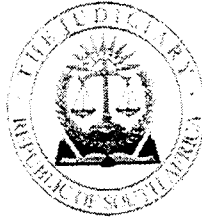


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 16170/2016

Date: 26/7/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
26/7/2016
DATE SIGNATURE

In the matter between:

ALEXIS HENRY STEENKAMP

APPLICANT

And

FACEBOOK PROPERTIES CC

FIRST RESPONDENT

RUDOLF ALBERTUS SMITH

SECOND RESPONDENT

JUDGMENT

PRETORIUS J.

INTRODUCTION:

- (1) In this application for summary judgment the applicant seeks summary judgment against the respondents, jointly and severally, for the amount of R500 000 plus interest, as well as an order declaring the immovable property of the first respondent specially executable. The applicant holds a mortgage bond over the property of the first respondent by reason of R500 000 lent and advanced to the first respondent by the applicant. The second respondent bound himself as surety and co-principle debtor jointly and severally with first respondent for the amount of money so advanced. The court granted condonation for the late filing of the opposing affidavit.

POINT IN LIMINE:

- (2) The respondents raised a point *in limine* to the effect that the respondents had not been placed in *mora* as stipulated by the acknowledgement of debt. The court was referred to clause 8 of the acknowledgement of debt which provides:

"In the event of my failing to make any payment promptly on due date, the creditor shall have the right to demand the immediate payment of the total amount owing to him. I further accept that in such circumstances I shall be liable for the payment of all legal fees on the attorney and client scale of costs, including collection commission, incurred by the creditor

in demanding and enforcing compliance with my obligations in terms hereof."

It is abundantly clear that this clause grants the applicant the right to demand immediate payment and not that a letter of demand must be issued.

- (3) The provisions of clause 9 provides:

"I further agree that in the event of my failing to carry out the terms on this offer, the creditor shall be entitled, without notice to me, to apply for judgement for the full amount of the debt outstanding, including costs and interest referred to in paragraph 3, above."

It is thus clear that the point *in limine* cannot succeed and is dismissed.

- (4) The second respondent attempted to secure a bank guarantee to the value of \$150 000 in Hong-Kong on behalf of the first respondent for which he needed to pay R500 000 as a once-off securing fee. As a result of him needing the R500 000 he entered into the acknowledgement of debt on behalf of the first respondent and as surety.

AMOUNT INCORRECT:

- (5) The respondents allege that the full amount was not paid over to them

as R22 000 was deducted for the registration of the mortgage bond and an amount of R100 000 paid to Mr Liebenberg as “*negotiating co-ordinator*”. There is no supporting affidavit by Mr Liebenberg and no proof that R22 000 had been deducted, apart from the bold averments. In any event clause 13 of the acknowledgement of debt provides:

“I undertake to pay all costs relating to or incidental to the negotiating and drafting of this agreement and the registration of the aforesaid Mortgage Bond and hereby authorise the creditor to pay KRUGER ATTORNEYS, 5 BOLERO PARK, KRUGER RAND GROVE, RICHARDS BAY on presentation of their Tax Invoice, directly from the capital sum”. It is clear that the second respondent bound himself in his personal capacity as well as surety and co-principal debtor in the acknowledgement of debt.”

- (6) The respondents was thus liable for the R22 000. The respondents acknowledged that R378 000 was paid to the first respondent and the provisions of clause 13 make the respondents liable for the further R22 000. The only remaining amount is the R100 000 paid to Mr Liebenberg. The respondents are thus liable for at least R400 000.
- (7) The respondents seem to be remorseful for securing the loan, as the further defence is that the second respondent signed the acknowledgement of debt under duress, as he was desperate to

secure the bank guarantee in Hong-Kong. The further submission is that the plaintiff had unlawfully forced the second respondent to sign the mortgage bond on the first respondent's immovable property. There is no evidence placed before the court as to how, where and when the second respondent was forced to sign the mortgage bond. There is no evidence of duress at all and the court cannot rely on these vague and bald statements.

- (8) The respondent must set out facts, which, if accepted as the truth which can be proved at trial with admissible evidence, disclose a defence. See **Sumelar Ontwikkelings (Pty) Ltd v HTF Developers (Pty) Ltd**¹:

*"The question then arising is whether the defence so put constitutes a bona fide defence within the meaning of rule 32(3)(b) sufficient to resist the plaintiff's claim for summary judgment. **Will the facts set out by the defendant, if proved at trial, constitute a sufficient answer to the plaintiff's claim?**" (Court emphasis)*

I cannot find in this regard that the respondents have disclosed a *bona fide* defence of duress and undue influence.

- (9) At no stage does the second respondent aver that the respondents do not owe the money.

¹ 2008(6) SA 650 (T) at 653A

SECTION 129 OF THE NATIONAL CREDIT ACT ("NCA"):

- (10) It is common cause that the applicant did not comply with the provisions of the **NCA**. The respondents claim that the provisions of the **NCA** applies to the credit agreement between the parties, as principal lender as well the second respondent due to the fact that the **NCA** applies in his case as surety.
- (11) In **Firststrand Bank Ltd v Carl Beck**², Satchwell J dealt with this question in depth. I do not intend repeating her analysis of the **NCA**, but align myself fully with her findings in respect to the **NCA**.
- (12) The **NCA** applies to every credit agreement between parties made within the Republic of South Africa, except for the exceptions created by section 4 of the **NCA**. Section 4(1)(a)(i) and (b) provides:
- "(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, **except-***
- (a) a credit agreement in terms of which the consumer is-*
- (i) **a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value***

² 2009(3) SA 384 (T)

determined by the Minister in terms of section 7 (1);

(ii) ...

(iii) ...

(b) *a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1);*” (Court emphasis)

(13) There is no doubt that the first respondent is a juristic person and that a mortgage agreement is both a credit transaction and a large agreement. In this instance section 4(1)(b) applies. The court does not know the asset value or annual turnover of the first respondent as it was not placed before the court. Therefor section 4(1)(b) read with section 9(4) of the **NCA** applies and exempts the applicant from complying with the Act.

(14) The surety, the second respondent, relies on the fact that section 129 of the **NCA** should apply to him and that the applicant failed to send the section 129 notification of the **NCA** notification to him.

(15) In the acknowledgement of debt the second respondent set out that:

“I, the undersigned,

RUDOLPH ALBERTUS SMITH

IDENTITY NUMBER: 790406 5025 08 8

*herein together with my heirs, executors, administrators, or
assigns in my personal capacity as **surety and co-principal
debtor** and my successors in title in my capacity as sole
member of*

FACEBOOK PROPERTIES CC

REGISTRATION NUMBER: 2009/090602/23

together with its order, successors in title and assigns

(herein after referred to as the “debtor”)

hereby acknowledge myself and FACEBOOK PROPERTIES

CC to be truly and lawfully indebted to:

ALEXIS HENRY STEENKAMP” (Court emphasis)

- (16) Section 8(5) of the **NCA** provides:

“An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.”

- (17) Due to the finding that the NCA does not apply to the first respondent, there can be no doubt that it subsequently cannot apply to the second respondent. The right to enforce the acknowledgement of debt from

the second respondent arises from the contract of suretyship, which relates to the acknowledgement of debt. There was no credit granted to the second respondent. In **Maasdorp v Graaff-Reinet Board of Executors**³, De Villiers CJ stated:

"It has been said that she is a maker, because by her contract on the back of the note she has undertaken the liability of a co-principle debtor as well as of surety, but, as was clearly pointed out by the Judge-President, the use of the words "co-principle debtor" does not transform her contract into any other than surety."


- (18) Due to the second respondent being the guarantor or surety, he is being sued as such and not as a debtor and in this instance the **NCA** does not apply to him as the principle debtor is exempt from the **NCA**.
- (19) I find that the facts and defences submitted by the respondents are not *bona fide* defences, as the respondents concede that at least an amount of R378 000 is owed by them.
- (20) I have perused the clauses setting out the interest payable by the respondents, but find that in the present circumstances I am not inclined to grant the interest and will grant leave to defend the amount

³ (1906 – 1909) 3 Buch AC 482 at 490

of interest.

(21) Having considered all the facts, decisions and arguments placed before me I make the following order:

1. The respondents are ordered to pay, jointly and severally, to the applicant the sum of R400 000;
2. The respondents are granted leave to defend the amount of interest applicable on the aforesaid sum;
3. The immovable property situated at ERF 59, POLLACK PARK TOWNSHIP, SPRINGS, JOHANNESBURG, is declared specially executable;
4. The respondents are granted leave to defend the balance of the claim set out in the notice of application, namely R100 000;
5. The respondents are to pay the applicant's cost of suit on attorney and client scale, one to pay the other to be absolved.



Judge C Pretorius

Case number : 16170/2016

Matter heard on : 19 July 2016

For the Applicant : Adv JF Van der Merwe

Instructed by : Kruger Attorneys

For the Respondent : Adv

Instructed by : De Meyer Serfontein Attorneys

Date of Judgment : 26 July 2016