IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 19449/11
REPORTABLE

In the matter between:

INVESTEC BANK LTD Plaintiff/Applicant

and

ANDRE BRUYNS Defendant/Respondent

Court: ROGERS AJ

Heard: 10 November 2011

Delivered: 14 November 2011

COUNSEL FOR PLAINTIFF/APPLICANT:	Adv B Manca SC N Badenhorst
INSTRUCTED BY:	Edward Nathan Sonnenbergs (L Field)
COUNSEL FOR DEFENDANT/RESPONDENT:	Adv F Sievers
INSTRUCTED BY:	Hilgard Bell Attorneys (H Bell) C/o Werksmans Attorneys (R Feenstra)

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JUDGMENT

ROGERS AJ

Introduction

1. The plaintiff asks for summary judgment against the defendant on various claims. The first claim, in the amount of R1 115 933,44, is for money lent to the

defendant on his personal bank account. The other claims, which total R11 811 721,86, are based on suretyships the defendant executed in the plaintiff's favour for the debts of Golf Development International Holdings (Pty) Ltd ("GDI") and Winners-Circle 111 (Pty) Ltd ("WC"). Both GDI and WC are in liquidation.

2. The defendant delivered an opposing affidavit and was represented at the hearing by Mr Sievers. Mr Manca SC appeared for the plaintiff together with Ms Badenhorst.

Claim against defendant as principal debtor

3. In regard to the claim for R1 115 933,44, the defendant denies being indebted to the plaintiff in this amount or at all. In explanation of this denial he says that in June and October 2006 he bought two erven in the Pinnacle Point development in Mossel Bay from Pinnacle Point Resorts (Pty) Ltd ("PPR"). He settled the purchase price under these agreements (R3 072 870 in all) and was thus *"the owner"* of the erven and *"entitled to the transfer thereof"* into his name.

4. He continues by alleging that the plaintiff has *"taken possession"* of the erven *"and purports to hold them as security for debts of* [PPR] *to it"*. The plaintiff, so he alleges, is thus *"holding"* his two erven for which he paid R3 072 870 and he accordingly has a claim against the plaintiff exceeding the plaintiff's claim against him (R1 115 933,44).

5. It is apparent that the defendant's denial of an indebtedness to the plaintiff is not strictly accurate. He has not alleged facts to show that the plaintiff does not have a claim against him for R1 115 933,44. His defence is that he has an unrelated counterclaim exceeding this figure. This is a permissible answer in a claim for summary judgment. The general approach in such cases is set out in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004

(6) 29 (SCA). As pointed out in this case, the starting point in terms of rule 32(30(b) is that the defendant must make full disclosure of the nature and the grounds of the counterclaim as well as the material facts on which it rests (para 10).

6. Manifestly the defendant has not met this requirement. He has not explained how he could be the owner of the erven if he still needs to obtain transfer of them into his name. Mr Sievers submitted that under our system of ownership it is possible for a person to be the owner of immovable property without having registration in his name (for example where ownership is acquired through acquisitive prescription). That is so but none of the unusual circumstances in which this may occur have been alleged in this case. On the facts alleged by the defendant, one is simply dealing with the case of a purchaser who has met his obligations in full but has not yet taken transfer of the property.

7. The defendant has, furthermore, not explained how any actions by the plaintiff could have prevented him in law from obtaining transfer in circumstances where he has allegedly fulfilled all his obligations as purchaser. He does not say when and in what way the plaintiff has supposedly taken possession of the erven or what the nature of the security is that the plaintiff asserts. He does not even allege that the plaintiff's actions in relation to the erven have been unlawful. If the plaintiff's actions have been lawful the defendant naturally can have no claim against the plaintiff (though he may have a claim against PPR); if the plaintiff's actions on the other hand have been unlawful it is not apparent how the unlawful actions could be a bar to the defendant obtaining transfer of the erven and if necessary evicting the plaintiff. After all, the agreements were concluded in 2006. The defendant has had ample time to assert and pursue his rights. He does not explain what has happened in the six years since then or why he is only asserting the counterclaim at this stage.

8. Finally, the defendant has not explained how, if he is in fact the owner of the erven with a right to obtain transfer, the plaintiff's actions could have caused

him to suffer damages or how these damages have been calculated. The fact that he paid more than R3 million for the erven is neither here nor there because on his version he is the owner of the erven and/or has a right to take transfer of the erven.

9. Despite the defendant's failure to comply with rule 32(3)(b) in regard to his asserted counterclaim I have an overriding discretion to refuse summary judgment. However, and as stated in *Soil Fumigation*, the fact that the defence is a counterclaim is a relevant consideration in exercising this discretion. This is so for the reason that the grant of summary judgment does not prevent the defendant from instituting the counterclaim in a separate action. The court would thus be less inclined in such a case to exercise the overriding discretion in the defendant's favour (see para 11 read with para 25 of the *Soil Fumigation* case[1]). Mr Sievers did not argue that I should exercise an overriding discretion in the defendant's favour on this basis and in any event I see no grounds for doing so, given the extremely sketchy if not unintelligible basis of the asserted counterclaim.

Claims against defendant as surety

10. In regard to the very substantial claims against the defendant as surety for GDI and WC, the defendant's opposition rests on the fact that according to him applications have been issued to place GDI and WC under supervision and to commence business rescue proceedings in respect of them in terms of s 131(1) of the Companies Act 71 of 2008. Although GDI and WC are in liquidation it is permissible for a business rescue application to be made in respect of them, as is apparent from s 131(6).

11. The defendant's contention is that the institution of the business rescue application has caused business rescue proceedings in respect of the companies

[1] See also *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd & Others* 2010 (1) SA 634 (WCC) para 28.

to commence as contemplated in s 132(1)(b) of the Act. If this is so, the defendant submits that summary judgment against the defendant as surety should be refused because [a] s 133(2) prohibits claims against parties who have executed suretyships in favour of a company undergoing business rescue proceedings [b] the defendant as surety can claim the benefit of the moratorium afforded to the companies (the principal debtors) by s 133(1) [c] that the amount of the principal debt is rendered uncertain by the fact that it may be compromised in terms of an approved business rescue plan as contemplated in s 150(2)(b)(ii) read with s 154(1).

12. There was an intricate debate before me as to whether business rescue proceedings in respect of the two companies have already commenced or whether they will only commence if and when an order is made by the court. The parties were *ad idem* that the commencement date of business rescue proceedings in the present case fell to be determined with reference to s 132(1)(b) of the Act rather than s 132(1)(c).[2] On this basis, the date on which business rescue proceedings in respect of the two companies commences depends on what date is contemplated by the phrase *"[when]... an affected person applies to the court for an order..."* in s 132(1)(b). The answer to this question is not free from difficulty. It is an important one that will no doubt have to be decided in due course by our courts. When that question arises for decision it will also need to be considered whether – if business rescue proceedings are indeed found to commence at the date of the launching of the application – the said result ensues forthwith on the launching of the application or only retrospectively after the making of a court order. In the present case, and for reasons that will become apparent, it is unnecessary for me to decide these questions. I am willing to assume in the defendant's favour that business rescue

[2] The reason for this is that any business rescue order which a court may in the future make in respect of the two companies would not be an order made under s 131(7) but an order made under the provisions of ss 131(1) to (6). Section 131(7) is a provision which applies where an affected person has not made a business rescue application under s 131(1) but the court nevertheless considers, in the course of liquidation proceedings or in the course of proceedings to enforce any security against a company, that it would be appropriate to make a business rescue order.

proceedings in respect of GDI and WC have indeed commenced as contemplated in s 132(1)(b).

13. On the basis of this assumption I now proceed to consider the three contentions summarised in [a], [b] and [c] in paragraph 11 above. I preface my consideration of the defendant's contentions by noting that in terms of the deeds of suretyship the defendant undertook the liability of a co-principal debtor and renounced the benefit of excussion.

Section 133(2)

14. Section 133(2) of the Act reads thus:

> *"During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances."*

15. In its plain meaning this section refers to a suretyship furnished by the company to a creditor on behalf of a principal debtor. Mr Sievers argued that to give s 133(2) its plain meaning would render the sub-section tortologous, because s 133(1) already provides for a moratorium in respect of claims against the company, and a claim against a company in its capacity as a surety is simply one instance of the claims that would in any event fall within s 133(1). He thus contended that s 133(2) should be construed as providing that during business rescue proceedings a suretyship given by a person (A) in favour of another (B) for the indebtedness of the company may not be enforced by B against A without the court's leave.

16. While there is a presumption against tortology it is by no means an uncommon phenomenon in legislation (see, for example, *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984 (1) SA 672 (A) at 678C-F). I do not see scope for the presumption here. Section 133(2) is so explicit that it is impossible to avoid its plain meaning. It refers to a surety (ie a contract of

suretyship) *"by the company"* and to its enforcement by another person *"against the company"*. In any event, there is in truth no tortology. Section 133(1) is a general provision and affords the company protection against legal action on claims in general except *inter alia* with the written consent of the business rescue practitioner or (presumably failing such consent) with the leave of the court. Section 133(2) is a special provision dealing specifically with the enforcement of claims against the company based on guarantees and suretyships, and stipulates that in such cases the claims against the company may be enforced only with the leave of the court. The business rescue practitioner is not empowered to consent to the enforcement against the company of claims based on guarantees and suretyships. Section 133(2), as the special provision, would apply to the exclusion of s 133(1) insofar as claims based on guarantees and suretyships are concerned.

The section 133(1) moratorium in respect of the principal debtor

17. The question whether the defendant as surety can raise as a defence the statutory moratorium in favour of GDI and WC (ie the moratorium in terms of s 133(1) which precludes the plaintiff from enforcing the claims in question against GDI and WC as principal debtors) depends on the well-known distinction between defences *in rem* and defences *in personam* (LAWSA First Re-issue Vol 26 para 201) *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd & Another* 1984 (2) SA 693 (C)). A defence which is purely personal to the principal debtor may not be raised by the surety. Examples of defences which are purely personal to the principal debtor include restrictions on the enforcement of claims against parties under sequestration or liquidation (see the *SA Fire Equipment* case at 695F-696F).[3] In *Worthington v Wilson* 1918 TPD 104 the court held that where the principal debtor had the benefit of a statutory moratorium in favour of soldiers on active service the moratorium was a defence *in personam* which did

[3] See also *Standard Bank of South Africa Ltd v Bonugli & Another* [2011] ZAWCHC 115 para 24.

not prevail the surety.[4] The judgment of Gregorowski J in *Worthington* contains a discussion of the old authorities, including the procedure which obtained in Holland whereby a distressed debtor could obtain from the court a moratorium on the enforcement of claims by way of letters of inductie or atterminatie. Voet and Van Leeuwen were agreed that in such a case a surety for the distressed debtor could not resist the creditor's claim on the basis of the moratorium granted to the principal debtor.

18. In my view the statutory moratorium in favour of a company that is undergoing business rescue proceedings is a defence *in personam*. It is a personal privilege or benefit in favour of the company. As was stated in the *SA Fire* case (at 310E-F) the essence of a defence *in rem* is that the defence attaches to the claim itself in the sense that the defence (if upheld) shows that the claim against the principal debtor is invalid or has been extinguished or discharged. A defence *in personam*, by contrast, arises from a personal immunity of the debtor in respect of an otherwise valid and existing obligation. Clearly the moratorium afforded by s 133(1) falls into the latter class. The obligations of the company as principal debtor are not extinguished nor discharged and their validity is in no way impaired. Indeed, with the consent of the business rescue practitioner or the court the obligations may be enforced.[5]

19. I thus conclude that the statutory moratorium in favour of GDI and WC does not avail the defendant.

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[4] See also *Bank of the Orange Free State v Cloete* 1985 (2) SA 859 (E) at 862D-863J.

[5] The distinction between defences *in rem* and *in personam* may not always provide the answer, as appears from *Cape Produce Co (Port Elizabeth) (Pty) Ltd v Dal Maso NO & Another* 2002 (3) SA 752 (SCA) paras 4-6 but it seems to me that in the present case the distinction is applicable and decisive. This is not a case like *Cape Produce* where the claim against the principal debtor became temporarily unenforeable through a consensual act of the creditor by way or a subordination agreement though arguably even there the defence (which eventually failed for other reasons) could be regarded as having been *in rem* because it concerned an alteration in the character of the principal obligation, rendering its enforcement (by a consensual act of the creditor) subject to the fulfilment of a condition (cf *Worthington v Wilson supra* at 106 *per* Mason J who emphasised the distinction between alterations with the consent of the creditor and personal immunity arising *aliunde*).

Potential compromise of principal debt

20. A business rescue plan may provide for the company to be released in whole or in part from its debts (s 150(2)(b)(ii)). If the business rescue practitioner puts forward a plan with such a feature and if the plan is approved by the requisite 75% majority in terms of s 152 and if the plan is then implemented in accordance with its terms and conditions, an affected creditor may in terms of s 154(1) lose the right to enforce his claim (whether in whole or in part). I am prepared to assume in the defendant's favour (without so deciding) that if all of these events were to occur a surety for the company would not be liable to the creditor for more than so much of the claim as survives the implementation of the business rescue plan.

21. However, at this stage it is pure conjecture whether any of these events will occur. Indeed, one does not even know whether an order placing GDI and WC under business rescue will be granted, and without such an order none of the further conditions which may result in the compromising of claims by way of a business rescue plan have any prospect of occurring. The defendant has not alleged facts to show that the granting of a business rescue order is likely. He has also not alleged facts to show that if a business rescue order is granted it is reasonably likely that a plan involving a reduction of the plaintiff's claims against GDI and WC will be proposed or approved. If the plaintiff is the largest creditor of these companies (and on the papers the plaintiff's claim against them is at least as large as the plaintiff's claims against the defendant as surety), it does not seem probable that the plaintiff would agree to any plan that would jeopardise its claim against the defendant.

22. But even if the defendant had alleged facts from which one could infer that it was at least a reasonable possibility that the companies would be placed under business rescue proceedings and that a plan involving a reduction of the plaintiff's claims against them would be approved and implemented, this would still not disclose a defence. At this stage the plaintiff's claims against GDI and

WC are unimpaired. Whenever a creditor sues a surety there is a possibility that at some stage in the future that creditor may compromise with the principal debtor or for that matter that the principal debtor may even discharge the debt by payment. These possibilities, whether likely or unlikely, do not permit the surety to ward off enforcement if at the time he is sued the principal debt is in existence. If the creditor takes judgment against the surety and the principal debt is later reduced or discharged before execution is levied against the surety, the latter could claim the benefit of the discharge or reduction. If the creditor were to recover from the surety in full, the right to consider a compromise against the principal debtor would pass to the surety because the creditor would fall out of the picture and the surety would take the creditor's place by virtue of his right of recourse against the principal debtor.

23. Mr Sievers argued that it would disturb the intended functioning of business rescue proceedings if midway through such proceedings the original creditor were to fall out of the picture and be replaced by a surety under the latter's right of recourse. Even if this were so, I do not see how it could affect the position. If the lawmaker had intended to prohibit creditors from enforcing their claims against sureties of companies undergoing business rescue proceedings it would have said so. Such a prohibition would be a drastic interference with the rights of creditors and would require clear language. Here there is no language at all on which to rest the supposed prohibition.

24. In any event I do not see why the enforcement of claims against sureties should disturb business rescue proceedings. The company undergoing business rescue proceedings would face either the original creditor or the surety as its creditor, depending on whether or not the surety had discharged his obligations to the original creditor. If anything, it might be better from the company's perspective that its creditor should be the surety under his right of recourse rather than the original creditor. This is so for the reason that the original creditor might be disinclined to support a compromise of his claim against the company if it would

jeopardise his claim against the surety. On the other hand, if the surety has discharged his obligations to the original creditor his only recourse is against the company itself and he would thus be inclined to look more favourably on a compromise that would yield a better dividend for him than in liquidation.

Conclusion

25. These reasons are sufficient for the conclusion that the plaintiff is entitled to summary judgment. I merely add that the terms of the suretships themselves, to which the parties did not refer in argument, suggest that the defendant can hardly complain of the outcome. Clauses 3.2, 6.2, 8.1 and 12 of the suretyships, which are in identical form, make plain that the plaintiff's rights against the defendant are unaffected by the insolvency, liquidation or judicial management of the principal debtors and that the plaintiff can give time to, release, discharge or compound or make any other arrangements with the companies without in any way prejudicing its rights against the defendant. (There is no reference in the suretyships to business rescue proceedings, since the suretyships were executed before the enactment of the 2008 Companies Act.)

26. The application for summary judgment is granted. The defendant is ordered to pay the plaintiff:

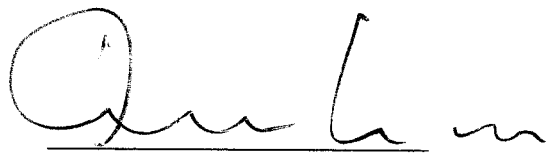
(a) R1 115 933,44 plus interest thereon at the plaintiff's prime interest rate minus 1% from 30 July 2011 to date of final payment, calculated daily and compounded monthly;

(b) R154 099,15 plus interest thereon at the plaintiff's prime interest rate minus 2% from 30 July 2011 to date of final payment, calculated daily and compounded monthly;

(c) R9 221 386,62 plus interest thereon at the plaintiff's prime interest rate plus 0.5% from 30 July 2011 to date of final payment, calculated daily and compounded monthly;

(d) R2 436 236,09 plus interest thereon at the plaintiff's prime interest rate minus 1% from 3 August 2011 to date of final payment, calculated daily and compounded monthly;

(e) The plaintiff's costs of suit.



ROGERS AJ

14 NOVEMBER 2011