IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 9512/2010

DATE: 25 JUNE 2010

In the matter between:

NEDBANK Plaintiff

and

ROELOF JOHANNES MINNAAR 1st Defendant

ALAN GEORGE NELSON 2nd Defendant

J U D G M E N T

DAVIS, J:

This is an application for summary judgment. The plaintiff institute it against the defendants for payment by each of the sum of R107 952,35, being half the debit balance of an overdraft facility granted by the plaintiff to the defendants jointly in terms of the written contract and interest thereon at the rate of 15% per annum, calculated daily and capitalised monthly from 7 May 2010 to date of payment, both dates inclusive. Plaintiff relies on certificates of balance to prove the quantum of the claim, the amounts appearing in the

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certificates and the calculation of interest had not been disputed.

Two defences had been raised by the defendants. Firstly, defendants' claim is in the form of a *bona fide* defence that the claim against them is tainted by the contravention of section 38(1) of the Companies Act 61 of 1973 (Act), in that the agreement on which the plaintiff relies was designed to make funds available to a company, Prime Pine Products (Pty) Limited, to enable the company to assist the defendants to buy shares in the company. It is trite law that the defendants bear an onus of showing that there has been a contravention of section 38 of the Companies Act.

Significantly in this regard, section 38(2)A of the Act, which was introduced into the Companies Act in 2006, waters down the scope of the prohibition to a considerable extent in keeping with modern company law. It provides that the prohibition against giving financial assistance for the purchase of shares, in a company or its holding company does not apply, if the company's board is satisfied that, subsequent to the transaction, the consolidated assets of the companies, fairly valued will exceed its consolidated liabilities. Further, subsequent to providing assistance for the duration of the transaction, the company will be able to pay its debts as they

become due in the ordinary course of business, and that the terms upon which the assistance will be given are approved by a special resolution of the company.

Mr Kruger, who appears on behalf of the plaintiff, was correct when he submitted that there is no indication in the opposing papers that the board had come to the conclusion that the company was not sufficiently solvent and liquid to justify the financial assistance.

A bland assertion that section 38 is contravened is surely not sufficient to indicate a *bona fide* defence. The second defence concerns a defence of *lis pendens*, namely that the entire facility agreement upon which the claim is predicated, is subject to proceedings in the George Magistrate's Court. It is trite law that for a valid plea of *lis pendens* to be sustained, the actions must be between the same parties and upon the same cause of action, instead of simply the same subject matter.

In the first place, it appears to be common cause that only the first defendant and his wife are parties in the magistrate's court action and not the second defendant. But there is a further difficulty. Defendant does not attach the summons to its particulars of claim in the magistrate's court action to

support its contention that *lis pendens* applies. It, therefore, makes it very difficult, if not impossible, for this Court to ascertain whether this is a sustainable defence and, most certainly the least that could have been expected of the defendants, was to indicate by way of the provision of the relevant documentation, that this was a case in which the same claim has been brought in the George Magistrate's Court, leaving aside, I might add, the difficulties of the identity of the parties.

It was, however, contended that if regard was had to clause 3 of the facilities agreement, there was a set of provisions relating to loans which were interlinked. The argument ran as follows: There were two categories of loans, one to PPP and another to R J Minnaar and A J Nelson; that is the two defendants. Insofar as the latter were concerned, the facilities were broken into three, a letter of guarantee, a temporary overdraft facility and insofar as it was relevant, an overdraft facility of R160 000, which is the subject of the present proceedings. The argument, therefore, proceeded thus: all three forms of loan to the defendants form part of the same loan agreement and, therefore, once this was litigated in the George Magistrate's Court, in effect the same proceedings were again being heard; thus in two different forums.

The difficulty with this contention is that these were three separate loans made by plaintiff to defendants, albeit that they were contained in one agreement. On its own, without more, it cannot be suggested, in my view, that it is a *bona fide* defence to say that because there is litigation insofar as one or other of these facilities or guarantees are concerned, it must, therefore follow that there is the same litigation insofar as a recycled overdraft facility is concerned. As I have already noted, absent any indication as to the summons and the particulars of claim in the magistrate's court action, there is no support for the contention that *lis pendens* actually applies. Therefore, the merits of this defence are impossible to penetrate.

In my view, the defences are not *bona fide* in terms of the standard of evidence required for their evaluation, in an application for summary judgment. For these reasons, therefore, the defendants are found to lack the *bona fide* defence to the plaintiff's claim, which would justify dismissal of the summary judgment. Accordingly summary judgment is granted as prayed, with costs.

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DAVIS, J

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