

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

Case No: 5363/2008

Date: 23 July 2008

In the matter between:

ARTHUR EDWARD BLACK

Plaintiff

And

GABRIEL JOZUA SPIES

First Defendant

ROELOF VAN HEERDEN SPIES

Second Defendant

JUDGMENT

VILAKAZI AJ:

1. The Plaintiff seeks an order against the First and Second Defendant for:

¹¹Payment of the sum of R 1,500,000.00 (one million five hundred thousand rand);

¹²Interests at 15,5% per annum;

¹³Cost of suit.

2. First and Second Defendants oppose the relief sought by the Plaintiff.

BACKGROUND

3. On or about 6th April 2005 First Defendant duly represented by Second Defendant signed an acknowledgement of a debt in favour of the Plaintiff. On

the same date First and Second Defendants bound themselves as Sureties and Co-principal Debtors with the Plaintiff for the due performance by the First Defendant of its obligation to the Plaintiff. The acknowledgment of debt and surety are annexed to the Plaintiffs Particulars of Claim marked Annexure "A". It appears further that a general notarial mortgage bond with number BN05/77773 was registered for purpose of perfecting the Plaintiff's security.

4.Clause 7.4 of the acknowledgment of debt makes provision for the acceleration of payment of the whole debt if the debtor fails to satisfy any judgment granted against it within 3 days.

5.On the 9th October 2007, the Plaintiff obtained judgment/order under case No 46130/2007 allegedly for the sum of R6,000,000.00. It is alleged that First Defendant failed to pay this amount as envisaged by Clause 7.4 of the acknowledgment of debt. Consequently the Plaintiff instituted this action against both First and Second Defendants.

6.The Plaintiffs case is therefore that the Defendants are in breach of Clause 7.4 of the Acknowledgment of Debt in that they have failed to satisfy the judgment of the 9th October 2007. Hence the whole debt has become due and payable.

7.In terms of the Acknowledgment of Debt the capital plus interests was payable on or before the 30th April 2010.

8.In resisting the summary judgment application, First and Second Defendants aver that they have a *bona fide* defence to the Plaintiffs claim in that they are not in breach of the acknowledgment of debt as alleged by the Plaintiff; that they have not failed to satisfy a judgment granted against them, the capital and interests are therefore not immediately payable. Furthermore they aver and argue that the judgment of the 9th October 2007 upon which the Plaintiff relies for the breach of the acknowledgment of debt is not a judgment as envisaged in Clause 7.4 thereof.

ISSUES

9. The issue to be determined is whether in light of the facts before this court the Plaintiff is entitled to the payment in terms of his particulars claims. Put differently, whether the Defendants are in breach of Clause 7.4 of the Acknowledgment of Debt as alleged by the Plaintiff

ANALYSIS

[10.](#)It is common cause between the parties that First and Second Defendants signed an Acknowledgment of Debt in favour of the Plaintiff and bound themselves as sureties and Co-principal Debtors to the Plaintiff.

11. In answering the issue, the Court is bound to read and interpret the Acknowledgment of Debt, Annexure "A" in particular Clause 7.4 thereof in conjunction with the judgment/order of the 9th October 2007. The salient Clause in the Acknowledgment of Debt is the Clause 7 which reads:

"7. BREACH

Should any one payment not be made on due date or should the debtor breaches any other term of this agreement, the whole amount owing by the debtor hereunder shall become immediately due and payable. Furthermore, the debtor agrees that the whole amount owing to the creditor shall become immediately due and payable in any of the following circumstances.

7.1.....

7 2

73....

74Should the debtor fail to satisfy any judgment against him within three days;"

12. It is clear that Clause 7 was incorporated into the Acknowledgment of Debt to protect the Plaintiff, as envisaged in the General Notarial Mortgage Bond in the situations falling under Clause 7.4 or any of the instances referred to there under. Unless any one of these instances is committed by the Defendants,

the Plaintiff cannot rely on the provisions of this Clause and the Acknowledgment of Debt will have to take its course.

13. In *casu* the Plaintiff relies on paragraphs 5, 6 and 7 of his Particulars of Claim which read:

5.

On or about 9 October 2007 judgment was granted against the debtor in favour of PICK AND PAY RETAILERS (PTY) LTD in the above honourable Court under case number 46130/2007 and specifically in the amount of R6 000 000,00 (six million rand).

6.

The debtor has failed to satisfy the judgment within three days as contemplated in the acknowledgment of debt.

7.

In the premises the indebted capital sum of R1 500 000,00 (one million five hundred thousand rand) has become immediately due and payable to Plaintiff."

14. Having examined Clause 7 of the Acknowledgment of Debt, I now turn to consider whether the judgment/order on which Plaintiff relies for the relief sought supports the Particulars of Claims as set out in paragraphs 5, 6 and 7. I pause to refer to the judgment/order of the Honourable Justice Mynhardt delivered under case number 46130/2007 on 9th October 2007. The judgment/order reads:

"IT IS ORDERED:

1. THAT the applicant through the sheriff of this Honourable Court be authorised and empowered for the purpose of perfecting its security in terms of the general notarial mortgage bond with number BN05/77773 to:

1.1 enter in and upon the premises of the respondent or any other place where any of its assets are situated, and to take possession of the respondent's assets to a

maximum value of R6 million rand;

1.2 Lock and change the locks on the respondent's premises;

1.3 Grant the respondent the rights as is contemplated in clause 6.1 to 6.1.11 of the notarial general mortgage bond with number 05/77773;

2. THAT the respondent is to pay the costs of this application on the attorney and client scale."

15. What is envisaged by Clause 7.4 of the Acknowledgment of Debt read in conjunction of paragraph 6 of the Plaintiffs particulars of claim is that a competent court must have given judgment with which First and Second Defendants were obliged to comply within three days of the said judgment or which places First and Second Defendants under an obligation to act in a particular manner failing which the provisions of Clause 7.4 will not be accelerated unless a judgment sounding in money granted in his favour has not been complied with by First and Second Defendants within the three days.

16. On closer scrutiny the judgment/order of the 9th October 2007 cannot be said to be a judgment sounding in money necessary to put the First and Second Defendants on the threshold of Clause 7.4. As it stands, "the judgment" perfects the security Plaintiff is holding in terms of the general notarial mortgage bond which authorises and empowers the sheriff of the court in the perfection of the Plaintiffs security to attach and seize any of the assets of the First Defendant to the value of R6 million and to deal with it as provided for in the rest of the judgment. A perfection order fulfils the purpose it was intended to achieve and without any accompanying order sounding in money. In my view the provisions of Clause 7.4 have not been triggered.

17. The Plaintiff has shot itself in the foot and cannot be heard to have his cake and eat it. I am inclined to agree with the Defendants that an order perfecting a notarial bond casts no obligation on the Defendants to perform; therefore does not constitute a judgment within the plain and ordinary meaning of Clause 7.4 of the Acknowledgment of Debt. The condition required to accelerate the relevant clause has not taken place and the Defendants are therefore not in breach of the lease agreement. Plaintiffs action is

accordingly premature.

18. Having considered all the facts in this matter, I am not satisfied that the Plaintiff has made out a case for the relief sought.

I therefore propose to make the following order:

- ¹.Summary judgment is refused;**
- ².First and Second Defendants are granted leave to defend the action ;**
- ³.Costs are caused in the cause.**

T.J. VILAKAZI AJ