IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. 2009/50239

DATE:29/10/2010

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In the matter between:

NEDBANK LTD Plaintiff

and

ZILTREX 77 (PTY) LTD First Defendant

& EIGHT OTHERS Second to Ninth Defendants

JUDGMENT

WILLIS J:

[1] The plaintiff claims from the first, second, third, fourth, eighth and ninth

defendants and the Adventure Family Trust on the basis that they are sureties for the debts of Co-Props 56 (Pty) Ltd, the principal debtor. The Adventure Family Trust is represented by the fifth, sixth and seventh defendants. Co-Props (Pty) Ltd is not a party to these proceedings. In the particulars of claim it is alleged that the debt of the principal debtor is R46 261 585, 11, together with interest and costs and that this debt arises from a so-called facility agreement (annexed to the particulars of claim as annexure “B”) in terms of which the plaintiff lent money to it, the principal debtor. Interest is claimed from 3 September 2009. The rate of interest is alleged to have been agreed between the plaintiff and the principal debtor. The plaintiff is a bank. I shall refer to it simply as “the bank”. The amount claimed from the different individual defendants in question varies according to the limit of the amount stipulated in the individual written agreements of suretyship. As against the individual defendants in question the bank claims joint and several liability with the principal debtor, the one paying, the other to be absolved. It is only against the Adventure Family Trust and fourth defendant that the plaintiff claims the full amount of the principal debtor’s debt. Annexure “B was signed by the principal debtor in Sandton on 13 June 2007 and the bank in Cape Town on 26 June 2007.

[2] It is common cause that in clause 9 of annexure “B”, the facility agreement was made “subject to” certain “special conditions”. These special conditions all relate to the plaintiff being placed in possession of certain documents before the money would be lent. These documents may all be described as documents which the plaintiff required as being part of its “due diligence”

exercise. The documents are clearly documents which were intended to "prove" certain facts upon which the plaintiff relied in agreeing to grant the loan. They have no bearing on the actual performance of any of the obligations giving rise to the claim. Furthermore, it is common cause that clause 2 of annexure B provides that the facility is conditional upon "the following security being furnished to the bank". In paragraph 12 of the particulars of claim the plaintiff alleges that the security as referred to in clause 2 was, in fact, provided to the bank "by 13 June 2007 and thus the facility expired 24 months thereafter". The security includes the written suretyship agreements upon which the plaintiff relies in its claim against the defendants. There appears to be no dispute that the money was in fact lent by the bank to the principal debtor.

[3] The defendants have excepted to the particulars of claim on the basis that, although the plaintiff alleged that the security as contemplated in clause 2 of annexure "B" had been provided, the plaintiff failed to allege that the "special conditions" referred to in clause 9 were, in fact, fulfilled. The defendants have also excepted on the basis that the plaintiff alleges that the facility expired 24 months after the commencement date, whereupon the debt became repayable but have failed to specify when this "commencement date'" occurred. The exception is confined to the ground that the plaintiff's claim lacks averments necessary to sustain a cause of action. In other words the defendants do not claim that the particulars furnished by the plaintiff are vague and embarrassing.

[4] In clause 1.1 of annexure “B” the following is set out:

> The bank will, subject to the terms hereof make available to the Borrower an amount of R46 000 000 (Forty Six Million rand) herein after referred to as the “facility amount”, of which a cash amount of R35 000 000 (Thirty Five million Rand) will be made available to the Borrower on the terms set out herein.
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> An amount of R10 500 00 (Ten Million Five Hundred Thousand Rand), hereinafter referred to as “the capitalisation amount”, will be retained by the Bank to capitalise future interest accruing on the facility.

The “Borrower” is the principal debtor.

[5] In clause1.2 of annexure “B” the following appears:

> For the purposes of this Facility Agreement, the Commencement Date will be the date that all the Bank’s security requirements, as set out in clause 2 hereof and any other preconditions as set out herein, for making advances in terms of the facility have been fulfilled.

[6] In clause 5.1 of annexure “B” the following appears:

> The facility will be conditional in all respects upon the provision and

registration, if applicable, of the security, if any, listed in clause 2 of the facility agreement and the Bank shall have no obligation under the facility pending the provision and registration of the same. The condition, if any, that security be furnished is for the benefit of the Bank. The Bank shall be entitled, unilaterally and at its discretion to waive fulfilment of any security requirements listed in clause 2 of the facility agreement or to accept partial fulfilment of any security requirements or to release any security that it holds for the obligations of the Borrower on written notice to the Borrower.

[7] In paragraph 11.2 of the plaintiff's particulars of claim it is alleged that:

The commencement date of the facility agreement was the date that all the plaintiff's requirements set out in paragraph 2 of the facility letter and other preconditions had been met.

[8] In paragraph 11.4 of the plaintiff's particulars of claim it is alleged that:

The principal debtor agreed that the facility would expire in 24 months following the commencement date, being the expiry date.

[9] In paragraph 13 of the plaintiff's particulars of claim it is alleged that:

Plaintiff duly complied with its obligations in terms of the facility agreement, annexure "b" hereto, and loaned and advanced the

principal debtor the amount of R46 million as contemplated in paragraph 1.1 of the facility agreement.

[10] In paragraph 14 of the plaintiff's particulars of claim it is alleged that:

On or about 23 July 2009 and in terms of an addendum to "B", the facility agreement, a copy whereof is annexed hereto marked "C", the plaintiff and the principal debtor agreed to extend the expiry date to 25 August, 2009.

[11] In paragraph 15 of the plaintiff's particulars of claim it is alleged that:

The facility expired by no later than 26 August 2009, and became repayable by the principal debtor on that day.

[12] Counsel for the contending parties were in agreement that it is a well established principle of our law that fulfilment of a suspensive condition must be pleaded by the party relying on the contract. Counsel on both sides referred me to the well-known case of *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co. Ltd*.[1] This may explain why much time was taken up with the question of whether the clauses in issue were truly "conditions" or whether they were "terms" and, if so, whether they were material terms. It is unnecessary to decide whether or not these clauses are "suspensive conditions." I shall, however, assume, in favour of the defendants, that they are suspensive conditions. The assumption is made in order to facilitate

[1] 1963 (1) SA 632 (A) at 644G.

arriving at the crux of the matter. In any event, it seems that they are indeed suspensive conditions because, if the principal debtor had sought to enforce the loan agreement, it would have been open to the bank to resist the claim on the basis that any one of these conditions had not been fulfilled. Nevertheless, I make no final decision in this regard.

[13] It is, however, common cause that the clauses in question operate for the benefit of the bank only. Besides, this much is clear not only from a plain reading of clauses 2 and 9 of annexure "B" but also from clause 5.1 thereof, to which reference has been made above.

[14] Notwithstanding the general rule that fulfilment of suspensive conditions must be pleaded by the party relying on the contract, in *Van Jaarsveld v Coetzee*,[2] the court of appeal unanimously agreed with Van Blerk JA when he said :

> Die voorwaarde is duidelik genoeg bedoel om slegs ten voordeel van die eiseres to strek. Die eksepsie kan nie staande gehou word nie.[3]

A condition that is exclusively for the benefit of one party cannot be relied on by the other party.

[15] Mr *Du Toit*, who appeared for the excipients, submitted that even though the clauses in question operated for the benefit of the bank, unless

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[2] 1973 (3) SA 241 (A)
[3] At 244G

one knew when the conditions had been fulfilled, one could not know when the agreement of loan commenced and, therefore, when it came to an end. I would have thought that it is obvious that the loan came into operation on the date upon which the principal debtor received the agreed amount of the loan from the bank. It seems clear enough that this occurred soon after 13 June 2007, when the bank received the security as provided for in clause 2 of annexure “B”. In any event, as has been mentioned above, the plaintiff alleges:

(a) in paragraph 13 of its particulars of claim that the bank loaned and advanced the principal debtor the amount as contemplated in clause 1.1 of annexure “B”;
(b) in paragraph 14 of its particulars of claim that: “On or about 23 July 2009 and in terms of an addendum to “B”, the facility agreement, a copy whereof is annexed hereto marked “C”, the plaintiff and the principal debtor agreed to extend the expiry date to 25 August 2009”; and
(c) in paragraph 15 of the particulars of claim that “The facility expired by no later than 26 August 2009, and became repayable by the principal debtor on that day”.

It is quite clear from the plaintiff’s particulars of claim, not only that the bank lent money to the principal debtor but also that, by the time of the service of the summons, the amount lent was due for repayment. As interest is claimed from 3 September 2009, any uncertainty as to the exact date

between 13 June and 26 June 2007 when the principal debtor received the money is neither here nor there. The plaintiff relies on 26 August 2009 (i.e. an agreed extension of time rather than any earlier date) as the date on which repayment of the debt was due and claims interest from 3 September 2009 (i.e. a date after 26 August 2009).

[16] To this, Mr *Du Toit* retorted that although annexure "C" appeared to contain the signature of someone duly authorised on behalf of the principal debtor, there did not appear to be any signature on behalf of the bank. Be this as it may, it cannot be said that the plaintiff's pleading does not disclose a cause of action or that the defendants are embarrassed in that they do not know how to plead thereto. In any event, as I have already mentioned, the exception is confined to the ground that the plaintiff fails to disclose a cause of action. I can see no prejudice to the defendants.

[17] I fail to see the defendants' difficulties in pleading to any one of the following: (a) whether the bank lent money to the principal debtor; (b) the amount thereof; (c) whether the principal debtor's debt is due for repayment; (c) whether interest is due from 3 September 2009; (d) whether interest is correctly calculated at the agreed rate; and (e) whether they are liable for the debts of the principal debtor to the bank in terms of the written agreements of suretyship upon which the plaintiff relies. These are the issues raised by the plaintiff's particulars of claim.

[18] Rule 18 (4) requires that particulars of claim should contain a clear and

concise statement of the material facts upon which a plaintiff relies with sufficient particularity to enable the opposite party to reply thereto.[4] In my view, the plaintiff has adequately met the standard of pleading that is required. Besides, sight should never be lost of "the evil of too ready a recourse to the taking of exceptions".[5] The plaintiff's particulars of claim contain sufficient clarity for the defendants to know what the case of the plaintiff is that they have to meet.

[19] Judgment is given in favour of the plaintiff against the first, second, third, fourth, eighth and ninth defendants (and against the fifth, sixth and seventh defendants in their capacities as trustees of the Adventure Family Trust), jointly and severally, the one paying the others to be absolved, as follows:

The defendants' exception is dismissed with costs.

DATED AT JOHANNESBURG THIS 29th DAY OF OCTOBER, 2010.

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: .*P.G. Robinson* SC

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[4] See *Trope v SA Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) at 210F-211B.

[5] See *International Tobacco Co. of SA Ltd v Wollheim and Others* 1953 (2) SA 603 (A) at 613A.

Counsel for the Defendants (Excipients): *S.F. Du Toit* SC (with him, *J. Blou* S.C.)

Attorneys for the Plaintiff: Lowndes Dlamini

Attorneys for the Defendants (Excipients): Burt Meaden Incorporated

Date of hearing: 25th October, 2010.

Date of judgment: 29th October, 2010