circumstances, it follows that the defendants have not in their opposing affidavit satisfied the court that they have any *bona fide* defence to the action. At best for them, the first defendant has an unliquidated counterclaim for damages against the plaintiff. However, I am of the view that this does not avail the defendants in these proceedings:

- First, in terms of clause 2.1 of the mortgage bond in question, the first defendant is liable to make all payments in terms of the bond 'without set off or deduction of any kind', with the result that the defendants are precluded from relying on any counterclaim as a defence against the plaintiff's claims.
- Secondly, the defendants have failed to disclose 'fully' the nature and grounds of the counterclaim and the material facts relied on therefor.
- Thirdly, as pointed out by Brand JA in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd*,⁶ when the answer raised in the opposing affidavit is in the nature of a counterclaim instead

⁵ See para [2](c) above.

⁶ 2004 (6) SA 29 (SCA) para 11.

of a plea, a defendant can still pursue the counterclaim by issuing summons in a separate action, with the result that the doors of the court are not finally closed against such litigant.

- Finally, the defendants unequivocally concede in their opposing affidavit that the first defendant ‘is indebted to the plaintiff in a certain amount’, which concession in itself is destructive of the counterclaim on which they seek to rely.

Agreement to grant leave to defend

[14] The defendants sought to rely on a further ground of appeal which was not mentioned in their notice of appeal, namely that the plaintiff’s attorney, Mr Claassen, had agreed with the defendant’s attorney, Mr Botha, that leave to defend would be granted. Accordingly, so it was argued, the magistrate erred in not enforcing this agreement.

[15] The rule is quite clear: a point not taken in the grounds of appeal is thereby waived and cannot be taken except by leave of the appeal court and on terms as to adjournment and costs. (Obviously leave would be more readily granted where a pure question of law is involved.) Where further grounds of appeal are subsequently, before the prosecution of the appeal, found to exist, the procedure laid down in rule 55A for amending the notice of appeal should be followed.⁷ The defendants did not seek the court’s leave to argue points not raised in the notice of appeal, nor did they seek leave to amend the notice.

⁷ *Jones & Buckle – The Civil Practice of the Magistrates’ Courts in South Africa* 10 ed Vol II at 51-11 – 51.12 (Original Service 2011).

[16] I am in any event satisfied that there is no merit in the point. The application for summary judgment had initially been enrolled for 11 May 2011. On the previous day the attorneys for the respective parties had a telephone conversation in the course of which the plaintiff's attorney indicated that the plaintiff was amenable to granting leave to the defendants to defend the action. It is common cause that no agreement regarding the costs of the application for summary judgment was reached. The defendants' attorney recorded the conversation in a letter of the same date, saying the following:

‘Ons bevestig u advies dat u instuksies het om verlof te verleen om te verdedig in bogemelde aangeleenheid.

Die enigste ander kwessie wat uitsorteer moet word is die kwessie rakende koste en soos reeds aan u adviseer is dit ons instruksies dat u kliënt aanspreeklik is vir die koste vir die bring van die aansoek.

U kliënte se blootstelling ten opsigte van 'n koste bevel is gegrond daarop dat hulle bewus was van ons kliënte se verweer alreeds voordat die dagvaarding beteken was en dat desnieteenstaande hulle steeds, nadat daar 'n aansoek om verdegiging geliasseer is voort gegaan het met die aansoek om summiere vonnis.

Die gesag is duidelik op hierdie punt en indien u kliënte nie dienooreenkomsitg toestem nie sal die aangeleentheid afstaan na die geopponeerde rol ten einde te argumenteer.’

[17] On 11 May 2011 the correspondent attorney who appeared on behalf of the plaintiff conveyed to the defendants' attorney, Ms Booysen, that the offer to agree to leave to defend had been withdrawn in view of the fact that no agreement regarding costs could be reached and that the matter had to be postponed to the opposed roll for argument. These

events were recorded as follows in a letter dated 16 May 2011 from the defendants' attorneys to the plaintiff's attorneys:

'Ons verwys na die hofverrigtinge op 11 Mei 2011 en bevestig dat u korrespondent, Daniel Venter, adviseer het dat aangesien ons koste wil argumenteer, die verlof wat u verleen het om te verdedig teruggetrek word en dat u die hele aansoek nou wil argumenteer.

Ons bevestig dat die aangeleentheid uitgestel is na 16 Augustus 2011 vir die geopponeerde rol te Somerset-Wes.'

[18] On 15 August 2011, i.e. one day before the hearing of the postponed application, both attorneys acting on behalf of the defendants, Mr Botha and Ms Booysen, deposed to affidavits recording the events recited above. The affidavits were apparently handed to Mr Claassen on behalf of the plaintiff at 09h05 on the morning of 16 August 2011. In addressing the magistrate shortly afterwards,⁸ the plaintiff's attorney, Mr Claassen, said the following:

'We received the opposing affidavit on the 6th of May if my memory serves me right. I then took instruction from my client regarding whether we should grant the defendants leave to defend the matter. I then on a without prejudice basis approached the attorney acting for the defendants and confirmed that on a without prejudice basis that my client is willing to grant the defendants leave to defend on condition that the costs be cost in the cause Your Worship.

Your Worship subsequently it became apparent that the defendants were going to persist that my client pays the costs of this application for summary judgment on attorney/client scale. I accordingly withdrew the offer to grant the defendants leave

⁸ According to the transcript, argument commenced at 10h32 and lasted until 11h38.

to defendant Your Worship. The decision to grant the defendants leave to defend was not in any way an admission by my clients that the defence put forward by the defendants today is of any merits [sic] . . .’

[19] At the commencement of her address, the defendants’ attorney raised the alleged agreement as a point *in limine*. She handed up the affidavits by herself and Mr Botha and started reciting the salient facts, at which point the magistrate interrupted her, stating:

‘COURT: At this point in time I’m truly not interested in – those are proceedings between the parties, that’s got nothing to do with the application. . . . It’s got nothing to do with me, you cannot now argue that – that are what I would regards as *without prejudice* discussions between the parties. If the parties agreed they’re going to withdraw it and if that withdrawal is removed or the offer is no longer then we proceed. And I think it is unethical of you now to come and argue that and to bring those things under the court’s attention.

ME BOOYSEN: Soos die hof behaag Edelagbare.

COURT: Because that doesn’t form part of the record – the matter is on the roll for the application because the applicant decided to go ahead with his application for summary judgment. And so therefore his application you are opposing it, oppose it. I’m not interested in out of court discussions that took place between the parties because it’s not on record.

ME BOOYSEN: Soos die hof behaag Edelagbare. Edelagbare dan sal ek voortgaan op die meriete van die aangeleentheid.’

[20] On appeal, counsel for the defendants took the magistrate to task for having adopted this approach and she may well have erred in that regard. Be that as it may, the magistrate was undoubtedly entitled to have regard to the statements from the Bar made by the plaintiff’s

attorney in the passage quoted above. As stated by Grosskopf J in *BEF (Pty) Ltd v Cape Town Municipality*:⁹

‘It is the practice in our courts to accept what counsel say from the Bar as indubitably true and correct and it is a practice without which the courts cannot perform their work properly and efficiently.’

[21] I have no doubt that the same principles apply in the case of attorneys appearing before any court. Where there is disagreement between practitioners as to what was said between them (as in this instance), the court must deal with it as best it can.¹⁰

[22] On the facts of this case, I am not persuaded that the defendants have established the alleged agreement on which they sought to rely. On both versions, no agreement had been reached regarding costs. In my experience, it is most improbable that the plaintiff’s attorney would have unconditionally agreed that leave to defend should be granted. It is more probable, as stated by Mr Claassen, that the offer conveyed to the defendants was in the terms as alleged by him, to which the defendants’ attorney made a counter-offer, thereby rejecting the original offer.¹¹ For these reasons, this point cannot succeed.

Further defences

[23] On appeal before us, counsel for the defendants sought to rely on certain further defences, which had likewise not been raised in the notice of appeal, nor have they been alluded to in the defendants’ opposing

⁹ 1990 (2) SA 337 (C) at 347E-F.

¹⁰ *Ibid.*

¹¹ Cf *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 420.

affidavit. Counsel claimed to be entitled to follow this course ‘due to the fact that summary judgment is an extraordinary and stringent remedy’.¹² However, as pointed out by Navsa JA in *Joob Joob Investments v Stocks Mavundla Zek*:¹³

‘The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his/her day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary.

...

Having regard to its purpose and its proper application, summary judgment proceedings only 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* case¹⁴ at 425G-426E.’

[24] In the light of these remarks, the defendants are not entitled to more indulgent treatment simply because these are summary judgment proceedings. As far as the failure to raise these points in the notice of appeal is concerned, I refer to what has already been stated above. Moreover, as far as the opposing affidavit is concerned, it is clear to me that had any of those points been properly raised, most of the alleged defects sought to be relied upon could have been cured by a simple amendment to the particulars of claim; e.g. the fact (no doubt as well known to the defendants as to this court) that the present plaintiff, Nedbank, is the successor in title of BOE Bank, in whose favour one of the suretyships was signed; or the fact that the agreement of 6 September

¹² The quotation is from counsel’s heads of argument.

¹³ 2009 (5) SA 1 (SCA) paras 32 and 33.

¹⁴ *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A).

2010 was in fact signed on the third page thereof, which page had not been annexed to the particulars of claim; or that the overdraft facilities had been duly called up, as contemplated in the relevant agreement; and so on. To allow the defendants, in these circumstances, to now raise these defences for the first time on appeal would clearly be prejudicial to the plaintiff and ought not to be allowed.

[25] It must be stressed once more that a defendant wishing to avoid summary judgment by deposing to an affidavit must first of all disclose ‘fully’ the nature and grounds of its defence and the material facts relied on therefor. On the facts so disclosed, the defendant must satisfy the court that it has a defence which is both *bona fide* and good in law. On the facts of the present matter, I am not satisfied that the ‘defences’ now sought to be advanced by counsel meet either requirement.

Order:

[26] For the reasons set out above, I am satisfied that the magistrate was justified in granting summary judgment as prayed in favour of the plaintiff. It follows that the appeal should be DISMISSED with costs on the scale as between attorney and own client, as agreed.

B M GRIESEL
Judge of the High Court

SAMELA J: I agree.

M I SAMELA
Judge of the High Court