IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 9512/2010

DATE: 21 OCTOBER 2010

In the matter between:

ROELOF JOHANNES MINNAAR 1st Applicant

ALAN GEORGE NELSON 2nd Applicant

and

NEDBANK LIMITED Respondent

J U D G M E N T

(Application for Leave to Appeal)

DAVIS, J:

This is an application for leave to appeal against the judgment of this Court of 25 June 2010 in which summary judgment was granted in favour of the plaintiff. The defendants have now approached the Court for leave to appeal either to the Supreme Court of Appeal or alternatively to a Full Bench of

this Division.

The issue which, of course, will determine an evaluation of this case, turns on that which is required of the defendant in his, her or its affidavit, that is what facts have to be shown in an opposing affidavit to stave off the granting of summary judgment. In Maharaj v Barclays National Bank Limited 1976(1) SA 418 (A) at 426, Corbett, JA (as he then was), in his typically lucid fashion, set out the position thus:

> "Where the defence is based upon facts in the sense that material facts, alleged by the plaintiff in his summons or combined summons are disputed, or new facts are alleged constituting a defence, a court does not attempt to decide these issues or determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court inquires into is (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which its founded and (b) whether on the facts so disclosed, the defendant appears to have, as to either the whole or part of the claim, a defence which was both *bona fide* and good in law. If satisfied on these matters, the court must refuse

summary judgment either in whole or in part."

In other words the affidavit deposed to by defendants in a case like the present, must demonstrate the *bona fides* of the defence. Therefore, the defendant has, on affidavit, to show the existence of a triable issue, based upon a dispute which is *bona fide* and which cannot be considered to be contrived merely for the purpose of postponing the inevitable.

In this case, the defendant put up three defences. In the first place the defendant contended that there was a set off which would operate so as to ensure that the amounts claimed could in any event be set off against these other claims set out in the affidavit and to which I shall make reference. Secondly, defendants allege a contravention of section 38(1) of the Companies Act of 1973 and thirdly, they allege *lis pendens*, that is that the facility agreement which was the basis of plaintiff's cause of action, is already the subject of pending proceedings in the George Magistrate's Court. Each of these defences has to be evaluated for the prism of the law outlined above.

I turn to the first defence of set off. As Mr Kruger, who represented the plaintiffs correctly submitted, it is trite that set off operates in the event of reciprocal debts between the same

parties. In this particular case, the defendants aver that plaintiff was obliged to set off against their liabilities as contained in the so called facility agreements, dividends received in respect of claims against the liquidated company. In my view, on no basis could this be considered to be a *bona fide* defence. It is clear that on the basis of the opposing affidavit in which Mr Minnaar, who deposed to that affidavit, states:

> "The afore-mentioned dividends and amounts received by the plaintiff must be set off against the plaintiff's claim."

There is no legal basis in my view, by which these alleged amounts should be set off against amounts contained in the facilities agreement.

Insofar as section 38(1) of the Companies Act is concerned, the averment is made in an opposing affidavit (which is characterised by considerable vagueness and imprecision). The essential averment suggests that the defendants addressed their concern with regard to section 38(1) of the Companies Act with managers of the plaintiff, who advised that plaintiff had a method of structuring the purchase of the shares of the company in such a way that it would not amount to a

contravention of section 38. Thereafter the affidavit sets out the background to the transaction and avers that the monies which flowed from the facility agreement, in effect were raised in the name of a company. The loan monies were then used directly by the two defendants to purchase shares in the company and accordingly the transaction fell foul of section 38(1).

Apart from the obvious observation that there is always a level of curiosity in the manner in which those indebted seek, after having been lent the money which they cannot repay, to invoke a section of the Companies Act of which they were allegedly concerned earlier, there is a legal problem which confronts the defendants. It is this: In order to show that this is a *bona fide* defence, the defendants have to show that a contravention of the section is such that at trial it would become a triable issue on the basis of the law. But as Mr Kruger correctly points out in his submissions, section 38(2A), which has watered down the scope of section 38(1), now provides that:

> "The general prohibition against financial assistance by a company for the purposes of the shares, does not apply if:
>
> (a)(i) the company's board is satisfied that subsequent to the transaction, the consolidated

assets of the company fairly valued will be more than its consolidated liabilities;

(a)(ii) that subsequent to providing the assistance and for the duration of the transaction, the company will be able to pay its debts as they become due in the ordinary cause of business, and that;

(b) the terms upon which the assistance is to be given, is sanctioned by a special resolution of its members."

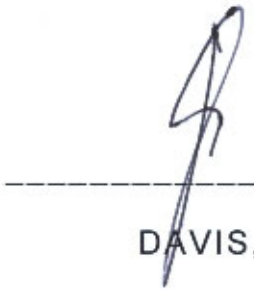
On the papers before me, there is no averment at all that the board of the company was not satisfied, that the company was solvent and liquid, subsequent to the transactions in terms of which the alleged financial assistance was rendered by the company. There is, in other words, no averment which can be said to suggest that there has been a contravention of section 38 of the Companies Act when account is taken of the operative section, that is section 38(2A).

I turn, therefore, to the third and final defence. The question is raised by the defendants that plaintiff is also the plaintiff in the action in the Magistrate's Court in George, whilst only the first defendant and his wife are parties in the Magistrate's Court's action and not the second defendant. The relevant liability is alleged to flow from the same agreement which is

annexed to the summons in the present case. It may be, and it is difficult to ascertain given that the defendant failed to attached the summons and particulars of claim in the Magistrate's Court's action to support its contention of *lis pendens*, that the cause of action is a suretyship by the first defendant for the obligations of the company. It is suggested that the validity of the facilities agreement insofar as clauses 3.1.1, 3.1.2, 3.2.1 and 3.2.2 are not inextricably linked with the overdraft facility which is the subject of the present proceedings. But that is difficult to ascertain, given that the claim in the present case is based on the same contract as the claim in the action before the Magistrate's Court, and given that there is a clear possibility on these papers, that what is claimed in the Magistrate's Court, George, may well include the liabilities which are said to arise in the present dispute. I cannot, on the basis of proceedings brought in a summary judgment application, reject defendants' contention that *lis pendens* may well be operative in the present case.

Given the findings to which I have now arrived, there is absolutely no reason why this matter should trouble the Supreme Court of Appeal. There is a crisp issue of determination and that is whether another court would find that the claims brought in the present dispute and the dispute before the Magistrate's Court are such that this would justify

the defence of *lis pendens*. In other words to summarise: in my view there is no reasonable prospect that another court would come to a conclusion different from this Court on the first two defences of set off and a breach of S 38(1) the Companies Act. For this reason, therefore, **LEAVE TO APPEAL IS GRANTEDIN RESPECT OF THE DEFENCE OF *LIS PENDENS* TO THE FULL BENCH OF THIS DIVISION. COSTS TO STAND OVER**.



DAVIS, J