

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/25244

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

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B.C. WANLESS

22 MAY 2023

In the matter between:

BUSINESS PARTNERS LIMITED

Plaintiff

and

FEDRIG KLEINER

Defendant

Neutral Citation: *Business Partners Limited v Fedrig Kleiner* (Case No: 2021/25244)
[2023] ZAGPJHC 533 (09 May 2023).

JUDGMENT

WANLESS AJ

Introduction

[1] In this matter Business Partners Limited ("*the Plaintiff*") seeks Summary Judgment against Fedrig Kleiner, an adult male ("*the Defendant*"), jointly and severally, together with any amounts recovered by the Plaintiff from the liquidation proceedings of K&K Italian Craft (Pty) Limited ("*the Principal Debtor*") as follows:-

- 1.1 Payment of the sum of R4 025 073,91, together with interest thereon at the rate of prime plus 4% (being 14.5% as at 25 December 2022) calculated daily and compounded monthly in arrears as aforesaid, calculated from 26 December 2022 to date of payment, both days inclusive.
 - 1.2 Cost of suit on the scale as between attorney and client.
 - 1.3 That the order be served on the liquidators of the principal debtor.
- [2] The legal nexus between the parties arose from a written agreement of loan ("*the loan agreement*") concluded between the Plaintiff and the Principal Debtor together with an addendum thereto. In terms of the loan agreement, R3 million was lent and advanced to the Principal Debtor by the Plaintiff.
 - [3] The indebtedness of the Principal Debtor was secured by registration of a mortgage bond over an immovable property ("*the property*") owned by the Principal Debtor. The relevance of same will become apparent later in this judgment. However, it is worthy to note at this stage that the Plaintiff does not seek an order that the property be declared specially executable.
 - [4] As further security for the amount advanced by the Plaintiff to the Principal Debtor the Defendant concluded a suretyship agreement in terms of which the Defendant bound himself as surety and co-principal debtor *in solidum* in favour of the Plaintiff for the indebtedness due by the Principal Debtor to the Plaintiff in an unlimited amount.
 - [5] The Plaintiff avers that the Principal Debtor has breached the terms of the loan agreement by failing to make payment of the monthly instalments due in terms thereof. Consequently, the full indebtedness in terms of the loan agreement is due and payable. It is common cause between the parties that the Principal Debtor has been wound-up.

Defences relied upon by the Defendant to avoid Summary Judgment

- [6] When the Defendant pleaded to the Plaintiff's Particulars of Claim and filed his Affidavit Resisting Summary Judgment, he raised a plethora of defences. This seems to have become the norm in Summary Judgment applications in this Court. Thankfully, at the hearing of this application, Mr Allis, the Defendant's attorney who appeared on behalf of the Defendant, advised this Court that the only defence to the Plaintiff's claim which the Defendant persisted with was that of prescription. In the premises, the parties confined their argument to that point only and this was the only defence of the Defendant which it was necessary for this Court to take into consideration when deciding whether to grant or refuse the Plaintiff's application for Summary Judgment.

- [7] The Defendant avers that the Principal Debtor made the last payment on the account in terms of which the loan agreement was conducted during 2017 and the summons was served during June 2021, more than three years later. Thus, the Defendant avers that the Plaintiff's claim in terms of the agreement has prescribed. In the affidavit in support of the Summary Judgment application the Plaintiff states that the last payment which was made into the relevant account was made on 8 June 2019. In support of this contention, a transaction history is attached to the said affidavit.
- [8] Mr Allis conceded (correctly) that the payment of a further amount towards the indebtedness constitutes an act equivalent to acknowledgement of indebtedness which will cause prescription to be interrupted and commence running afresh in terms of subsections 14(1) and 14(2) of the Prescription Act, 68 of 1969 ("*the Act*").
- [9] He also accepted the principle as enunciated in the matter of *Jans v Nedcor Bank Ltd*¹ that interruption of prescription in relation to a Principal Debtor resulted in interruption of prescription in relation to a Surety. Furthermore, it is clear from the Defendant's Plea that it is common cause between the parties that the amount advanced to the Principal Debtor in terms of the loan agreement was secured by way of a mortgage bond. Hence, the applicable prescription term which would apply is a 30-year period² and the indebtedness due to the Plaintiff by the Defendant would likewise not have prescribed.
- [10] Faced with these difficulties, Mr Allis was left with having to submit, from the Bar, that his instructions were that the payments made which interrupted prescription were not made by his client (the Defendant) and that it would be equitable if this Court refused Summary Judgment and allowed the liquidators of the Principal Debtor to deal with the property. Regrettably, this is not a *bona fide* defence to Summary Judgment, nor does it raise an issue for trial.
- [11] In light of the foregoing, it is clear that the application for Summary Judgment should be granted, with costs. At the hearing of the application, an updated Certificate of Balance was handed to this Court by Plaintiff's Counsel. There was (correctly) no objection thereto by Mr Allis. Summary Judgment will be granted in terms thereof.
- [12] It is important to note that the brevity of this judgment and the relative simplicity thereof does not align with the lapse of time between the hearing of the opposed application on this Court's Opposed Motion roll and the delivery thereof. The sole reason therefor is the onerous workload under which this Court has been placed which has prevented this Court from dealing herewith at an earlier stage.

¹ [2003] 2 All SA 11 (SCA).

² Subsection 11(a)(i) of the Act.

Order

[13] This Court makes the following order:

1. Summary Judgment is granted in favour of the Plaintiff against the Defendant, jointly and severally together with any amounts recovered by the Plaintiff from the liquidation proceedings of K&K Italian Craft (Pty) Limited, as follows:
 - 1.1 Payment of the sum of R4 025 073,91 together with interest thereon at the rate of prime plus 4% (being 14.5% as at 25 December 2022) calculated daily and compounded monthly in arrears as aforesaid, calculated from 26 December 2022 to date of payment, both days inclusive.
 - 1.2 Costs of suit on the scale as between attorney and client.
 - 1.3 This order shall be served on the liquidators of K&K Italian Craft (Pty) Limited.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 17 January 2023
Ex Tempore: 09 May 2023
Transcript: 22 May 2023

Appearances

For Plaintiff: CL Markram-Jooste
Instructed by: Strydom Britz Mohulatsi Attorneys.

For Defendant: IT Allis
Instructed by: Allis Attorneys