

IN THE HIGH COURT OF SOUTH AFRICA /ES
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 10336/05

DATE: 7/6/2006

NOT REPORTABLE

IN THE MATTER BETWEEN:

CHANGING TIDES 17 (PTY) LTD

PLAINTIFF

AND

VIA IMPORTS AND EXPORT CC

1ST DEFENDANT

ROBERT WALTER THORNTON

2ND DEFENDANT

JUDGMENT

JOOSTE, AJ

[1] This is an application for summary judgment. The plaintiff's claim against the defendants is for payment of the sum of R453 676,74 plus interest thereon at the rate of 12,6% per annum from 21 February 2005 to date of payment, an order declaring the mortgaged property situated at Erf 198, Kensington B Township to be specially executable and costs of suit on an attorney and own client scale. The first defendant is the principal debtor and the second defendant a surety. It is the plaintiff's case that the first defendant breached the loan agreements, annexures

"B1", "B2" and "C1" and "C2" to the plaintiff's particulars of claim by failing and/or neglecting to pay monthly instalments due to the plaintiff in terms thereof.

[2] Of note, at the outset, is the fact that the second defendant in his personal capacity as well as representing the first defendant elected not to swear positively to the fact that the defendants have a *bona fide* defence to the plaintiff's claim. Where the merits are dealt with in the affidavit resisting summary judgment the following is *inter alia* stated by the deponent:

"11.1 The certificate of balance is incorrect in that SA Home Loans have charged interest on the re-advanced bond fees, as well as valuation fees, which has been incorporated into the normal account statement.

...

11.4 According to paragraph 17 of the loan agreement between plaintiff and defendants, are [*sic*] plaintiff only entitled to debit any legal fees to the home loan account upon request or demand; no such request, or demand has ever been received; nor has a court order against defendants been granted to pay any such legal fees. Such debits are also contrary to the Usury Act, 1968.

...

12. Defendants further wish to place on record that plaintiff *alternatively* SA Home Loans has on various occasions frustrated the defendants in denying defendants the opportunity to settle the

full outstanding debt, as far back as February 2005, as more fully described hereunder: ..."

From the above it is clear that the defendants admit not only the loan agreement but also the full outstanding debt. They in fact rely on the loan agreement. Of further importance is that the defendants do not dispute that the first defendant fell in arrears with the monthly bond instalments, thereby entitling the plaintiff to cancel the loan agreement and claim the relief that forms the subject of the plaintiff's claim. Instead the defendants endeavour to avoid summary judgment being granted by raising a number of points of a purely technical nature.

- [3] It is well known that the overriding consideration where technical irregularities are raised in summary judgment proceedings is whether or not the purported irregularities result in a defendant being prejudiced in defending the proceedings. If the formalities complained of are of a cosmetic nature the points raised in that regard by a defendant will not generally avail him.

Of specific relevance is what is stated in *Standard Bank of South Africa Ltd v Roestof* 2004 2 SA 492 (WLD) at 496G-H, namely:

"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

summary judgment makes it clear beyond doubt that he knows and appreciate the plaintiff's case against him."

[4] The first point *in limine* raised by the defendants is that the plaintiff has no *locus standi*. This argument is based thereon that from the heading of the combined summons it appears that the plaintiff is cited as "Changing Tides 17 (Pty) Ltd" whilst in paragraph 1.1 of the particulars of claim the plaintiff is cited as "The Plaintiff is Changing Tides 17 (Pty) Ltd, represented by Donald Andrew Guthrie, a private company with limited liability duly registered in accordance with the Company Laws of the Republic of South Africa". On the basis of these citations, Mr Vermeulen, on behalf of the defendants, argues that the plaintiff has no *locus standi* in it is not stated that it acted in its official capacity and instituted the action *nomino officio*. This argument is without merit. In paragraph 1.2 of the particulars of claim it is stated that the plaintiff is "the trustee of the South African Home Loans Guarantee Trust" and in paragraph 1.3 of the particulars of claim it is specifically stated that the Master of the High Court has issued the letter of authority to the plaintiff (annexure "A1").

[5] The second point *in limine* is that the letters of authority issued by the Master do not comply with the provisions of section 6(4) of the Trust Property Control Act, Act 57 of 1998 ("the act"). Section 6(4) of the act provides as follows:

"If any authorisation is given in terms of this section to a trustee which is a corporation, such authorisation shall ... be given in the name of the

nominee of the corporation for whose actions as trustee the corporation is duly liable."

[6] In my view this point is semantic in nature as it is evident that the plaintiff, as corporate trustee, nominated Donald Andrew Guthrie to act as the natural person that represents it. The letter of authority is furthermore of the standard type issued by the Master of the High Court in accordance with the provisions of the act. The reason for the letter having to be issued is that corporated trustees perform their functions through natural persons acting on their behalf. In this regard the following is stated in *Honoré's South African Law of Trust*, 5th ed, by Cameron, De Waal and Wunsh at p209:

"Alternatively the corporation or universitas may itself be appointed trustee. The argument that since the statute imposes fiduciary duties on a trustee which only a natural person can perform, only such persons can hold office as trustee under the Trust Property Control Act has being decisively rejected. All companies act through their directors and officials, and duties imposed upon companies necessarily have to be performed by natural persons acting on their behalf. The courts have indeed in such cases made it a condition of the appointment that the corporation shall nominate an officer to administer the estate, shall accept liability for its nominees' acts and shall notify the Master of the name of the nominee, who must by letter addressed to the Master accept the appointment to administer the state on behalf of the corporation."

That the purpose of the provision is to enable the Master to liaise with a specific natural person when dealing with a corporate trustee was confirmed in *Nedequity Ltd and Another v NWN Properties Ltd and Others* 1998 2 SA 554 (T). Mr Vermeulen's effort to distinguish between the *Nedequity* decision and the case *in casu* on the basis of the facts being different, is in my view unconvincing and it is unnecessary to dwell on that argument. The fact that the letters of authority issued by the Master do not refer to Guthrie as the "nominee" is of no consequence and can in any event not constitute a defence to the defendants as it is for the benefit of the Master of the High Court.

- [7] The third point *in limine* is to the effect that the plaintiff's particulars of claim does not disclose a cause of action and is therefore excipiable. The basis for this contention is that the papers, annexed to the particulars of claim on which the plaintiff relies, refer to the "guarantee trust" and not to the "South African Home Loan Trust". This point lacks the substance and merit. The trust number of the South African Home Loans Guarantee Trust, being IT10713/00 is in fact reflected on all the annexures referred to by the defendants in paragraphs 6.1.1 to 6.1.5 of the affidavit resisting summary judgment. In my view it is evident from the particulars of claim that the reference to "guarantee trust" in the annexures simply constitutes an abbreviated form of the name of the trust in question. Furthermore the defendants are not prejudiced because it is clearly to their knowledge that in fact the same trust is referred to.

- [8] The next point *in limine* is to the effect that as Changing Tides 17 (Pty) Ltd appointed "The South African Home Loans (Pty) Ltd" as auditor of the "South African Home Loans Guarantee Trust", such an appointment is *ultra vires* having regard to section 6(4) of the act. This point is clearly without substance on the same basis as the third point *in limine, supra*.
- [9] The next point *in limine* is to the effect that as the certificate of balance was issued by SA Home Loans (Pty) Ltd as the appointed auditor, whilst it was in fact not appointed in that capacity that the certificate is of no value. This point is also without merit as it is founded upon the incorrect assumption that South African Home Loans (Pty) Ltd was not "legally" appointed as accounted by the South African Home Loans Guarantee Trust.
- [10] The last point *in limine* is that the affidavit in support of the application for summary judgment is not in order in so far as the deponent declares that "she is the litigation supervisor of the plaintiff" whereas the plaintiff is not cited in its official capacity. Therefore the deponent cannot state under oath that the facts are within her own personal knowledge and that she can swear positively thereto.
- [11] There is no merit in this argument on the same basis that the lack of *locus standi* point is rejected hereinbefore.

[12] So far as the defendants' effected payments after the plaintiff cancelled the loan agreement, and the certificate of balance was prepared, such payments are to be deducted from the plaintiff's claim *minus petitio* by the amount of R32 456,00. Also in so far as the plaintiff is not entitled in terms of the provisions of section 5 of the Usury Act 73 of 1968 to recover the legal costs reflected in paragraphs 11.3.1 to 11.3.4 of the affidavit resisting summary judgment these amounts also fall to be deducted from the claim, *minus petitio*.

[13] In the result I am satisfied that the defendants has failed to show that they have a *bona fide* defence to the plaintiff's claim and that the plaintiff is entitled to summary judgment in the reduced amount.

[14] As far as costs are concerned Mr Terblanche SC appeared with Mr Prinsloo for the plaintiff. Mr Terblanche argued that in view of the technical nature of the application and also as a mark of disapproval, costs of two counsel should be awarded to the plaintiff. Mr Vermeulen on the other hand argued that the matter is not of such complexity that it warranted the employment of two counsel. In my view and in regard to the technical points raised, *inter alia* regarding the *locus standi* of the plaintiff, it is clear that the application is of great importance to the plaintiff and that the employment of two counsel is warranted.

[15] Summary judgment is granted against the first and second defendants jointly and severally, the one paying the other to be absolved as follows:

- (i) payment of the amount of R408 846,08;
- (ii) interest on the amount of R408 846,08 at the rate of 12,6% per annum from 21 February 2005 to date of payment;
- (iii) an order declaring the undermentioned property to be specifically executable:

Erf 198 Kensington B Township, Registration Division IR, Province of Gauteng measuring 991 (nine hundred and ninety one) square metres, held by deed of transfer 36827/2001 also known as 12 Adderley Street Kensington B, Randburg, Gauteng;

- (iv) costs of suit on an attorney and own client scale such cost to include the employment of two counsel.

F J JOOSTE
ACTING JUDGE OF THE HIGH COURT

10336-2005

HEARD ON: 8/6/2005
FOR THE PLAINTIFF: ADV F H TERBLANCHE SC, ADV D PRINSLOO
INSTRUCTED BY: EDELSTEIN-BOSMAN INC, PRETORIA
FOR THE DEFENDANTS: ADV P J VERMEULEN
INSTRUCTED BY: LOUIS NEL INC, PRETORIA