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

Case Number: 12750/2010

In the matter between:

NEDBANK LIMITED	Plaintiff
and	
TRUSTEES FOR THE TIME BEING OF THE O C VERMEULEN TRUST	First Defendant
OCKERT CORNELIUS VERMEULEN	Second Defendant
VANNESSA VERMEULEN	Third Defendant

Heard: 5 September 2011

Court: Acting Judge J I Cloete

Delivered: 12 September 2011

JUDGMENT

CLOETE AJ:

Introduction

[1] The plaintiff seeks summary judgment *'against Defendant'* arising out of a loan granted by it to the first defendant and secured by a covering mortgage bond registered over an immovable property owned by the first defendant. The second and

third defendants are sued jointly and severally in their capacities as sureties and co-principal debtors for the due performance of the first defendant's obligations to the plaintiff.

[2] The relief sought by the plaintiff in its particulars of claim is for payment of the outstanding balance due under the loan together with interest thereon, as well as an order declaring the mortgaged immovable property specially executable. The plaintiff also seeks costs on the attorney and client scale as provided in clause 15 of the mortgage bond and in the respective deeds of suretyship signed by the second and third defendants.

[3] Despite all three defendants having entered an appearance to defend, only the second defendant delivered an affidavit in opposition to the plaintiff's application for summary judgment. This was confirmed by second defendant's counsel in argument.

[4] The plaintiff is a registered credit provider as defined in s 40 of the National Credit Act (*'the NCA'*). It is not disputed by the second defendant that:

(a) The first defendant caused a covering mortgage bond (*'the bond'*) to be executed and registered in favour of the plaintiff over the immovable property situated at Erf 7161 St Helena Bay in the municipal area of Saldanha Bay, Western Cape, which immovable property is owned by the first defendant;

(b) The second and third defendants respectively executed deeds of suretyship in terms of which they bound themselves as sureties and co-principal debtors to the

plaintiff for the due performance of the first defendant's obligations to the plaintiff under the bond;

(c) The plaintiff has complied with its obligations under the bond by *inter alia* loaning and advancing monies to the first defendant in terms thereof;

(d) The first defendant breached the terms of the bond in that it failed to timeously repay to the plaintiff the monies so lent and advanced and has failed to make any payment since 30 November 2009;

(e) The first defendant applied to a debt counsellor to have itself declared to be over-indebted in terms of s 86(1) of the NCA;

(f) The plaintiff thereafter lawfully terminated the debt review in terms of s 86(10) of the NCA;

(g) At 11 May 2010 the first defendant was indebted to the plaintiff in the sum of R1 418 424.94 together with interest thereon at the rate of 8.65% per annum calculated daily from 2 May 2010;

(h) The plaintiff has complied with the provisions of ss 130(1) and 130(1)(a) of the NCA.

[5] The second defendant's defence is two-fold:

(a) The first defendant is not properly before this court; and

(b) The first defendant entered into a *pactum de non patendo* with the plaintiff. It should be noted that the second defendant alleges that this defence applies equally to the other defendants, although they themselves have not delivered any opposing affidavits as required by Rule 32(3)(b) of the Rules of Court.

Issues

[6] The first issue which must be determined is whether the reference to *'the Defendant'* in the plaintiff's application for summary judgment is sufficient to cover a reference to all three defendants.

[7] The Notice of Application for Summary Judgment refers to the application to be made against *'Defendant'*. The attorneys representing all three defendants are referred to therein as *'Defendants' attorney'* (thus implying all three defendants). The affidavit in support of the application refers to *'the Defendant'* throughout. The certificate of balance annexed to the affidavit refers only to the first defendant. The affidavit otherwise complies fully with Rule 32(2) and in particular verifies the cause of action and relief claimed in the summons, which relief is clearly sought against all three defendants.

[8] Importantly, the only defendant to file an opposing affidavit did not claim that he was in any doubt that the plaintiff sought summary judgment against all three defendants. In fact, in paragraph 8 of his opposing affidavit the second defendant states that *'My defence and that of the other Defendants lies in an agreement which I*

entered into with the Plaintiff as set out below and in terms of which the Plaintiff is precluded from proceeding with summary judgment'.

[9] In addition, the second defendant's opposing affidavit is accompanied by a filing sheet signed by the *'Attorney for the Defendants'* (emphasis supplied).

[10] In these circumstances it would be overly technical to refuse the plaintiff's application on this ground. I agree with the views expressed by Blieden J in *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (WLD) at 496G-H that:

'If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing the summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him.'

[11] In any event, this is not a defence which the second defendant has raised in his affidavit and as stated by Blieden J in the *Standard Bank* case at 497G-498J:

'While appreciating the difficulties which any defendant is presented with on receipt of an application for summary judgment, there seems to be no reason for an affidavit made in terms of Rule 32(2) to be more strictly construed than any other affidavit. If a defendant has difficulty in dealing with pleadings because they are not technically correct for one or other reason, this should be stated in his affidavit filed in terms of Rule 32(3)(b) as a justification for his inability to present an affidavit disclosing "fully the nature and grounds of the defence and the material facts relied upon therefor". However, if there is no doubt as to what the plaintiff's case is, even though there may be some manifest errors in the way it has been presented, which is the position in the present case, it seems to me to be an exercise in futility to non-suit the plaintiff after the defendant has filed an affidavit in terms of Rule 32(3)(b) in which he demonstrates

his appreciation of the plaintiff's case and sets out what he perceives to be an answer to it as required by that Rule.'

[12] In order to resist the plaintiff's application for summary judgment it was incumbent on the first and third defendants to either furnish security as provided in Rule 32(3)(a) or satisfy the court by affidavit (or with the leave of the court by oral evidence) that the relevant defendant has a *bona fide* defence to the action as provided in Rule 32(3)(b); such affidavit or evidence has to disclose fully the nature and grounds of the defence and the material facts relied upon therefor. In the present case the first and third defendants have not met either of these requirements.

[13] Rule 32(5) provides that if a defendant does not find security or satisfy the court by affidavit as provided in Rule 32(3), the court may enter summary judgment for the plaintiff. This discretion should not be exercised on the basis of mere conjecture or speculation; it should be exercised on the basis of the material before the court: see *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229F. In the present case the only *'material'* before the court in relation to the first and third defendants are their combined Notice of Intention to Defend and the passing reference in the second defendant's opposing affidavit to the defence set out therein being his *'and that of the other Defendants'.* Nowhere does the second defendant state that (a) he deposes to his affidavit not only in his personal capacity, but also in his capacity as duly authorised representative of the first defendant - on the contrary he denies that he does not have a *bona fide* defence; and (b) he deposes to his affidavit on behalf of the third defendant as well (and there is no confirmatory affidavit from the third defendant to that effect).

[14] Simply put, there is no material before the court which would enable me to exercise the discretion referred to in Rule 32(5) in favour of the first and third defendants and the plaintiff is thus entitled to summary judgment against them.

[15] The next issue to be determined is whether the second defendant has raised a *bona fide* defence. The first leg of his defence is that the first defendant is not properly before this court. The second defendant contends that when action is instituted against a trust, all of the trustees of that trust must be cited in their representative capacities. He submits that the plaintiff has failed to identify the trustees of the first defendant in its particulars of claim and for this reason the first defendant is not properly before the court.

[16] There is no merit in this contention. It is trite that a trust is not a juristic person and that its assets vest in the trustees in their capacities as such. Accordingly, all trustees must be joined in an action to enforce a right pertaining to a trust or to enforce an obligation of a trust. In the present case the plaintiff has done exactly that. In its particulars of claim it refers to the first defendant as *'the trustees for the time being of the O C Vermeulen Trust whose chosen domicilium citandi executandi at* (sic) *26 Lampies Avenue, St Helena Bay (also known as 7161 St Helena Bay)'*. Whilst the trustees have together been categorised as *'the first defendant'*, it is clear from the particulars of claim that it is the trustees who have been cited.

[17] When trustees have contracted on behalf of a trust the trustees may be cited as a class (i.e. *'the trustees for the time being'*) without the need to determine who precisely, at the time of institution of proceedings, those trustees are:

'In legal proceedings the trustees must act nomine officii.... *It is usual for the trustees to be cited as "A, B and C" in their capacity as the trustees of the XYZ Trust" but cases in which the trust as such is cited are not unknown and there should be no objection to a citation of the "trustees for the time being of the XYZ Trust".'* (emphasis supplied.) (See Cameron *et al* Honorés South African Law of Trusts 5th Edition (2002) at 256.)

[18] Counsel for the second defendant referred to the case of *Le Roux and Another v Trustees (for the time being) of the Sevenus Family Trust* [2000] 1 All SA 413 (C) as authority for the proposition that the first defendant is not properly before this court. In that case, after the respondent objected to the *locus standi* of the second applicant trust on the basis that it was not properly cited in the papers, the applicants applied for an amendment to cite the respective names of the trustees in their capacities as such. The amendment was granted without objection. Accordingly the court in that case did not have to decide that issue.

[19] The other leg of the second defendant's defence consists of reliance upon an agreement reached with the plaintiff after the latter initially applied for summary judgment. It is this agreement which, it is alleged, constitutes a *pactum de non patendo.*

[20] In *Miller and Another NNO v Dannecker* 2001 (1) SA 928 at 937A-B Ntsebeza AJ commented that *'in contrast to an agreement of release or waiver, a* pactum de non patendo *does not extinguish the legal consequences of a transaction, but merely suspends the capacity to enforce it, usually for a specific period or until the occurrence of some contingency'.*

[21] It is common cause that after the plaintiff initially applied for summary judgment the parties agreed to postpone that application. What the second defendant disputes is whether the plaintiff was entitled to re-enrol the application at a later stage. As these are summary judgment proceedings, all that the second defendant has to advance are facts which, if proved at the trial, will constitute an answer to the plaintiff's claim: see *inter alia* the *Breitenbach* case (*supra*).

[22] The second defendant has annexed various items of correspondence to his opposing affidavit in support of his contention that the plaintiff was precluded from proceeding. This correspondence commences with an e-mail addressed by the second defendant to a Peter Edwards of the plaintiff on 22 July 2010. In that e-mail he requested the plaintiff to advise *'if there is any way that Nedbank can help me with keeping my house or perhaps give me some more time to market my house'.*

[23] Later that day an Azara Patel ('Patel') of the plaintiff's Home Loans Collections and Recoveries Unit advised the second defendant by e-mail that:

'1. You may enter into a Nedbank Assisted Sales Programme or a Restructure programme with us.
2. In order to qualify for the above, you will have to withdraw your defence herein.
3. Kindly contact the writer to provide you with more detail herein.'

[24] On the following morning (23 July 2010) the second defendant addressed an e-mail to Patel in which he advised that *'I would like to enter into your programme. Can you please assist me how to?'* (sic).

[25] On 3 August 2010 the attorneys representing all three defendants wrote to the plaintiff's attorneys, stating that:

'We confirm that we are the attorneys of record for Defendants in the above matter.

We have instructions to withdraw the Notice of Intention to Defend in order for our clients to enter into the Nedbank Assisted Sales Programme.

We further confirm that no judgment will be taken against our client (sic) *in the above matter and that any legal action be suspended on the basis that an agreement to enter into the Assisted Sales Programme is in place.*

Kindly let us have confirmation that the Application for Summary Judgment is will (sic) *be withdrawn and that any legal action be suspended'.* (emphasis supplied.)

[26] On the same day the same attorneys addressed a letter in similar terms directly to the plaintiff on behalf of the second defendant.

[27] In response thereto and on 4 August 2010 the plaintiff's attorney advised the defendants' attorney that:

'My instructions are to postpone the Summary Judgment application for three months which would give sufficient time for the NAS mandate signed by your clients to run its course ... I also specifically record that my client's rights are reserved .... Kindly take instructions and revert'.

The plaintiff's attorney thus made it clear that his client was not prepared to suspend all legal action on the basis that an agreement to enter into the plaintiff's Assisted Sales Programme (*'NAS'*) was in place. Instead, the plaintiff proposed that the summary judgment application be postponed for three months which, in the plaintiff's

view, would give the defendants sufficient time for the NAS mandate signed *'to run its course'.*

[28] On 6 August 2010 the defendants accepted this proposal. This is evident from an e-mail addressed by the defendants' attorney to the plaintiff's attorney, the relevant portion of which reads as follows:

'....we hereby confirm that the Summary Judgment application scheduled for hearing in the 3rd division on 10 August 2010 will be postponed for 3 (THREE) months in order for the NAS mandate to run its course.'

[29] Pursuant to this agreement the plaintiff did not proceed with its application for summary judgment until after a period of three months had elapsed.

[30] The plaintiff thereafter re-enrolled the application in March 2011 for hearing in the motion court, at which stage the second defendant delivered an opposing affidavit.

[31] Despite the agreement reflected in the exchange of correspondence between the parties' respective attorneys that litigation would be suspended for a period of three months, the second defendant now contends that he understood this suspension to be indefinite. Unfortunately for the second defendant, the stance now adopted by him is at odds with the very correspondence on which he relies.

[32] During argument the second defendant's counsel sought to persuade me that the phrase *'run its course'* is ambiguous and open to interpretation, and that accordingly this amounts to a triable issue which should result in a refusal of the

application for summary judgment against the second defendant. I am unable to agree. The words used by the parties were clear and unambiguous. The terms of the agreement set out in the exchange of correspondence of 4 August 2010 and 6 August 2010 were unequivocal. In fact, they were repeated in identical terms by the defendants' attorney when accepting the plaintiff's proposal on their behalf.

[33] The second defendant's allegation in his opposing affidavit that *'I am complying with the agreement between the plaintiff and myself as set out above and in the circumstances the plaintiff is not entitled to take any legal action against me on any arrears in terms of the original mortgage bond'* must be rejected. The three month period agreed upon to suspend the application for summary judgment has *'run its course'.* The period of the *pactum de non patendo* has expired. Entering into the agreement to suspend the litigation for a period of three months did not extinguish the legal consequences of the defendants' liability, but merely suspended the plaintiff's capacity to enforce its rights for that specific period. Upon expiration of that period the plaintiff was entitled to proceed.

[34] In my view the second defendant has not advanced facts which, if proved at the trial, will constitute an answer to the plaintiff's claim.

[35] It should be mentioned that the second defendant has not taken issue with the relief sought by the plaintiff to have the mortgaged immovable property declared specially executable despite having had his attention drawn to s 26 of the Constitution in the plaintiff's particulars of claim. In fact, on the second defendant's own version, the first defendant intends to dispose of the immovable property, hence its request for

assistance from the plaintiff to enter into its NAS programme.

[36] It accordingly follows that the plaintiff is entitled to summary judgment against the second defendant as well.

[37] In the result, I make the following order:

1. **Summary judgment is granted against the defendants jointly and severally, the one paying, the other to be absolved, for:**
   - 1.1 **Payment of the sum of R1 418 424.94;**
   - 1.2 **Interest on the sum of R1 418 424.94 at the rate of 8.65% per annum calculated daily from 2 May 2010 to date of final payment;**
   - 1.3 **Costs of suit on the attorney and client scale, including the costs of the previous postponements;**
2. **Erf 7161 St Helena Bay, in the Saldanha Bay Municipality, Malmesbury Division, Western Cape Province, in extent 503 (five hundred and three) square metres and held by Deed of Transfer number T97034/2006 is hereby declared specially executable.**

J I CLOETE
ACTING JUDGE OF THE HIGH COURT