

SOUTH AFRICA / JUDGMENT

Swanepoel N.O and Another v Standard Bank of South Africa Limited (20366/2013) [2013] ZAGPPHC 411 (5 December 2013)

[2013] ZAGPPHC 411

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

20366/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT)

Case

Number: 20366/2013

Date:

5 December 2013

Not

reportable

Not

of interest to other judges

In

the matter between:

GERHARDUS

JOSHUA SWANEPOEL N. O.....1st

EXCIPIENT

[In

his capacity as Trustee of the HARNE TRUST]

GERHARDUS

JOSHUA SWANEPOEL.....2nd

EXCIPIENT

and

STANDARD

BANK OF SOUTH AFRICA LIMITED.....RESPONDENT

IN

RE: STANDARD
BANK OF SOUTH AFRICA
LIMITED.....PLAINTIFF
GERHARDUS
JOSHUA SWANEPOEL N. O.....1st
DEFENDANT
S
SWANEPOEL N.
O.....2nd
DEFENDANT
GERHARDUS
JOSHUA SWANEPOEL.....3rd
DEFENDANT

Coram: HUGHES

JUDGMENT

Delivered on: 5 December 2013 Heard on: 22 October 2013

HUGHES J

1. This is an exception by the first and third defendant's to the plaintiffs particulars of claim on the basis that they lack averments
which are necessary to sustain a cause of action.
2. On 28 May 2013 the first and third defendant's filed their notice of exception in terms of Rule 23(1) and (3) of the Rules of Court. The defendants seek that the exception raised be upheld and that the plaintiffs claim be struck out with costs.
3. The plaintiff withdrew its action as against the second defendant as it was established that the second defendant was not a trustee of Harné Trust, as cited in the plaintiffs founding papers.
4. The plaintiff alleges that it has two claims against the defendants. The first claim is alleged to have been concluded on 3 November 2013 at Delmas in respect of an agricultural production loan. It is alleged that the defendants concluded this agreement in their capacity as trustees of Harné Trust. The second claim arises from a business current account opened by the plaintiff on behalf of the defendants on 24 April 2008 at Carolina. Likewise with the business current account the defendants are alleged to have concluded this agreement in their capacity as trustees of the Harné Trust.
5. On 11 May 2009 at Delmas the third defendant executed a deed of suretyship in favour of the plaintiff in respect of the amounts due and payable by the defendants to the plaintiff.
6. The agricultural production loan agreement on 6 February 2013 was overdrawn in the sum of R640 688.95, Whilst the business current

account was overdrawn in the sum of R66 342.22.

7. The case of the defendants with regards to the agricultural production loan agreement is set out below:

7.1 Ex facie the agreement, the conclusion thereof was on 10 November 2011 and not 3 November 2013 as alleged in the papers by the plaintiff;

7.2 from the agreement, it is evident that Harné Trust and not the trustees concluded the agreement with the plaintiff as the trust was cited as "Borrower". The third defendant merely signed the acceptance on "behalf of the Borrower" and not as the "Borrower";

7.3 ex facie the resolution signed by the Borrower, which incidentally was prepared by the plaintiff, the resolution illustrates that the trust

was to be the Borrower, the third defendant was to arrange the financial facility with the plaintiff and sign the agreement between

the plaintiff and the Borrower;

7.4 likewise with the business current account, ex facie the agreement, this was also concluded between the plaintiff and the trust and not the trustees on behalf of the trust;

7.5 the suretyship, was also drawn up by the plaintiff, and its execution date as alleged in the papers is 11 May 2009, whilst the document

reflects that the date is in fact 6 November 2009;

7.6 on an examination of the suretyship signed by the third defendant, it transpires that it has no valid principal obligation, as it states that the surety is liable "for the payment when due". In addition the third defendant (ex facie all the agreements, the resolution and the suretyship agreement) has bound himself as surety for his own debt.

8. With regards to the first claim the plaintiff argued that the first defendant signed the "acceptance by borrower" in his

capacity as trustee "on behalf of the borrower: Harné Trust Registration number: IT685/2000".

This came about as a result of the resolution adopted by Harné Trust on 10 November 2011. The first defendant did not sign in his personal capacity as stated by the excipients.

9. Likewise with the second claim the plaintiff contends that the first defendant as trustee, duly authorized by a resolution taken on 23 April 2008, had the power to sign on behalf of the Trust.

10. The plaintiff submitted that the excipients contention that the plaintiff entered the agreements with the trust and not trustees of trust is without merit. Further, even if it is found that the citation of the trust as the contracting party is open to criticism this can be rectified by extrinsic evidence to identify the parties with regards to their negotiations and consensus.
11. It is trite that a trust is "a debtor in the usual sense of the word" as stated by Nestadt J at 163 A-C in *MAGNUM FINANCIAL HOLDINGS (PTY) LTD (in liquidation) v SUMMERLY AND ANOTHER NNO* 1984(1) SA 160 (W).
12. I disagree with the plaintiff's argument that, that which is criticized of the citation of the trust, in the documents before court, may be rectified by way of extrinsic evidence. I refer to the case of *KPMG CHARTERED ACCOUNTANTS (SA) v SECUREFIN LTD AND ANOTHER* 2009 (4) SA 399 (SCA) at

[39] on page 409.

"[39] First; the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act; extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) S/A 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses ... Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent... Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B

- C)..."

13. It is evident ex facie the documents that the execution dates of such documents are incorrectly cited in the papers of the plaintiff. Further, that that

in itself is indicative of the papers of the plaintiff being embarrassing to say the least, as clearly the context of the plaintiffs pleadings are not correct.

14. I accept the argument of Mr Rossouw on behalf of the defendants that the plaintiff could not have contracted with the trust as is

indicated in the papers of the plaintiff. He argued that the trust was not capable of contracting as it had no legal persona. I agree, as the trust is not a legal person and it is only through the trustees that the trust can act even though the trust can accumulate assets and liabilities which constitute the trust estate. See *LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v PARKER AND OTHERS* 2005(2) SA 77 SCA at 83 paragraph [9] and [10]

"[9] These contentions rest on an erroneous approach to the Questions of trust capacity and trustee authority. Given the way the bank pleaded its case, and the evidence it presented, two principles of trust law entail that its submissions cannot prevail.

The first is that a trust does not have legal personality. The second is that, in the absence of authorisation in the trust deed, trustees must act jointly. I deal with these in turn.

A sub-minimum of trustees cannot bind the trust

[10] The first principle accounts for the fact that the trust could not be bound while there were fewer than three trustees. Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trusts constitutive charter. Outside its provisions the trust estate can not be bound."

15. Having accepted that the trust is not a legal person and could not have contracted with the plaintiff as is evident from the agreement before this court, it is conclusive that no legal rights and duties flow from an agreement that is said to be void ab initio. See *WILKEN v KOHLER* 1913 AD 135 at 143:

"A transaction which has no force and effect is necessarily void initio and can under no circumstances confer any right of action."

16. Turning to deal with the suretyship agreement signed by the third defendant in his personal capacity, this surety is in respect of the agreements which are not valid agreements, that have no rights and obligations flowing from them. As such there is no valid principal obligation that exists between the third defendant and the plaintiff. See *NEDBANK LTD v VAN ZYL* 1990(2) SA 469(A) at 475 OF set out below:

"... Moreover, definitions of the contract of suretyship by writers on Roman-Dutch law emphasise that the surety undertakes under certain circumstances to discharge the obligation of another (the principal debtor): see eg Grotius *Inleydinghe* 3.3.12; Van Leeuwen *Het Rooms-Hollands-Recht* 4.4.2 and *Censura Forensis* 1.4.17.3; Voet (op cit 46.1.1); Huber (op cit 3.26.2).

Modern South African writers also accept that under our law it is essential to the existence of a suretyship that there be a principal obligation in terms whereof someone other than the surety is the debtor; and that a person cannot stand as surety for his own debt (see De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 345; Joubert (ed) *Law of South Africa* vol 26 para 153; Caney *The Law of Suretyship* 3rd ed at 27 - 8, 174; Wessels *Law of Contract in South Africa* 2nd ed paras 2624, 4368; Van Jaarsveld *Suid- Afrikaanse Handeisreg* 3rd ed at 760)..."

17. Under the circumstances and in light of all the above considerations, I conclude that the plaintiffs particulars of claim lack the necessary averments to sustain a cause of action. The exception was taken correctly and should succeed. The costs will follow the result and as the matter is of significance and importance to the parties, the employment of senior counsel was warranted.

18. In the result the following order is made:

18.1 The exception is upheld with costs on a party and party scale, such costs to include the consequent employment of senior counsel;

18.2 The particulars of claim are struck out.

W. Hughes Judge of the High Court

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