

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Jackson (13022/2012) [2014] ZAKZDHC 30 (7 August 2014) [2014] ZAKZDHC 30

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Van Zyl

CASE / FILE NUMBER

13022/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NUMBER: 13022/2012

In

the matter between:

FIRSTSTRAND

BANK

LIMITED.....Plaintiff

and

EUGENE

DELANEY

JACKSON.....Defendant

JUDGMENT

VAN ZYL, J.:-

1. This is an application for summary judgment. The Plaintiff, a commercial banking institution, alleged that it had lent and advanced monies on loan to Consolidated AOne Trade & Invest 6 (Pty) Ltd (for convenience herein called “AOne”) in respect of a building development in terms of an agreement concluded on 16 May 2008 (annexure “A”) and subsequently varied by a further agreement concluded on 8 August 2008 (annexure “B”).

2. As part of the loan agreement the plaintiff sought to secure its exposure, inter alia by requiring the registration in its favour of a first covering mortgage bond over the immovable properties concerned in the development. In addition thereto the plaintiff obtained a personal suretyship commitment from the defendant who, at all material times also represented AOne in its dealings with the plaintiff.
3. A copy of the document embodying the defendant's personal commitment to the plaintiff was headed "Suretyship" and is annexure "C" to the particulars of plaintiff's claim. Therein the defendant in his personal capacity agreed to bind himself jointly and severally as surety and co-principal debtor together with AOne to and in favour of the plaintiff for all amounts then owing or which would in the future become owing, but limited to the sum of R30 million.
4. Whilst it is unnecessary at this juncture to repeat all the detailed provisions embodied in the agreement of suretyship (for convenience called "the suretyship"), it is nevertheless relevant to mention that in clause 13.2 the parties recorded that their agreement would in all respects be construed and interpreted in accordance with the laws of the Republic.
5. The suretyship document reflects that the defendant signed it at Sandton on 23 May 2008. Below his signature and by way of a separate paragraph, in printed form but which is not numbered, appears the following;

"MARITAL CONSENT

I, the undersigned

Being married to the surety, which marriage is governed by the laws of the United States of America, hereby consent to the surety entering into this suretyship.

Signed by the spouse of the surety on the __ day of ____ 2008.

As witnesses:

1. ____
2. ____ (Spouse)"
6. The plaintiff, in its particulars of claim alleged that AOne defaulted on its repayment obligations to the plaintiff, thereafter embarked upon business rescue proceedings in terms of Section 129 of the Companies Act No. 71 of 2008 and has as a result been placed under business rescue supervision. The plaintiff further alleged that as at 7 November 2012 AOne was indebted to it in the sum of R47,841,057-12, together with ongoing interest to be calculated thereon to date of payment.

7. In the circumstances and relying upon the defendant's suretyship commitment, the plaintiff claims judgment as against the defendant for payment of the sum of R30 million, interest thereon at the plaintiff's prime interest rate, plus 2%, calculated daily and capitalised monthly in arrears, as from 1 June 2010 to date of payment, costs of suit on an attorney and own client scale, together with alternative relief.
8. Following service of the summons upon the defendant, the latter caused appearance to defend to be entered and the plaintiff in turn delivered an application seeking summary judgment as against the defendant. The defendant opposed this application and delivered his opposing affidavit in support of such opposition.
9. The defendant raised a number of defences. The first was that the suretyship obligation attributed by the plaintiff to the defendant was of an accessory nature and since the principal debtor (AOne) was under business rescue, that this rendered the plaintiff's claim against AOne unenforceable so that the accessory claim was likewise unenforceable. This defence was not, however, persisted in and wisely so in the circumstances.
10. The second line of defence, essentially argued as a defence in limine, comprised an attack upon the capacity or authority of Mr M J du Preez ("Du Preez"), the deponent to the plaintiff's

affidavit in support of the application for summary judgment. It was alleged that Du Preez was not the author of the documents upon which the action was based, nor was he involved in the negotiations and conclusion of such documents and that he was therefore unable from his personal knowledge to attest to their accuracy.

11. Accordingly, so the argument ran, his averments in support of the application for summary judgment constituted inadmissible hearsay, so that the requirements of Rule 32(2) remain unsatisfied.

These require that the deponent to the affidavit in support of summary judgment is a person who can swear positively to the facts, verify the cause of action and the amount, if any, claimed and is able to state that in her or his opinion there is no bona fide defence to the action and that appearance to defend had been delivered solely for the purpose of delaying finalisation of the action.

12. In the present matter Du Preez stated on oath that he was employed by plaintiff in its Rand Merchant Bank Division as a manager of credit at 1 Merchant Place, Cor. Fredman Drive and Rivonia Road, Sandton, Johannesburg, Gauteng. It is not disputed that the plaintiff has throughout dealt with AOne and the defendant through the medium of its Rand Merchant Bank Division. This is also the address nominated by the plaintiff as its domicilium address in clause 17.1 of the primary agreement with AOne (dated 16 May 2008) and where the plaintiff in its summons commencing the present action alleged that its principal place of business is located. This address also corresponds with the plaintiff's address as contained in the original agreements of 16 May and the amending agreement of 8 August 2008, as

concluded between AOne and the plaintiff.

13. Du Preez went on the claim on oath that he has personal knowledge of the facts relevant to the plaintiff's claims against the defendant. He explained the sources of his personal knowledge with reference to the execution of his functions as a manager of credit for the plaintiff at the location where all these transactions were concluded and confirmed that, in addition thereto, he had read and considered all the relevant documentation and records in the plaintiff's possession which set out the latter's claims against the defendant.
14. In argument Mr Southwood, who appeared for the defendant, relied at the outset upon the well known decision in *Maharaj vs Barclays National Bank* 1976 (1) SA 418 (AD) in submitting that Du Preez lacked sufficient personal involvement to qualify him as one with sufficient first-hand knowledge to be able to authoritatively verify the plaintiff's claim for summary judgment. In this decision Corbett JA (as he then was) at page 424B made it clear, with reference to *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at pp 516-7, that it would be difficult, if not impossible for a single person to have first-hand knowledge of every fact that goes into making up the plaintiff's cause of action.
15. In *Love* (supra) Miller J (as he then was) stated inter alia that "It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account must needs rely upon the bank records which show the amounts paid into his account and the amounts withdrawn by the client." That is no different from the position claimed by Du Preez in the present matter, insofar as he relies upon having read and considered the plaintiff's records with regard to AOne and the defendant.
16. However, Du Preez went further and claimed that one of the sources from which his personal knowledge derived was with reference to the execution of his functions as a manager of credit for the plaintiff at the location where all these transactions were concluded. In this regard and with reference to the position of the assistant to the branch manager whose exact duties were unclear, Corbett JA remarked in *Maharaj* (supra) at page 424F that if one read that together with the claim on oath that the deponent was able from personal knowledge to verify the claim, then there was sufficient compliance with the rule to support a claim for summary judgment. In my considered view this conclusion can also be drawn with regard to Du Preez and the plaintiff in the present matter.
17. The position is also not all that dissimilar to the position in *Kurz NO v Ainhirn* 1995 (2) SA 408 (D) where Howard JP held, with reference to the *Maharaj* matter, that the position of a liquidator of a close corporation was such that he would clearly have had both the duty and the opportunity to obtain knowledge of the relevant facts, inter alia, from the documentary records of the close corporation in liquidation, to verify the cause of action.
18. The considerations above are also consistent with the more recent views as expressed by the Supreme Court of Appeal in *Dean Gillian Rees v Investec Bank Limited* (330/13)

[2014] ZASCA 38 (28 March 2014) where, in para 15 of the judgment it was stated that –

“Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj.”

19. It follows that there is no merit in this defence in limine, as raised.
20. However, the defendant raised a number of further defences. These included alleged deficiencies in the formulation of the plaintiff’s cause of action, verification of the applicable interest rates from time to time, the validity of certain debits allegedly made by plaintiff against the account of and relating to the calculation of the indebtedness by the principal debtor (AOne) to the plaintiff, as well as to what extent these would affect the R30 million limit of the defendant’s indebtedness to the plaintiff.
21. An additional defence belatedly raised on behalf of the defendant relates to his matrimonial domicile and is effectively also a defence in limine which, if sustained, would have a decisive impact upon the application for summary judgment. I therefore propose firstly to deal with this issue and only to give detailed consideration to the remaining defences relating to the merits of the claims if the additional defence is not sustained.
22. This defence was raised by way of a supplementary affidavit delivered by the defendant with leave of the court specifically granted in regard thereto. Therein the defendant recorded that at all times material to this action he was married to his wife Phyllis Gertha Jackson. The defendant claims that the marriage was duly solemnised in the County of Los Angeles, State of California, United States of America, on 13 March 1992 and still subsists.
23. In elaborating upon the background to his marriage the defendant averred that at the time of entering into marriage he was permanently resident in the State of California, which he regarded as his permanent home and that he was thus also domiciled in California. Accordingly the defendant asserts that, as a matter of law, the marriage was one contracted in community of property according to the laws applying in California.
24. Subsequent to their marriage the defendant and his wife have maintained their matrimonial residence in California where his wife still resides, despite the defendant’s subsequent move to the Republic of South Africa and where by mutual consent of the couple she controls their communal personal and real property. Broadly speaking it would appear that personal property is alleged to equate to movable property and real property to ownership of or rights in and to immovable property.

25. With reference to a written declaration by one William G. Cort, claiming to be an Attorney at Law entitled to practise before all the courts in the State of California and in the Northern Central and Southern Districts of the Courts of the United States of America, the defendant alleges that the signature by the defendant of the deed of suretyship relied upon by the plaintiff (annexure “C” to the plaintiff’s particulars of claim) may constitute a contravention of Section 1100
- (b) of the California Family Code (“the CFC”) which is alleged to be applicable to the marital regime of the defendant and
- his wife.
26. The relevant portion of Section 1100(b) of the CFC is alleged to provide as follows;
- “(b) A spouse may not, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse.”*
27. In the light thereof the defendant contends, citing the views of Mr Cort, that given the failure to obtain the written consent of his spouse, the conclusion of the suretyship agreement itself is invalid and unenforceable as a matter of California law and, in any event, whether the suretyship commitment amounted to a disposition of community property for less than fair and reasonable value, is a question of fact, which cannot be determined for purposes of summary judgment.
28. In addition the defendant seeks to rely upon the provisions also of section 1102(a) of the CFC which is alleged to provide that;
- “(a), either spouse has the management and control of the community real property, ... but both spouses, ..., must join in executing any instrument by which that community real property or any interest therein is ... encumbered.”*
29. In this regard the defendant contends that at all material times his wife, by mutual consent, has had the management and control of both the real and personal property making up the bulk of their community estate and which remain situated in California. Therefore, so the defendant contends, the suretyship by its terms purports to convey or encumber the whole of their community estate comprising both real and personal property without the written consent of his spouse. By reason thereof it contravenes the provisions of Section 1102(a) of the CFC, and would thus be unlawful and unenforceable in terms of the Californian law.
30. The defendant also drew attention to the fact that the suretyship (annexure “C” to the plaintiff’s particulars of claim) specifically provided, as already indicated above, for the written consent of the defendant’s spouse. He accordingly contends that at all material times the plaintiff was fully aware of the fact of the defendant’s marital status, of the need for the consent of his spouse to be obtained in order to ratify the suretyship and that the plaintiff had neglected to secure such consent. Without such consent, so the defendant alleges, the suretyship is unenforceable and the plaintiff is not entitled to summary

judgment.

31. As already indicated, the “facts” relating to the defendant’s marriage, the marital regime, the Californian law, if applicable thereto and the interpretation or application thereof have been placed before the court in less than desirable detail and in an unusual manner. But, as stated in Maharaj at page 426 A-E, where there are disputed or new facts alleged, a court considering summary judgment does not attempt to determine the balance of probabilities or decide the issues arising. The enquiry is limited to determining firstly whether the defendant has sufficiently disclosed the nature and grounds of his defence. The second consideration is whether the defendant, on the facts so disclosed, appears to have a defence which, thirdly, is both bona fide and good in law.
32. In regard to the first consideration it is sufficient if the court is able to discern the nature of the defence and the material facts upon which it is alleged to be based with sufficient clarity to conclude whether it represents a triable issue. Thus in the Rees matter (supra) at para 23 the Court of Appeal held in this regard, as follows:-

“However, as was stated by Navsa JA in Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) paras 32 & 33:

‘The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary

judgment

proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded.’”

33. In the present matter the defence under consideration concerns the applicable matrimonial regime arising from the marriage of the defendant. In Frankel’s Estate & Ano v The Master & Ano 1950 (1) SA 220 (A) it was held that the matrimonial domicile of spouses, where they are not at the time of their marriage domiciled in the same country, is determined by that of the husband. The probabilities suggest that both spouses were at the time of their marriage domiciled in California but, in any event and since the defendant alleges that he was domiciled there, their matrimonial domicile would be California and the laws of that State would govern the patrimonial consequences of their marriage.

34. The fact that the parties to such a marriage, or either of them subsequently establishes a new domicile in another country would have no effect upon the matrimonial regime or the proprietary rights of the parties to the marriage, save that subsequent changes to the law of the matrimonial domicile would retrospectively apply to their proprietary regime (See: *Sperling v Sperling* 1975 (3) SA 707 (AD); *Hassan v Hassan* 1998 (2) SA 589 (D)).
35. In my judgment a triable issue appears to arise as to whether the suretyship would contravene the prescriptive requirements of the CFC referred to above and, if it does, then whether the suretyship undertaking given by the defendant without the requisite consent of his spouse, may found any obligation by the defendant to the plaintiff.
36. An interesting twist in the applicable considerations arises from the provision, in what appears to be a document prepared by the plaintiff for the defendant's signature, requiring the written consent by the defendant's spouse to the transaction. Being summary judgment there are no explanations at this stage from the plaintiff. But arguably the plaintiff was dilatory in following up and securing such consent, so that estoppel would not apply. Or the consent clause could represent a condition precedent for the validity of the suretyship in terms of currently applicable South African law, so that the suretyship agreement contemplated in the document never came about, because an essential party to the intended agreement is lacking.
37. There would appear to be ample scope for speculation at this stage, without even entering into the area of the application of the laws of California. That being so, the effect of a finding against the validity of the suretyship would potentially represent a complete defence to the defendant as against the claims of the plaintiff in the present action. It is, of course and for present purposes unnecessary for me to arrive at any firm conclusions in this regard.
38. But given the scope of the issues which may arise if the matter were to go to trial I am in any event of the view that, in the exercise of my discretion, summary judgment should be refused in the circumstances aforementioned. It would be a proper exercise of such discretion where the facts put forward in defence are open to criticism as to detail or admissibility, but the court nevertheless considers it in the interests of justice to afford the defendant the opportunity to establish his defences on trial. (*Grühn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (AD), *Rumpff JA* (as he then was) at page 58D and the cases there cited; *Maharaj v Barclays National Bank Ltd* (supra) at page 425H).
39. In the result I make the following order namely:-
- a. The application for summary judgment is refused.
 - b. The defendant is granted leave to continue his defence in the action under case number 13022/2012.
 - c. All issues of costs are reserved.

VAN ZÿL, J.

CASE INFORMATION

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Date of Hearing: 20 September 2013

Judgment

delivered: 7THAugust 2014

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Prepared on 10 October 2026 · Esheria