IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no 20081/2009

NEDBANK LIMITED	Plaintiff
v	
MASIQHAME TRADING 213CC	1st Defendant
AKEELA PALEKER	2nd Defendant
HOPE FOUNTAIN INVESTMENTS 205CC	3rd Defendant
GHULAM KADIR PALAKER	4th Defendant
ISMAIL KADER PALEKER	5th Defendant
HALIMA PALEKER	6th Defendant
COALITION TRADING 494CC	7th Defendant
REGISTRATION OFFICE	

JUDGMENT DELIVERED THIS THURSDAY, 10 DECEMBER 2009

CLEAVER J

[1] The plaintiff applies for summary judgment against the 2nd to 7th defendants inclusive. The plaintiff has two claims against the first defendant. The first claim is for payment of R745 471.92, plus interest due on an overdraft facility granted to the first defendant which was called up by the plaintiff. The second claim is for payment of the sum of R227 744.34 advanced by plaintiff to the first defendant on a loan account which account has similarly been called up by the plaintiff.

[2] It is common cause that after the issue of summons the first defendant was liquidated. Plaintiff's claims against the second to seventh defendants are based on separate deeds of suretyship signed by the defendants in terms whereof they bound themselves as sureties and co-principal debtors for the liability of the first defendant to the plaintiff.

[3] In opposing the application for summary judgment the second to seventh defendant rely firstly on defences which they say would have been available to the first defendant and also on other defences.

THE OVERDRAFT ACCOUNT

[4] The agreement in terms whereof the plaintiff advanced funds to the first defendant on overdraft is described in the summons as a partly written and partly verbal agreement. It is the written portion of the agreement on which the defendants rely for their defences. The written portion consists of a letter (the facility letter) addressed by the plaintiff to the members of the first defendant. The opening two paragraphs read as follows:

> *"We refer to recent discussions between the Business Banking Division of Nedbank Limited ('Nedbank Business Banking') and Masiqhame Trading 213 CC, Hope Fountain Investments 205 CC, Coalition Trading 494CC (referred to as 'the borrower'), duly represented by Hilton Davids and I K Paleker.*
>
> *We have conducted a review of your overdraft facility and confirm that we are satisfied to allow this facility to continue at the current limit upon the same terms and conditions until the next review."*

Sixteen paragraphs are then listed with paragraphs 1. and 2. reading as follows:

"1. ***BORROWER***
a) Masiqhame Trading 213 CC (Reg No 2004/105730/23)
b) Hope Fountain Investments 205 CC (Reg No 2006/075778/23)
c) Coalition Trading 494 CC (Reg No 2004/082949/23)

2. ***LENDER***
Nedbank Limited (Reg No 1951/000009/06)"

In paragraph 3 the facilities granted to the three entities referred to in paragraph 1 are set out in detail with all the other terms and conditions which were to apply to the granting of the facilities being listed in the remaining paragraphs. The letter is signed on behalf of the plaintiff by a business manager and credit manager with the final portion reading as follows:

> *"On signature hereof we, the undersigned, for and on behalf of the Paleker group:*
>
> *confirm that prior to signature hereof, we obtained the requisite authority from all entities forming the Paleker group as defined herein, to sign this agreement for and on behalf of the said Paleker group;*
>
> *acknowledge, understand and agree to abovementioned facilities being taken up by the Paleker group, subject to the terms and conditions as set out above;"*

The letter was signed by the fifth defendant above the inscription *"authorised signature"*.

[5] The first defence, which is a point taken *in limine*, appears from the affidavit of the fourth defendant who says:

> *"I am advised there is a reasonable possibility that the Agreement which I signed on 12 May 2008 may be null and void for want of my authority to enter into such Agreement on behalf of a juristic entity which does not exist or is not described and / or defined in the Agreement and that this Agreement may be void* ab initio."

The submission on behalf of the defendants was that since the fifth defendant's signature accepting the terms for the facilities granted to the first, third and seventh defendants appeared to have been appended for and on behalf of the Paleker group and since there was no indication as to the status of the Paleker group, the agreement could possibly be void. In my view there is no merit in this submission. To start with the fourth defendant in his opposing affidavit admits that in or about May 2008 the first defendant was indebted to plaintiff on its current account in the amount of approximately R2 million. The fourth defendant records that at that time and in consultation with the first defendant's accountant and the plaintiff's representatives, it was agreed that the first defendant's overdraft facility would be reduced by an amount of R1 250 000 in the following manner:

- The sixth defendant would take on R1 million additional debt on its existing loan;
- The first defendant would convert an additional amount of R250 000 into a term loan repayable over 60 months at the rate of R6 053.35 per month.

Significantly, the fifth defendant does not deny that he was at all relevant times a member of the first defendant and that he was therefore in that capacity authorised to enter into agreements on behalf of the first defendant. He also does not deny that he had the necessary authority to sign the facility letter in respect of the cheque account of the first defendant and furthermore, he does not allege that he signed the facility letter in error.

In my view the defence that there was no valid agreement between the plaintiff and the first defendant for the operation of the cheque account with overdraft facilities cannot be *bona fide*.

[6] The certificate of balance in respect of the amount owing on the overdraft account reflects the account number allocated by the bank as *"49264710002 (previously 149812256)"*. In the opposing affidavit, the deponent says that he has no knowledge of when or if the plaintiff changed the first defendant's current account number and the defendants appear to suggest that by changing the number, they have in some manner been afforded a defence. There is no merit whatever in this suggestion. The number of the cheque account does not affect the amount claimed under that account.

[7] The next defence raised is that the arrangements in terms whereof the overdraft facilities were granted to the first defendant were that the first defendant would be granted such facilities up to an amount of R750 000. It was submitted that since the amount claimed from the first defendant under this heading was less than R750 000, the amount was not due and furthermore it was contended that the plaintiff had not made written demand on the first defendant in terms of the conditions attached to the grant of the facility. The facility granted to the first defendant was an overdraft facility and as usual in respect of such facilities, the facility letter contains the following clause under the heading 'GROUNDS FOR MAKING DEMAND'.

> *"e) Notwithstanding the above, nothing herein contained shall prejudice Nedbank's right to demand repayment of the facility at any time."*

In the summons it is alleged that the first defendant is in breach with its agreement in that it has exceeded the limit and/or the duration of the facility and/or has failed to make punctual payments in redemption thereof. However, in the alternative, payment was claimed on the basis of the plaintiff's right to call for payment on demand in terms of the condition which I quoted. In the circumstances there is no merit in this defence.

[8] Three defences said to be available to the first defendant are raised in respect of the plaintiff's second claim against the first defendant. To start with, the certificate of balance is challenged. Secondly, it is contended that the first defendant had sufficient funds in its account from which payments were to have been transferred to the credit of the loan account and that the conduct of the plaintiff calls for an explanation and finally it is said that the amount owing to the plaintiff is disputed. The deeds of suretyship signed by the defendant provide that:

> *"The nature and amount of my obligation, as well as the interest rate payable in respect thereof shall be determined and proved by a certificate purporting to have been signed by a manager or accountant for the time being of any branch or the Head Office of Nedbank."*

The certificate of balance attached to the summons was signed by one Anne Hilde Bezuidenhout ("Bezuidenhout") whose position with the plaintiff is recorded as Manager: Legal Recoveries, Legal Recovery Centre: Western Cape. The affidavit in support of the application for summary judgment is signed by Bezuidenhout and Coenraad Frederick Pieterse who are described as managers of Nedbank Limited. The purpose of the certificate of balance annexed to the particulars of claim is to serve as *prima facie* evidence of the amount due. The amount has again been confirmed by the two managers who signed the affidavit in support of the claim for summary judgment.

[9] The defence raised as to the amount claimed is not understood and in my view does not constitute a *bona fide* defence. After listing certain debits and credits, the fifth defendant records that he has no knowledge as to why the plaintiff reversed certain payments and concludes:

> *"and I respectfully submit that this calls for an explanation of such by the plaintiff."*

He alleges that the first defendant had sufficient funds to accommodate payments which were reversed by the plaintiff and then concludes:

> *"Notwithstanding the above I am equally at a loss to understand how in the circumstances and taking the Plaintiff's version of events into account that an amount of R51 351.34 has been paid from the First Defendant's Current Account to the First Defendant's Term Loan Account how the balance can be R227 744.34 and this calls for an explanation of such by the Plaintiff."*

There is no indication in the papers as to where the amount of R51 351.34 referred to by the fifth defendant is to be found. Furthermore, the list of payments and credits which is referred to is suspect to say the very least, since the defendant's counsel advised from the Bar that the very first entry referred to in the affidavit may be incorrect to the extent of some R300 000. To avoid summary judgment a defendant must disclose fully the nature and grounds of the defence and the material facts relied upon therefor and must also disclose a defence which is *bona fide*. In *Hendricks v Saacks and Another*[1] it was held that a defence which was to the effect that the alleged cancellation must be subject to *"the gravest suspicion"* was held to be insufficient, the court holding that the defendant had had ample time to test, by search and by asking for particulars the accuracy of the statement made in the summons. In the present case the amount claimed is not disputed as such and in any event, it would seem that at best for the defendants that the contention is that the amounts payable in January and March 2009 should have been paid from the current account. However, in my view, there is not sufficient before the court to make that finding.

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[1] 1945 CPD 270 at 272

[10] The second, fifth and sixth defendants contend, in addition to the other defences raised by them, that the action against them is to be stayed since they are presently under debt review in terms of the National Credit Act No 34 of 2005 ("the NCA"). It is clear from the papers that these defendants are in fact under debt review and that steps are currently being taken by a debt counsellor to restructure their debts. It is also clear that the amounts claimed from them by the plaintiff have been included in the debts under consideration by the debt counsellor in respect of the fifth and sixth defendants. On behalf of the plaintiff, it was submitted that the NCA does not apply since the plaintiff is not a credit provider and agreement relied upon are not credit agreements as defined in the NCA; and that consequently the second, fifth and sixth defendants are not entitled to the protection of the NCA. In my view this cannot be correct. The NCA has as its objective *inter alia* to provide for debt reorganisation in the cases of over-indebtedness and since the defendants in question are already subject to debt review, it would be quite incorrect to exclude them from that protection in the present case. If I should be wrong on this aspect, I would in any event exercise my discretion in favour of these defendants.

[11] The fourth defendant is not under debt review and relies solely on the defences which I have already dealt with.

[12] On behalf of the plaintiff it was submitted that any judgment against any of the defendants should include a punitive costs order. The basis for this submission was that the defendants had burdened the record unnecessarily with prolix documentation

and also that the adjournment of the hearing had been caused by the request on behalf of the second, fifth and sixth defendants to submit an affidavit making it clear that they were under debt review. In my view a punitive costs order is not called for. In the order which follows, I make provision for the payment of costs and for the guidance of the taxing master, I direct that one half of the costs of the hearing of the application should be allocated to the case against the third, fourth and seventh defendants and the remainder to the case against the second, fifth and sixth defendants. Counsel are at liberty to approach me immediately after judgment has been handed down if they wish this allocation to be altered in any way.

[13] The following orders will issue:

1. Summary judgment is granted against the third, fourth and seventh defendants jointly and severally, the one paying the other to be absolved, for:

    1.1 Payment of the amount of R745 471.92;

    1.2 Interest on R745 471.92 at the rate of 10.50% per annum, calculated daily and capitalised monthly from 21 August 2009 to date of payment, both dates inclusive;

    1.3 Payment of the amount of R227 744.34;

    1.4 Interest on R227 744.34 at the rate of 11.50% per annum, calculated daily and capitalised monthly from 21 August 2009 to date of payment, both dates inclusive;

    1.5 Costs of suit.

2. The application for summary judgment against the third, fifth and sixth defendants is refused and leave is granted to these defendants to defend the action. The costs incurred in respect of these defendants will stand over for later determination.

R B CLEAVER