



IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

29/7/2014

Case Number: 14059/2003

Coram: Molefe J

Heard: 21 July 2014

Delivered: 29 July 2014

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

29 July 2014
DATE

D Molefe
SIGNATURE

In the matter between:

SUNNYVIEW MOTORS CC

APPLICANT

AND

JOSE' DE GOUVEIA

FIRST RESPONDENT

GEOFFREY KENNETH GADDIN

SECOND RESPONDENT

JUDGMENT

MOLEFE, J:

[1] This is an application in terms of which the plaintiff (applicant) seeks leave to introduce a number of amendments to its particulars of claim. The second defendant (second respondent) opposes the application and objects to the amendments. Defendants contend that the amendments have become new

causes of action and that such new causes of action have become prescribed.

Background

[2] The plaintiff issued summons against the first respondent (as first defendant and principal debtor) and the second respondent (as second defendant and as surety and co-principal debtor) for payment of an amount of R365 569,25 plus *mora* interest thereon at the rate of 15,5% per annum and costs of suit.

[3] In the plaintiff's amended particulars of claim, the plaintiff averred that the claim against the first defendant is based on an agreement of sale ("the agreement") between the plaintiff and the first defendant in terms of which the plaintiff sold the business known as Sunnyview Motors ("the business") to the first defendant as nominee for a close corporation to be formed (which was never formed) for a purchase price of R700 000,00 and the first defendant's breach and failure to effect timeous and full payment of the purchase price.

[4] In the plea, the defendants denied that the first defendant entered into the agreement in his personal capacity and that although the second defendant bound himself as surety for the first defendant in his personal capacity, the deed of surety is null and void alternatively unenforceable, since no breach has been committed by the first defendant in his personal capacity.

[5] The plaintiff gave notice of its intention to amend its particulars of claim in terms of Rule 28 (1) and (2) on 1 October 2013 by *inter alia* proposing to aver:

5.1 that the first defendant, acting in person and in writing, undertook and guaranteed in his personal capacity that he would be liable to the plaintiff for all payment obligations stipulated in and that may arise from the written sale agreement (annexure 'A'). First defendant's written undertaking and guarantee were annexed and marked 'A1' (post *facto* typed copy marked Annexure A2").

5.2 that the whole purchase price in terms of the agreement became due and payable because of the provisions of an acceleration clause being invoked.

5.3 that in the event of the business being sold before the purchase price had been paid in full, the full outstanding balance of the purchase price would become due and payable immediately.

[6] The second defendant objects to the proposed amendments on the basis that;

6.1 The undertaking and guarantee by the first defendant is not a suretyship and is thus separate and distinct from the principal debt and can become prescribed independently from the debtor's obligation;

6.2 The first defendant's undertaking and guarantee became prescribed,

because it arose more than 3 years prior to the proposed amendment and an amendment seeking to introduce a claim which is prescribed will not be allowed;

6.3 The claim based on the acceleration clause being invoked has also arisen more than 3 years prior to the proposed amendment and has thus also become prescribed;

6.4 Any liability which the second respondent has incurred from binding himself as surety and co-principal debtor for and on behalf of the first defendant in favour of the plaintiff has thus also become prescribed;

6.5 An amendment seeking to introduce a claim which is prescribed will not be allowed.

[7] The plaintiff now seeks leave to amend its particulars of claim in terms of Rule 28 (4).

Plaintiff's Proposed Amendments

7.1 The first proposed amendment deals with an undertaking that the first defendant has given in his personal capacity to the plaintiff with regard to the purchase of the business in terms wherein he undertook to be personally bound to the contract. This undertaking was given on 15 December 1998, ("Annexure A1 and Annexure A2").

7.2 The plaintiff seeks to introduce alternative facts in support of his claim for

payment, being the provision of clause 16 of the contract in terms whereof the balance of the purchase price became due and payable on the subsequent sale of the business by the purchasers.

7.3 the plaintiff also seeks to introduce a rectification of clause 16 which provides for the payment of capital, also to include the word interest.

7.4 Finally, the plaintiff seeks to amend the amount claimed being the outstanding balance and interest of the agreed purchase price.

[8] Clause 16 of the agreement reads as follows:

"16.1 Should the Purchaser decide to sell the business before the purchase price has been paid in full, the full balance of the capital then outstanding will become (sic) due and payable to the seller immediately.

16.2 Until such time as the full purchase price has been paid, ownership of the assets sold hereby will remain vested in the seller and may not in any way be alienated without the prior written permission of the seller having been obtained, unless to replace or improve".

[9] The business was sold by the defendant in 2002 and the plaintiff alleges that by virtue hereof the balance of the purchase price (capital) became due and payable.

[10] Plaintiff's Counsel¹ submits that the issue of suretyship will only arise where the principal debtor is also a defendant and where a party would then seek to either join the surety or to amend his case to provide for a claim based on surety against an existing party and which had not been previously pleaded, which is not the case *in casu*.

[11] Counsel for the plaintiff further submits that the *ratio* on which the court found that prescription of suretyships are interrupted with the interruption of the main debt, applies equally to co-principal debtors and particularly to the undertaking made by the first defendant on 15 December 1998. In this regard, plaintiff's counsel relied on **Jans v Nedcor Bank Ltd 2003 (6) SA 646 A** at par 14:

"If in sooth the making of a demand on one of two joint debtors interrupts prescription in respect of the other also, when each of them was bound as a principal debtor, far more must we say that an obligation against a surety is prolonged by a demand which was made on the principal debtor".

[12] It was further argued by the plaintiff's counsel that the relief claimed by the plaintiff in terms of the existing particulars of claim and the proposed amendments is exactly the same – i.e. payment of the purchase price in respect of the purchase of the service station which the first defendant failed to do. The claim against the second defendant is based on suretyship which he completed with regard to the first defendant's obligations in terms of the contract. The only difference is that the basis is no longer an alleged agreement with the first defendant to be liable in his personal capacity in the event of the close

¹ Advocate Jan Möller

corporation not being established or ratifying the purchase, but a written instrument executed under the hand of the first defendant.

[13] Plaintiff's counsel contends that the question is not what the cause of action is, but whether the debt that is claimed is still the same and he referred the court to **Saner Prescription Law of South Africa** page 3-150:

"In the final analysis the critical test is whether the relief claimed, in the broad sense of the words is the same in the amended and unamended process".

The Plaintiff's counsel placed reliance on the judgment of **CGV Insurance Ltd v Rumdel Construction (Pty) Ltd 2004 (2) SA 622 SCA at par 7:**

"When a court is called upon to decide whether a summons interrupts prescription it is necessary to compare the allegations and relief claimed in the summons with the allegations and the relief claimed in the amendment to see if the debt is substantially the same".

[14] Second Respondent Counsel² argued that the contract of guarantee is distinct from suretyship and amounts to a principal obligation and is not accessory to any other agreement³.

It is the contention of the respondents' counsel that the applicant clearly relies on a contract of guarantee i.e, by virtue of Annexure A1 the first respondent **"undertook and guaranteed in writing to be personally liable"** to the applicant for

² Advocate D B Du Preeze SC

³ Forsy & Pretorius Caney's Law of Suretyship 6th Ed p.32

all payment obligations arising from the agreement. This, according to the respondent's counsel is not a suretyship because the first respondent did not undertake that the close corporation will perform its obligations, but accepted personal liability.

[14] It is the submission of the second respondent's counsel that the first respondent's obligations and liabilities in terms of the contract of guarantee arose at the latest on 12 September 2002, whilst the plaintiff only sought to include this claim in the particulars of claim by notice of amendment on 1 October 2013, 11 years after the proposed claim arose.

As the first respondent's alleged undertaking and guarantee are separate and distinct obligations from the alleged principal debt, the first respondent's personal obligations and liability are not subject to the principle that a surety's obligations could not prescribe independently from the principal debtor's obligation. (See *Jans v Nedcor supra* par 30.

[15] In my view, the argument by the second respondent's counsel must fail. It is a sound premise that an amendment is permissible provided that the debt which is claimed in the amendment is the same or substantially the same debt as originally claimed. (See *Sentrachem Ltd v Prinsloo 1997 (2) SA 1 at 15H-16B*). The real test is whether the same claim had been preferred in the earlier process, that is whether the debt as set out in the amended summons was recognisable from the original summons, so that any subsequent amendment amounted to no more than a clarification of a defective pleading in which the right of action relied on throughout was set out.

The argument that by the plaintiff's introduction of the first respondent's

undertaking in terms of the agreement and pleading of the facts that relate to clause 16 of the contract, the plaintiff has introduced a new cause of action or another claim is in my view incorrect.

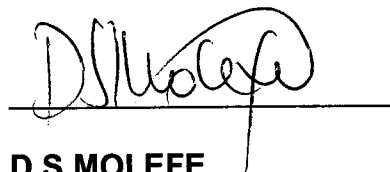
[16] It does not follow that by the plaintiff curing a defective cause of action by introducing the contract upon which it relies in the amendment of the particulars of claim, the plaintiff's summons necessarily claims a different debt. The proposed set of amendments by the plaintiff is not an introduction of a separate and distinct claim from particulars of claim. It is clear that the debt that is claimed by the plaintiff is still the same.

[17] It is my view that what the plaintiff sought by way of relief before the introduction of the amendments and what he seeks by way of relief post the proposed amendments, is the same relief and the parties from whom the relief is claimed are the same. The only change occasioned by the proposed amendment is the facts on which the claim is premised.

[18] In the circumstances, the following order is made:

18.1 The application for leave to amend the plaintiff's particulars of claim is granted.

18.2 The applicant is awarded the costs of the application.



D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	Adv. J Möller
Instructed by	:	Dawie Beyers Attorneys
Counsel on behalf of Respondent	:	Adv. D du Preez SC
Instructed by	:	Du Plessis & Eksteen Inc.