

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES:

Eastern Cape Development Corporation

v

Sotran Trading 3 CC and 4 others

- Case Number: **105/2009**
 - High Court: Eastern Cape Division, Grahamstown
 - DATE HEARD: **26 March 2009**
- DATE DELIVERED: Order delivered: **27 March 2009**
Reasons available: **24 April 2009**

JUDGE(S): REVELAS J

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): **Adv F Louw**
- for the Respondent(s): **Mr Marongo**

Instructing attorneys:

- Applicant(s): **Neville Borman & Botha**
- Respondent(s): **GM Yeko**

CASE INFORMATION –*Nature of proceedings:*

1. *Topic :*
2. *Key Words:*

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – GRAHAMSTOWN**

Case No: 105/2009
Date Heard: 26/03/09
Order Delivered: 27/03/09
Reasons Available: 24/4/09

In the matter between

**EASTERN CAPE DEVELOPMENT
CORPORATION**

Plaintiff

and

SOTRAN TRADING 3 CC

First Defendant

MALUSI KOBESÉ

Second Defendant

THOZAMA CYPRIAN MAGAQA

Third Defendant

NDIYAKOLWA SAMUEL KOBESÉ

Fourth Defendant

TUSO MERRYLINE KOBESÉ

Fifth Defendant

Reasons for Judgment

REVELAS J

[1] The plaintiff/applicant ('plaintiff') issued summons against the five defendant's/respondents ('defendants') on 29 January 2009, jointly and severally, for the amount of R1 259 148.83 and interest (the claim against the third, fourth and fifth defendants being limited to R180 00.00), based on an acknowledgement of debt, and arrear payments in terms of a loan agreement, deeds of suretyship and a surety mortgage bond. The defendants entered an appearance to defend the action, which the plaintiff argues is

brought purely for purposed of delaying payment of the amounts owing since they have no *bona fide* defence.

[2] The first defendant (SOTRAN) is a close corporation and the second and third defendants are its sole members. During August 2005 the plaintiff entered into a loan agreement with SOTRAN who was represented by the second and third defendants. In terms of the agreement, SOTRAN acknowledged its indebtedness to the plaintiff in the amount of R942 603.00 with interest and costs relating to financial assistance in running a fruit and vegetable franchise. Repayments of the capital and interest would be in monthly instalments of R32 228.24. Interest would be claimed in respect of overdue payments and in respect of the costs relating to claiming arrears. The agreement also contained an acceleration clause in terms whereof the plaintiff could call up the loan if the conditions in the agreement were not complied with.

[3] The agreement also provided that a certificate under the hand of a member of the plaintiff (also a close corporation) shall be *prima facie* evidence of the amount due and payable. On 20 June 2007 such a certificate was indeed issued, stipulating SOTRAN'S indebtedness to the plaintiff in the sum of R1 259 148.83. According to the plaintiff, the certificate in the form of a letter was issued because SOTRAN had not made any payments in terms of the agreement since November 2006.

[4] The second defendant had also bound himself as surety and co-principal debtor with SOTRAN for repayment of the debt in terms of a deed of suretyship which was signed on 26 August 2005, the day on which the loan agreement was finalized. The third defendant similarly bound himself. The fourth defendant, who is married to the fifth defendant in community of property, also bound

himself as a surety and co-principal debtor with SOTRAN, but limited to R180 000.00.

[5] The fourth and fifth defendants also executed a power of attorney in favour of the plaintiff to register a surety mortgage bond, over an erf in Mdantsane as a first mortgage, as security for the fulfilment of their obligations to the plaintiff. The mortgage bond was registered in September 2008.

[6] The third defendant had also similarly authorized the plaintiff's attorneys to have a bond registered over his property in East London which was also registered in September 2008. It was a term of the bond that the hypothecation of the property was to secure fulfilment of the third defendant's obligations in terms of the suretyship in the sum of R180 000.00.

[7] The defendants, who contend that they have a range of *bona fide* defences filed four opposing affidavits. Sotran and the second defendant disputed that the amount claimed is a liquid amount. They argued that the amount mentioned is not fixed as the loan in the particulars of claim (R942 603.00) is different from the amount stipulated in the plaintiffs certificate of indebtedness is R1 259 148.83 and because an amount of R878 708.50 is also mentioned therein. They also disputed that the certificate was a proper certificate, because it was only a letter.

[8] In my view, the different amounts do not affect the liquid character of the actual amount claimed. The sum of R878 708.50 is the total sum of the overdue instalments as at 20 June 2007 (date of the certificate). The capital amount loaned was indeed R942 963.00 according to the agreement, but the defendants had not repaid (and this is not in dispute) any amounts for a period of eight

months plus the costs involved. Sotran signed an acknowledgement of debt which is a liquid document. In any event, the plaintiff was entitled to call up the loan in terms of the agreement if the defendants did not comply with its terms. Furthermore, the certificate of indebtedness stipulated the amount owed and there can be no valid objection to the fact that the certificate was in the form of a letter and it does not amount to a proper defence. Other than attempting to cast doubt as to the actual amount owed, the defendants do not proffer any further useful information.

[9] What is stated by the defendants in their respective affidavits was that the plaintiff "failed and/or neglected its obligation to give the relevant defendants/applicant the capital amount of the loan" and that the loan was taken over by "a third party" and therefore they are not liable. No details of the third party and his or her indebtedness is given. The loan was granted in August 2005 and the defendants do not attempt to explain why they did not oppose the registration of the mortgage bonds in 2008.

[10] The fourth respondent, interestingly, states in his affidavit (paragraph 10 thereof) that his understanding of the suretyships was that they would be "resorted to if and when the first defendant would be unable to settle its indebtedness to the plaintiff". This suggests that the money was advanced, which is in conflict with averment that the money was never paid over. Then, as in the case of the other defendants, the "third party" who allegedly bought back the loan is mentioned by the fourth defendant. Once again without any particularity.

[11] All the affidavits filed by the defendants contain several paragraphs setting out trite principles of the law applicable to

summary judgments, but very few facts and none of them constitute a defence. In my view the defendants have not, demonstrated that they have a *bona fide* defence to the plaintiff's action.

[12] Accordingly an order was made in the following terms:

3. Against First, Second and Third Defendants jointly and severally to pay to Plaintiff the sum of R1 259 148.83 together with interest on the said sum at the rate of 2% per annum above the prime lending rate of First National Bank from time to time calculated from 20 June 2007 to date of payment.
4. Against Third Defendant, jointly and severally with First Defendant, to pay to Plaintiff the sum of R180 000.00 together with interest thereon at the rate of 2% per annum above the prime lending rate of First National Bank from time to time calculated from 20 June 2007 to date of payment.
5. Against Fourth and Fifth Defendants, jointly and severally with First Defendant : to pay to Plaintiff the sum of R180 000.00 together with interest thereon at the rate of 2% per annum above the prime lending rate of First National Bank from time to time calculated from 20 June 2007 to date of payment.
6. Costs of suit on the scale as between attorney and own client inclusive of collection fees at the rate of 10% on all sums recovered from the Defendants.
7. The Plaintiff is given leave, in the event of non-payment of the aforesaid sums by Third, Fourth and Fifth Defendants, to approach this Court on the same papers suitably amended, if necessary, for orders in terms of prayers 3 and 4 of the Particulars of Claim.

E REVELAS
Judge of the High Court