IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Civil Case No. 36/2004

In the matter between

STANDARD BANK SWAZILAND LTD	Plaintiff
Vs	
CARR CORP INVESTMENTS (PTY) LTD	
T/a CLEOPATRA'S and the NILE	1st Defendant
SHAYNE CARR	2nd Defendant
ISABEL CARR	3rd Defendant
Coram	JACOBUS P. ANNANDALE, ACJ
For Plaintiff	Mr. Motsa
For Defendants	Ms Nkambule

JUDGMENT

23 JUNE 2004

This is an opposed application for summary judgment.

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Standard Bank Swaziland Ltd (the Bank) sued the respondents jointly and severally in an action in respect of monies lent and advanced, said to be due and owing but unpaid. Two banking accounts are held by the first respondent (the company) with the Bank, in respect of both Cleopatra's and the Nile - each being an operative business account. The second and third respondents are sureties and co-principal debtors of the company.
The first claim of E70 014.68 relates to the "Nile" account and the second claim of E110 556.91 to the "Cleopatra's" account. Both claims include prayers for interest at 5% above prime rate a tempore morae and costs on the scale of attorney and own client including collection commission.

Following a notice to defend by the defendants, the Bank filed its declaration in which the information relevant to its claim is spelled out in detail. Briefly, the facts are said to be as follows:

On the 6th June 2003 the Bank and the first defendant, represented by Mrs. Carr, entered into a loan agreement of E250 000, repayable over 36

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months in instalments of E11 422.61. This loan attracted interest at prime plus 5%. The terms and conditions are incorrectly stated to be set out in annexure "A", whereas it is actually reflected in "B". The covering letter of the 6th June 2003 incorporates by reference form 39220, which in turn sets out the Bank's "General Terms and Conditions applicable to Term Loans".

Specifically, under clause 5 thereof, the Bank has the right to convert the loan to one repayable on "written demand'5, inter alia if the borrower defaults in the repayment on the due date of any amount due under the loan agreement or breaches any term or condition of the loan agreement.

The loan agreement itself further provides for conversion of the loan to one repayable on "written demand" if there is a material deterioration in the defendant's financial position, also if there are

insufficient funds for repayment in two consecutive months on the current account, when the loan may be called up and full payment demanded.

On the same date as the E250 000 loan, a further E40 000 was made available by the Bank as an overdraft facility of E40 000, essentially on the same conditions.

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The Deed of Suretyship annexed to the declaration is comprehensive with all the usual provisions. Specifically, the second and third defendants stand unlimited surety and co-principal debtors for debts of the first defendant company, with renunciation of the benefits of excussion and division, the authentica si qua mulier and senatusconsultum velleianum insofar as the (female) third defendant is concerned, notarially explained to her, and the further renouncements of all other benefits and legal exceptions that could or might be raised or pleaded by the surety in answer to any claim by the Bank under the suretyship. Also, clause 12.2.1 provides that the suretyship shall be fully enforceable against the surety regardless of any breach of contract on the part of the Bank or the Debtor. It is a moot point whether this clause is enforceable or not. For the reasons leading to the outcome of the matter it is not necessary to determine the validity of this clause.

Clause 19 provides that a certificate of balance as to the amount owing to the Bank by the debtor and/or surety, the fact that it is due and payable, the interest rate and date from which it is reckoned shall be binding on the surety and shall be prima facie proof of the facts stated therein.

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Such certificates were filed by consent at the hearing, verifying the claimed outstanding balances in each of the two trading accounts held by the company with the Bank.

Also annexed to the plaintiff's declaration are the aforementioned deeds of cession and hypothecation. The latter has it explicitly recorded that upon default of payments, the Bank may forthwith claim payment of all due amounts over and above the calling up of the hypothec. The amount is limited to E250 000 to cover the principal sum of indebtedness plus an additional sum of E62 500 to cover all further costs and expenses incidental to recovery of its money, including costs on attorney and own client scale and collection commission. The deed identifies the three defendants as the mortgager, with Mr. and Mrs. Carr as the duly authorised directors of the first defendant company.

The two deeds of cession records the cession of all rights, title and interest that the two directors have in their company, in favour of the Bank.

The first defendant company, which operated two current accounts held with the Bank, first defaulted in making payments at the end of August

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2003, some three months after receiving the credit facilities. The plaintiff claims that by the 1st January 2004 the non-payments amounted to El10 556.91 and E70 814.68, respectively with regard to the Cleopatra's and Nile accounts held with the Bank, with the amounts being inclusive of interest at prime plus 5%.

The plaintiff's declaration confirms the claim of El81 371.59 in total, plus the same rate of interest as from the 15th January 2004, against the three defendants, jointly and severally, payment by one to absolve the other, with liability of the two directors in terms of their suretyship. The plaintiff further sought an order to have the Deed of Hypothecation declared executable in favour of the Bank, and costs on the scale of attorney and own client.

The plaintiff's declaration was followed by an application for summary judgment with the same prayers, save the omission of the prayer for the Deed of Hypothecation to be declared executable. The Bank's "Manager (of) managed accounts", one Allister Ryan, deposed to the affidavit in support of the summary judgment application, and not Lynette Groening as stated in the notice of the application. Nothing turns on this

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anomaly and it was not argued either. It causes no prejudice and it has the appearance of a mistake in the drafting of the notice. Greater care is expected in the preparation of pleadings than the example at hand. Nevertheless, the essential averments of his verification of the cause of action and the amount claimed is stated, as well as his belief that there is no defence to the claim and that notice to defend has been filed solely for purposes of delaying the action.
In the face of the clearly and comprehensively pleaded case of the applicant, the second respondent, Shayne Carr, filed his affidavit resisting summary judgment. He denies Ryan's averment that the appearance to defend is to delay the action and sets out what his defence is perceived to be. He does not deny the contract with the Bank and provision of credit facilities but he does deny its entitlement to claim the amount claimed and also that the hypothecated property be declared executable. As already indicated above, the application for summary judgment does not contain a prayer for the hypothecated property to be declared executable, as was the position in both the summons and the declaration.

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He pleads that 'the plaintiff has failed to perform its part of the contract in that the defendants did not receive the full benefit of the credit facilities as per the agreement' (my underlining).

He goes on to state (in paragraph 8) that '(on) several occasions prior to the institution of this action I had informed the plaintiff... that the defendants were not satisfied with the plaintiff's failure to perform as per the agreement and that we insisted upon the plaintiff's performance. Alternatively, we requested that the agreement be amended by recalculating the monthly installment (sic) in accordance with the sums actually received by the defendants'.

It is this which is held out as a bona fide defence to the claim.

Stripped of all niceties and subterfuge camouflage, the respondent in fact says that yes, we did take up the loan, as it is set out in the papers, but since we did not avail ourselves to the maximum or full ceiling amount, notwithstanding our undertaking to repay as per the contractual agreement, we actually do have a defence to the claim despite our continued failure to repay.

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The acknowledged agreement between the parties is clear: the Bank was to provide money to the company and the company had to repay in monthly instalments. Money was actually used by the company, and this is reflected in the statements of account, filed with the declaration. By January 2004, some six months after the date of contract, the Nile current account of the respondent company had an debit balance of almost E71 000, inclusive of E8 258.75 interest. The Cleopatra's account had a debit balance of over 110 000, inclusive of E11 340.28 interest. By then, more than E180 000 of the initially available funds had been withdrawn.

It appears that the respondents are dissatisfied with the attitude of the Bank, by not releasing further monies to the full extent of the credit that was granted, but still being required to repay the agreed amounts every month. Extracts of a "Detail Account Enquiry" in respect of each account were filed as annexures to the plaintiff's declaration. It indicates the activities on each account. The agreement between the parties is clear and unambiguous: each and every month the company had to repay an amount of E 11 423.61 in respect of the E250 000 loan. Two such repayments are shown on the Cleopatra's account. Virtually the only credit entries on the Nile account are

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due to unpaid cheques, reversed by the Bank. The respondents most certainly did receive the benefit of money made available by the Bank. In turn, it did not adhere to the agreement to make good by repaying the agreed amounts. Put otherwise, the respondents seem to want the bank to first advance further amounts, until the maximum or full loan has been released, before it wants to make further repayments. Until then, the Bank is expected not to call up the loan.

What the respondents now want is to renege on the agreement and have the repayments adjusted to the level of money withdrawn, recalculated to lesser amounts. That was not what they contracted. There is also no plea of error calculi.

What the court is to determine is whether the opposing affidavit, filed by the second respondent with the bald statement that the Bank failed to perform and that the respondents did not receive the full benefit of the credit facilities, could constitute a valid defence to the claim. The affidavit disclosing a valid defence need not be as specific as a proper plea. It is necessary to bear in mind what Harcourt AJ said in Fashion Centre and Another v Jasat 1960(3) SA 221 (N):

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"One must remember that summary judgment is a drastic and extraordinary remedy involving the negation of the fundamental principle audi alterant partem, and resulting in final judgment which is normally only granted in clear cases, and not where there is any doubt, in which latter event leave to defend ought to be given."

Also, if it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant (see Mowscheson & Mowscheson v Mercantile Acceptance Corporation of SA LTD 1959(3) SA 362 (W)).

As shown above, the plaintiff's declaration is as comprehensive and detailed as it could be. It clearly and precisely sets out the particulars of the parties. Copies of the written contracts, deeds and relevant documentation is annexed to it, with full reference to the applicable aspects in the declaration. The plaintiff shows that the defendant company utilised a substantial sum of money, made available due to the plaintiff's performance under the contract. The nature, grounds and the extent of the action is fully indicated and motivated, leaving no doubt about the claim for a liquid amount of money. If the respondents wanted to plead the exceptio non adimpleti contractus, as

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it seems from a reading between the lines, it is properly disposed of by the declaration, from which it is clear that indeed the Bank lent and advanced the money it now claims back. To foresee a possibility that at a trial it may be found that the plaintiff did not perform under the loan agreement would require more than a strong imagination. It is also not alleged that the defendant company did not receive the money that is claimed. The breach by the respondent is fully alleged and substantiated.

One also has to bear in mind that it was expressly stated in the contract that it remains within the sole discretion of the Bank to recall the loan at any time after it was granted. In the present matter, the discretion has not been frivolously exercised - the respondents did not repay in accordance with the agreement. The Bank was entitled to sue for cancellation immediately after the second non-payment was established, at minimum. It chose not to do so forthwith, and it indulged a period of reprieve.

In the present circumstances, I hold the firm view that there is no doubt that the first respondent company has breached the terms of its loan agreement and that there is no triable defence. The second and third respondents are liable in solidum as sureties and co-principal debtors of the

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first respondent. There is no bona fide defence to the application for summary judgment. Any borrower of money is at liberty to request its Bank to ameliorate repayment amounts and schedules but a refusal of such indulgence is not subject to judicial review. The purported defence, if it is to be termed as such, might have had an impact on their ability to make lesser repayments on the loan and to prolong the agony, so to speak, but it is not a defence to the claim at all.

In the event, there is no reason to refuse the application and it is ordered that summary judgment be entered against the three respondents, jointly and severally, the one to pay the other absolved, as prayed for in the application for summary judgment. In respect of claim 1 - The Nile, payment of the sum of E70 014.68 and in respect of claim 2 - Cleopatra's, El 10 556.91. Both claims shall attract

interest at 5% above the prime rate of interest, a tempore morae to date of final payment, with costs of suit on the attorney and own client scale, including collection commission.

As noted above, the application does not continue to seek a declaration to declare the movable property hypothecated under Deed No. 472/2003 to be executable, and it is for that reason that it is not so ordered.

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The applicant remains at liberty to seek such further relief in the event that it becomes necessary to do so.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE