IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA.
In the matter between:
MERCEDES-BENZ FINANCIAL' SERVICES (PTY) LTD
vs.
Case No: 63311/2014
JOHANNES PIETER V1SAGIE
MERCEDE-BENZ FINANCIAL' SERVICES (PTY) LTD
v **Case** No: 63312/2014
JOHANNES PIETER VISAGIE
MERCEDES-BENZ FINANCIAL
SERVICES (PTY) LTD
v **Case** No: 63347/2014
JOHANNES PIETER VISAGIE
MERCEDES-BENZ FINANCIAL
SERVICES (PTY) LTD
v **Case** No: 63348/2014.
JOHANNES PIETER VISAGIE
D.P.J. ROSSOUW A.J.

[1] The Applications before me are for leave to appeal in all four matters to the Full Bench of the High Court of S.A, Gauteng Division, Pretoria. Alternatively, to the Supreme Court of Appeal, Bloemfontein, against the judgment and order in each of the four matters, delivered by me on the 10th November 2014.

[2] The Notice of Application for leave to appeal was served and filed, in each of the four matters, on the 1st December 2014, timeously.

[3] For the sake of clarity and to avoid any confusion, the parties are referred to herein as Plaintiff and Defendant.

[4] Defendant had filed affidavits in all four matters opposing the applications for summary judgment. In paragraph 2.2 of each of his affidavits he states the following:

"2.2. These are four actions that have been instituted by Applicant against Respondent, which 1 am advised are identical to each other, save for the case numbers. It will therefore be respectfully requested that all four actions be heard together at the same time, as a matter of convenience. The case numbers of the four actions, inclusive of this specific action are:

2.2.1. 63347/2014
2.2.2. 63348/2014

2.2.3. 63311/2014
2.2.4. 63312/2014".

[5] Adv. Welgemoed, appearing for the applicant in all four matters filed four identically worded Practice Notes in which he recorded the following:

In paragraph 8 thereof - **"Cause of action:**

Written instalment sale agreement read with deed of surety".

In paragraph 10 thereof-

"National Credit Act:

The agreement is not subject to the NCA".

[6] Adv. Stevens, appearing for the respondent in all four matters also filed a Practice Note stating therein the following:

6.1. '"that the application is for summary judgment against the respondent, as surety, the cause of action stemming from a written loan agreement"; and

6.2. "The defenses raised by respondent are as such also identical. It is therefore requested that all four actions be heard together at the same time as a matter of convenience".

[7] In all four cases the allegations are in fact made that the agreement in each case "is exempt from the provisions of the National Credit Act 34 of 2005" and "the deed of suretyship in each case is also not subject to the provisions of the National Credit Act 34 of 2005".

[8] These allegations in the particulars of claim have been confirmed in the affidavits filed in support of the applications for summary judgment.

[9] From the-above, as well as the statements by the advocates appearing for the parties on 10th November 2014, it is clear that the issue, whether the National Credit Act applied to anyone of the four agreements, was not in issue before me at the time.

[10] The defenses raised by defendant in his affidavits filed resisting the applications for summary judgment were first, that the debts have become prescribed; secondly, that the trucks had been sold by the liquidator and that the actual amounts owing to plaintiff have not been determined and the claims are therefore not "a liquid amount"; thirdly, that in regard to the claim under case number 63311/2015 the suretyship is dated ante the date of the instalment

sale agreement and that he would not have signed surety for a non-existent debt.

[11] Adv. Stevens appearing for respondent put it as follows in his heads of argument filed opposing summary judgment:

"The respondent has opposed the applications for summary judgment on the basis essentially that applicant's respective claims have prescribed and that the amount claimed by the applicant is not a liquid amount as payments by the liquidator of 8 Cattle Ranch would have been made as vehicles which were the subject of the four loans were in fact sold by the Liquidator".

[12] The four claims were in fact claims against Mr. Visagie in his capacity as surety for the debts of the principal debtor, V8 Cattle Ranch, in terms of a written suretyship dated 3 It July 2007.

The four principal debts were incurred in terms of the respective written agreements as follows:

Case No: 63311/2014 on the 14th August 2007.

Case No: 63312/2014 on the 31st July 2007.

Case No: 63347/2014 on the 31st July 2007.
Case No: 63348/2014 on the 31st July 2007.

[13] The relevant Deed of Suretyship is dated 31st July 2007 and a copy is attached to each of the four summonses as annexure "E".

It is in Afrikaans and I consider it expedient to quote only the parts thereof relevant for purposes of this judgment.

[14] It reads as follows:

"AKTF. VAN BORGSTELLING"

"Ek die ondergetekende, Visagie, Pieter Johannes Mnr. ID [61…….] tussenplaas en bind my hierby gesamentlik en afsonderlik as borg en medehoofskuldenaar in solidum met V8 Cattle Ranch {"die Debiteur") vir die verskuldigde en stiptelike betaling deur die Debiteur aan Daimler Chryslor Financial Services South Africa (Edms) Bpk ("die Krediteur") vir alle bedrae wat die Debiteur nou of van tyd tot tyd aan die Krediteur, sy opvolgers, en regsverkrygendes skuld of verskuldig is, om enige rede hoegenaamd, ongeag of sodanige skuld deur die Debiteur aangegaan word alleen, gesametlik of in vennootskap met enige ander person, firma of maatskappy en verder vir die stiptelike en getroue nakoming deur die Debiteur van enige verpligtinge van enige aard hoegenaamd ... wat hy nou of in die toekoms aan die krediteur skuld. Hierdie borgstelling word op die volgende bepalings gegee:

1…

2…

3.. .

4 Ek doen hierby afstand van die voordele van die regseksepsies,
uitwinning, verdeling sessie van aksie, geenwaarde ontvang, non causa debiti, hersiening van rekening en de duabus vel pluribus res debendi, met die effek en uitwerking waarvan ek ten voile vertroud is. Ek doen afstand van die voordele aan my verleen by die Veijaringswet No. 68 van 1969 (sOOs gewysig). Hierdie borgstelling...bly van krag as 'n voortgesette sekuriteit ondanks enige tussen liggende vereffening van rekening...van die Debiteur se skuld...

5.. .

6.. .

7 Vir enige doel hoegenaamd ingevolge hiervan... hetsy vir enige aksie
teen my… is 'n sertifikaat uitgereik deur 'n Direkteur, Bestuurder of die Sekretaris van die Krediteur (waarvan nie een se aanstelling as sodanig bewys hoef te word nie) prima facie bewys van alle feite daarin vermeld, totdat die teendeel duer my bewys is.

8…

9.. **.**

10.. .

11 Jndien dit nodig is dat geregtelike verrigtinge teen my ingestel word, kom ek ooreen dat

11. 1….

11.2. ek verantwoordelik sal wees vir alle regskoste, insluitende invorderingskommissie, op 'n basis van prokureur en klient".

[15] The validity and/or enforceability of the Deed of Suretyship has not been attacked, except in regard to the claim under case number 63311/2014, alluded to in paragraph [10] supra. And which attack is clearly without any merit, regard being had to the wording of the Deed of Suretyship quoted in paragraph

14 supra.

[16] Considering the provisions of the Deed of Suretyship, more specifically those parts quoted in paragraph [14] supra, I am of the view that the Orders granted in all four matters on the 10th November 2014 were correctly granted as none of the defences advanced would have succeeded in a trial, had summary judgment been refused and leave granted to defendant to defend the actions.

[16 (A)] The reasons for the conclusion in the immediate preceding paragraph are as follows:

(a) It is averred in paragraph 9.3 of plaintiff's particulars of claim that:

"To date hereof (i.e. 25th August 2014) the plaintiff and/or liquidators have been unable to locate the whereabouts of the vehicles".

(b) This averment is amply supported in the affidavit ofplaintifF legal Team Manager in paragraphs 1 to 5.2 thereof.

(c) Defendant in his affidavit opposing summary judgment contents himself in paragraph 3.3 thereof to a statement that plaintiff's application is

"an attempt to enforce payment of a debt bona fide disputed on reasonable grounds which will be more fully set out herein".

(d) Defendant then goes on to deal with prescription of the debt as a bona fide defence in paragraph 4 of his opposing affidavit, without as much as mentioning clause 4 of the Deed of Suretyship wherein he expressly waives the

"voordele aan my verleen by die Veijaringswet No. 68 van 1969".

(e) In regard to his second so called bona fide defence dealt with in paragraph 5 of his opposing affidavit, he states the following:

(i) "I am advised that the vehicles ... have in fact been sold by the liquidator".

His source is not disclosed.

(ii) "As a creditor that lodged its claim.. .the Applicant would be aware that the vehicles.. .have been sold. As a result thereof I am of the opinion that the applicant is entitled to payment as a portion of the monies owed to it as a result of the sale...".

This does not amount to proof of an actual sale having taken place.

In light of the above I am firmly of the view that it cannot be said that defendant has disclosed any defence, let alone a bona fide one.

[17] In the Applications for leave to appeal, now under consideration, defendant raises, inter alia, a point which was not raised previously in any of the four affidavits filed by him resisting the applications for summaiy judgment

[18] The Notice of Application for leave to appeal, filed in each of the four matters, raises the issue that the court erred in granting summary judgment in that the court did not mero motu raise the point that the cause of action was based on an "Afbetalings-ooreenkoms" subject to the provisions of the National Credit Act, 34 of 2005.

[19] In matters under case numbers 63311/2014 and 63347/2014, it appears ex facie

the Agreements (annexure "A" to the particulars of claim) that "Hierdie ooreenkoms is onderhewig aan die bepalings van die Nasionale Krediet Wet, 34 van 2005," in the preamble of the Agreement on page one thereof.

[20] In matters under case numbers 63312/2014 and 63348/2014, it appears ex facie the agreements (annexure "A" to the particulars of claim) that "Hierdie ooreenkoms is nie onderhewig aan die bepalings van die Nasionale Krediet Wet, 34 van 2005 nie".

[21] In regard to the two matters referred to paragraph [20] supra, I am not persuaded that an appeal would have a reasonable prospect of success.

[22] In regard to the two matters referred to in paragraph [19] supra, those under case numbers 63311/2014 and 63347/2014,1 have to consider, whether leave to appeal should be granted, notwithstanding the fact that is was averred in the summons that the agreements are exempt from the provisions of the National Credit Act, 34 of 2005; and notwithstanding the fact that the point is only now raised in the Application for leave to appeal for the first time.

[23] Adv. Welgemoed, appearing for plaintiff in this application argues that defendant now, by raising this point, seeks to introduce new factual issues which is not allowed. He relies on the dicta in F & J Advisors (Edms) Bpk v. Eerste Nasionale Bank van Suidelike Afrika 1999 (1) 515 SCA where it is stated:

"A party is bound by factual concessions and may not present argument in conflict with facts which were common cause in the court a quo or in conflict with the parties' common understanding as to what exactly the issues were in the court a quo".

[24] I agree that in respect of all the other issues now being raised for the first time, his submission is in accord with the authority quoted by him referred to in paragraph 23 supra.

[25] I am, however, of the view that in regard to the issue raised in respect of the applicability of the National Credit Act 34, of2005 to the agreements, different consideration come into play. The authority quoted by Adv. Welgemoed can be distinguished on the facts in regard to this issue for the following reasons: first, in the matters now in hand there has not been any express concession or clear abandonment of this issue. Secondly, the point raised is not so much a factual one but it seem to me rather a legal point; thirdly, I do not think one can say that there was in this matter a common understanding between the parties as to what exactly the issues were, considering that in the relevant two matters the agreements explicitly state that they are subject to the provisions of the National Credit Act, 34 of 2005 and fourthly, the evidence that two of the agreements were not exempt from the National Credit Act was there but was overlooked by all concerned.

[26] In casu the dicta in ALEXKOR LTD v. RICHTERS VELD COMMUNITY 2004 (5) S.A. 460 (CC) para [43] and [44] appear to be apposite:

[43] "The applicable rule is that enunciated in Paddock Motors (Pty) Ltd v. Igesund. In that case, the Appellate Division held that a litigant who had expressly abandoned a legal contention in a Court below was entitled to revive the contention on appeal. The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal Court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong. As the Court put it:

If the contention the appellant now seeks to revive is good, and the other two bad, it means that this Court, by refusing to investigate it would be upholding a wrong order." '

[44] It is therefore open to Alexkor and the Government to raise in this Court the legal contention which they abandoned in the SCA. However, they may only do so if the contention is covered by the pleadings and the evidence and if its consideration involves no unfairness to the Richtersveld Community. The legal contention must, in other words, raise no new factual issues. The rule is the same as that which governs the raising of a new point of law on appeal. In terms of that rule "it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness ... and raises no new factual issues".

I am satisfied that the point now being raised for the first time, in the application for leave to appeal, does not involve any unfairness to plaintiff in the matters under case numbers 63311/2014 and 63347/2014.

[27] In casu, through an error on the part of all concerned, the feet that the National Credit Act, 34 of2005, prima facie applies to the two matters under case number 63311/2014 and 63347/2014, ex facie the two agreements in question, was overlooked and not taken into account This resulted in summary judgments being granted, where it perhaps should not have been granted.

[28] It is trite law that it is in the public interest that there should be an end to litigation. However, given the particular circumstances, it offends my sense of justice to refuse the defendant leave to defend the matters under case numbers 63311/2014 and 63347/2014, where it appears that the point raised cannot be said to be without merit, even though raised belatedly.

[29] I have in this judgment traversed in some detail also the reasons that led me to grant the summary judgment on the 10* November 2014, on the evidence then before me and the arguments then advanced by the respective counsel who appeared for the parties.

[30] I am of the opinion that leave to appeal should be given to defendant in terms of Section 17 (1) (a) (ii) of the Superior Court Act 10 of 2013, on the basis that there is a compelling reason for the appeal to be heard in matters under case numbers 63311/2014 and 63347/2014, only on the aspect of the applicability of the provisions of the National Credit Act, 34 of 2005, to the two agreements as well as the applicability thereof to the Deed of Suretyship in question.

[31] THE FOLLOWING ORDERS ARE THEREFORE MADE:

1. In the matter under case number 63312/2014:

Application for leave to appeal is dismissed with costs, costs to be taxed on scale applicable between attorney and client

2. In the matter under case number 63348/2014:

Application for leave to appeal is dismissed with costs, costs to be taxed on scale applicable between attorney and client

3. In the matter under case number 63311/2014:

Application for leave to appeal is granted to defendant to appeal to the Full Bench of the High Court of South Africa, Gauteng Division, Pretoria.

Costs to be costs in the appeal. (Limited to the issue stated in paragraph [30] of this judgment).

4. In the matter under case number 63347/2014:

Application for leave to appeal is granted to defendant to appeal to the Full Bench of the High Court of South Africa, Gauteng Division, Pretoria.

Costs to be costs in the appeal. (Limited to the issue stated in paragraph 30 of this judgment).

D.P.J ROSSOUW.S.C

Acting Judge of the High Court 23rd SEPTEMBER 2016.

APPEARANCES.

Counsel on behalf of Plaintiff: Adv. C.J. Welgemoed.
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