FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, PORT ELIZABETH JUDGMENT

ECJ:

PARTIES**:** **STANDARD BANK OF SA LIMTED**

AND

AUTO PRESS CC +1

- Registrar: **1093/2010**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABETH**

DATE HEARD: **25/05/10**

DATE DELIVERED: **17/06/10**

JUDGE(S): **GROGAN AJ**

LEGAL REPRESENTATIVES –

Appearances:

for the Plaintiff(s): **ADV: Zietzman**

for the Defendant(s): **ADV: Mullins**

Instructing attorneys:

- for the Plaintiff(s): **PAGDENS STULTINGS ATTORNEYS**

for the Defendant(s): **RICHARD LAWRANCE ATTORNEYS**

CASE INFORMATION -

1. *Nature of proceedings*: **SUMMARY JUDGMENT**

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO.: 1093/2010

In the matter between:

STANDARD BANK OF SA LIMITED **Plaintiff**

and

AUTO PRESS CC **First Defendant**

DARELL ALBUTT **Second Defendant**

JUDGMENT

GROGAN AJ:

[1] This is an opposed application for summary judgment. The plaintiff seeks payment on two claims. The first (Claim 1) is in the amount of R301 978.55 plus interest of 11% per annum calculated daily and compounded monthly in arrears from 24 December 2009 to date of payment. The second (Claim 2) is for payment of R161 890.82 plus interest calculated on the same basis and for the same period.

[2] According to the particulars of claim, Claim 1 arises from an alleged breach by the defendants of a “Business Revolving Credit Plan Agreement” (the credit agreement) in terms of which credit to the maximum of R480 000.00 would be extended to the first defendant’s predecessor in title, with interest calculated at 1, 25% above the prime rate, provided that the first defendant paid a monthly amount of R13 714.00 plus interest set at the applicable rate. The credit agreement also provides that in the event of default by the client, the applicant may recover all amounts owing under the agreement. That the first defendant assumed all rights and obligations under the agreement when it converted from a limited liability company to a close corporation is not in dispute. Nor is the second defendant’s liability as surety and co-principal debtor in solidum with the first defendant. The plaintiff claims that the first defendant breached its obligations under the credit agreement by failing to pay the stipulated monthly payments, by notifying the plaintiff that it was not able to do so, and by making an offer of compromise.

[3] In respect of the overdraft facility (Claim 2), the alleged breach consists of the first defendant’s failure to pay the required monthly instalments, and that the first defendant informed the plaintiff that it was unable to meet its monthly commitments and made an offer of compromise.

[4] The claims against the second defendant are based on a deed of suretyship in favour of the plaintiff in terms of which he bound himself as surety and co-

principal debtor *in solidum* with the first defendant in respect of its liability to the plaintiff.

[5] The documents filed by the plaintiff indicate that the facts on which these claims are based are on the face of it well founded.

[6] The second defendant opposes the application in his personal capacity as well as in his capacity as sole member of the first defendant. The second defendant claims that he has a *bona fide* defence and also raises a special plea. This is that the deponent to the affidavit used in the summary judgment application did not have personal knowledge of the facts to which she deposed. This averment is based solely on the fact that the deponent is based in Cape Town, while all the defendants' "dealings" with the plaintiff have been in Port Elizabeth. This objection is without merit. The deponent to the affidavit filed on behalf of the plaintiff is the manager of the plaintiff's Customer Debt Management Department. Her affidavit does no more than verify the cause of action and the defendants' indebtedness to the plaintiff in the amounts set out in the particulars of claim. The deponent also certified the "certificate of balance" relating to the credit plan. The affidavit suffices for purpose of an application for summary judgment. The mere fact that a bank official is located in a particular city is an insufficient reason in itself to warrant the inference that she does not have personal knowledge of affairs in other branches or regions. The defendants' special plea accordingly falls to be dismissed.

[7] Insofar as it may be relevant, I also reject the submission that the Court should have no regard to the letters confirming the defendants' acknowledgment of its inability to meet its obligations and the so-called offer of compromise, which are annexed to the summons. There is no indication in either of these letters that they are intended to be regarded as having been made on a "without prejudice" basis. The defendants simply used the services of an attorney to communicate a request to the bank that his client be treated with leniency because of the difficulties it was experiencing. This was well before litigation was contemplated. It follows that this point also falls to be dismissed.

[8] On the merits, the second defendant claims in respect of Claim 1 that the plaintiff was not entitled to call in the balance owing on the credit agreement because it was not in breach thereof. He avers in this regard that the amount the plaintiff claims is owing is well below the credit limit of R480 000.00 and that the monthly instalments are not fixed at R13 714.00, as the respondent claims, but are variable. This, says the second defendant, means that the monthly amount the first defendant is bound to pay could vary from month to month. If, so the submission goes, the plaintiff's argument is taken to its logical conclusion, the defendant would have to pay R13 714.00 per month even if only R1.00 was outstanding on the loan. The second defendant contends on this basis that it was not in breach of the agreement.

[9] The difficulty with this argument is that it is entirely hypothetical. The second defendant does not deny in terms that the defendants are indebted to the plaintiff for a significant amount. Nor, in the face of the provision in the credit agreement that a certificate issued by the bank shall be conclusive proof of the amount owing, can it do so. A condition of the credit plan is that a minimum monthly instalment of R13 714.00 is payable, ***and*** that interest calculated on a daily balance on the outstanding balance will be charged at

1, 25% above the prime interest rate. In any event, this argument is inconsistent with the tender made on the defendants' behalf by their attorney in October 2009. That makes it clear that the first defendant was experiencing financial difficulties which made it impossible for it to meet its obligations and that the second defendant was "desirous of making ***full*** payment of his indebtedness to yourselves" (my emphasis). Furthermore, the "letter of grant" preceding the credit agreement clearly provides for the amounts payable monthly, and records an agreement that the defendants would increase the ***minimum*** monthly instalment to R20 000.00. The agreement itself grants the plaintiff the right to convert the plan to a loan facility payable on demand and provides that the agreement is terminable by notice.

[10] With regard to Claim 2, the second defendant avers that the amount owing is below the credit limit of R161 890.82. He contends that since the credit limit is R200 000.00, the defence to Claim 1 is equally applicable. I deal with this defence below.

[11] The defendants also contend that they did not receive reasonable prior notice of cancellation of the respective agreements. The short answer to this submission is that the credit plan expressly provides that it may at any time be converted into a loan payable on demand in the event of the client *inter alia* failing to pay any instalment due in terms of the agreement. The standard overdraft facility expressly states that the bank may demand payment "at any time", and that a certificate signed by the manager containing details of the amount, including interest, shall be sufficient proof of the amount owed.

[12] The precise date on which the plaintiff made its demand does not appear from the papers. However, it seems clear that the defendants have known of the demand since at the very latest January 2010. Since then, the plaintiff has instituted action twice. On the first occasion, the plaintiff withdrew the action and tendered the defendants' costs. Mr *Mullins*, who appeared for the defendants, contends that this was done because the defendants disclosed a *bona fide* defence. That submission begs the question before this Court. I merely observe that in the first application the defendants raised two points *in limine*, one of which is dealt with above and has since been abandoned. For all I know, this may have been the reason why the plaintiff decided to withdraw the first action and to reconsider its options. But I need not speculate in that regard. The question remains whether the defendants have now proved that they have a *bona fide* defence.

[13] Ms *Zietzman*, who appears for the plaintiff, contends that the bank is entitled to payment of the amounts claimed because the defendants' indebtedness arose at the moment the plaintiff decided to call in the credit loan and the overdraft. The question raised by this submission is whether an overdraft or loan extended by a bank is payable on demand. There may well be circumstances in which banks and their clients conclude agreements in which the calling in of loans and overdrafts is qualified by special conditions. This is not such a case—the standard overdraft conditions specifically state that the plaintiff may "demand payments of all amounts owing to you at any time". The credit agreement, which is also essentially an overdraft facility, similarly gives the bank "the right, without prejudice to any other rights or remedies available to us, to terminate the Business Revolving Credit Plan facility and claim immediate payment of the outstanding balance by giving written notice". While the credit agreement does not specify the form or period of the notice, it is clear that the defendants were at all material times fully aware that the plaintiff wished to call in the loan and the overdraft.

[14] The law on the rights of banks in respect of the withdrawal of overdraft facilities is set out in *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C), in which the court stated:

> "When the customer requests an overdraft he must be taken to know that the loan is repayable on demand and that if he wishes to repay the loan at a later fixed date or only after receipt of notice of repayment from the bank, he must conclude the necessary agreement with the

bank to vary the common law [rule] that a loan without an agreed date of repayment is repayable on demand without specific notice."

[15] The defendants' defence amounts in essence to the claim that the bank acted capriciously and without valid legal grounds in making its demand. I have adverted above to the provisions of the respective agreements. In my judgment, those agreements did not alter the common law as set out above. The plaintiff was accordingly entitled to demand payment of the amounts as set out in the plaintiff's current claims when and in the manner it did. It has done so. To the extent that the defendants contend that the plaintiff acted unreasonably in so doing, the following remarks by the High Court of Namibia in the unreported judgment in *Standard Bank Namibia Limited v Klazen* (case no. (P) I 2180/2008, dated 23 February 2009, to which Ms *Zietzman* drew this Court's attention), is apposite:

"It goes without saying that one of the obligations of the borrower is to repay the money lent to him by the bank. Should the customer of the bank fail to repay the overdraft or exceed the limit the bank has the right to demand payment. In my view it would be unrealistic, if not absurd, to expect the bank to enter into negotiations and agree with the customer whether the bank should sue the customer for the money owed and if no such agreement were reached the bank would be held to be acting unfair or unreasonable [*sic*] if it proceeded to sue for the repayment of its money.... The applicant did not need an agreement or consensus or permission from the respondent before it could sue for the money admittedly owed by the respondent."

[16] The defendants have done no more than dispute the amount the plaintiff alleges is due and payable, without venturing to suggest how much they claim is due. The credit agreement expressly states that a certificate signed by a manager is sufficient proof or the amount due at any time, unless the contrary is proved. The plaintiff has issued a certificate setting out the amounts due. The defendants have not proved the contrary. In respect of the amount owing in respect of Claim 2, the common law requires the defendants to provide some basis for their challenge to the claimed amount. There is none.

[17] I accordingly conclude that the defendants have failed to prove a *bona fide* defence.

[18] As to costs, both agreements provide that the client will pay costs of recovery of amounts owing on the scale as between attorney and client. I see no reason why the defendants should not be held to those terms.

[19] The following order is accordingly issued:

2. Summary judgment is granted against the defendants in the sum of R463 869.37, with interest at the rate of 11% per annum calculated daily and charged monthly in arrears from 24 December 2009 to date of payment.

3. The first and/or second defendants shall jointly and severally pay the plaintiff's costs on an attorney and client scale, the one paying, the other to be absolved.

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J G GROGAN

ACTING JUDGE OF THE HIGH COURT