THE HIGH COURT OF SWAZILAND

FIRSTRAND BANK LTD Plaintiff

And

MCN PROPERTIES (PTY) LTD 1st Defendant

NORMAN MARK PATRICK 2nd Defendant

Civil Case No. 484/2003

Coram S.B. MAPHALALA – J

For the Plaintiff MR. RODRIQUES

For the Defendants MR. A. LUKHELE

JUDGEMENT

(05/03/2004)

Before court is an opposed application for summary judgment, the order sought is in terms of the plaintiff's Particulars of Claim as follows:

1.1 Payment of the sum of E150, 991-60;

1.2 Interest thereon at the rate of 23% per annum calculated from the 18th October 2002, to date of final payment;

1.3 Costs of suit on the attorney and own client scale;

1.4 Further and/or alternative relief.

1.5

According to the plaintiff's declaration on about 30th September 1999 the first Defendant at its own special instance and request applied for and was granted a valid credit card and for the use of the first and second Defendant as the authorised users thereof

In terms thereof the first and second Defendants agreed to be bound by the terms and conditions of the application for a business credit card annexed to the Plaintiff's papers marked "FR1" as follows:

5.1 that they would be jointly and/or severally liable in respect of transactions, purchases and/or cash withdrawals made by either of the Defendants as authorised users and/or authorised holders thereof,

5.2 that such transactions, purchases and/or withdrawals would be debited against the Defendants credit card account,

5.3 that such transaction, purchases and/or withdrawals made by either of the Defendants would be due, owing and payable to Plaintiff within 25 days of date of statement,

5.4 the Defendants are obliged to pay interest to Plaintiff calculated daily at the rate determined by Plaintiff from time to time on the card account balance, until any amount is credited to the card account and thereafter on a reduced monthly balance until the amount stipulated together with

interest thereon has been paid and:

5.4.1 Interest on amounts due to Plaintiff by Defendants to be capitalized every month and included in the amount as reflected as owing on each subsequent statement.

5.4.2 that Plaintiff would from time to time vary the interest rate payable in respect of concluded transactions by written notice.

5.5 that Defendants are liable to Plaintiff for all expenses incurred in collecting any amount owing by Defendants to Plaintiff, which expenses shall include legal charges (on an attorney and own client scale) collection charges and tracing fees.

5.6 that a certificate signed by any manager of the Plaintiff, whose status of appointment need not be proved, would be prima facie proof of the amount owing by Defendant to Plaintiff and inclusive of interest applicable to the account.

5.7

The Plaintiff alleges that as at the 18th October 2002, the Defendants were indebted to Plaintiff in the amount of El50, 991-60 together with interest thereon at the rate of 23% per annum calculated from the afore-stated date in respect of monies lent and disbursed at Defendants special instance and request. The Plaintiff annexes a certificate of indebtedness marked "FR2".

Despite statements being issued to Defendants in the manner as afore-stated by Plaintiff to Defendants, the latter have failed and/or neglected to pay Plaintiff in breach of their agreement with Plaintiff.

The defence put forth by the first Defendant in the opposing affidavit of its Managing Director Kogi Pillay is that the first Defendant denies that at any stage it applied for, or was issued and utilised a credit card as alleged at all. The application for the credit ' card seems to have been made and utilised by the second Defendant. The handwriting and the signature that appears on the application for the credit card is that of the second Defendant and it is well known to him. All in all, the defence put forth is that the use of the credit card was never authorised by the first Defendant. The second Defendant holds no position in first Defendant and had no authority to transact for and on behalf of the first Defendant.

Mr, Rodriques for the Plaintiff argued that the contract between the parties was one of the suretyship, the first Defendant bound itself as surety and co-principal debtor under a continuous guarantee for the liability of second Defendant. To this end the court was referred to the case of Diners Club South Africa vs Durban Engineering 1980

(3) S.A. 53 at 68 to buttress the plaintiff's case.

The second argument advanced by the Plaintiff is that the first Defendant could have contested the issuance to the second Defendant of the card during the afore-said period (some 3 years) thereby terminating its liability thereon to Plaintiff. The court's attention was directed to the case of Kalil vs Standard Bank South Africa Ltd 1967

(4) S.A. 550 (A) at 555 G-Hand at 556 H to support this view.

It was argued au contraire for the first Defendant that firstly, the first Defendant did not apply for use of credit card, secondly, the second Defendant was not authorised by the company to apply for the use of the credit card, and thirdly, the first Defendant did not use the credit card. Therefore, the Defendant disputes that the credit card was issued to and utilised by the company. Such dispute, according to the 1st Defendant cannot be determined on a summary judgment application.
The plaintiff's case is premised on what was held in the case of Diner's Club South Africa (supra). Mr. Rodriques argued that the facts in that case are at all fours with the present case and therefore the

court ought to follow the ratio in that case. The facts of that case are clearly outlined in the headnotes and are thus reproduced in extenso as follows:

"Appellant- had issued a Diners Club "company" credit card to D€, an employee of Respondent company, which had countersigned the application for the credit card. In terms of the terms and conditions applying to the issue of Diners Club cards, which were incorporated by reference into the application form, "cardholder and company assume(d) joint and several liability for all charges incurred" in the case of a "company card". During the currency of the card, DC had left Respondent's employ. He had returned the card to neither Applicant nor Respondent, but continued to use it in France. On 13 February 1973 Appellant dispatched a telegraphic demand for moneys outstanding in respect of the use of the card to DC, at Respondent address. On the same day Respondent's accountant, J, had discussed the matter telephonically with a member of Appellant's staff, G, who suggested to him that the Respondent cancel the card in writing, on receipt of which cancellation a "watchdog" message would be sent to certain of Appellant's overseas agents, who would then attempt to "pick up" the card. A telegraphic "confirmation of cancellation of the card" was immediately sent by Respondent to Appellant. It appeared that, as a result of the conversation with G, J said he was left under the impression that this would be an end of the matter, as far as Respondent was concerned. The card was not "picked up" and was continued to be used by DC until its expiry in July 1973. Appellant had sued Respondent for the amounts so incurred in respect of the use of the card during March to September in a Magistrate's court, which found in Appellant's favour. Respondent then appealed to the National Provincial Division, which reversed the Magistrate's decision".

From the above-cited facts it was held inter alia that the contract between the parties was one of suretyship, the Respondent having bound itself as surety and co-principal debtor under a continuous guarantee for liability of De Colbert to the Appellant. It was further held, applying the law stated in Kalil vs Standard Bank of South Africa (supra), that the Respondent could, unless there was an express or implied provision to the contrary in its contract with the Appellant, bring about a termination of its liability for future debts incurred by De Colbert by giving notice of termination to Appellant.

The gravamen of the plaintiff's case in casu therefore is that the first Defendant could have contested the issuance to the second Defendant of the card during the period (some 3 years) thereby terminating its liability thereon to Plaintiff.

It would appear to me though on the facts, that the Plaintiff cannot succeed in its application for summary judgment. The second Defendant denies that the first

Defendant at any stage applied for, was issued and utilised a credit card as alleged.

The application for the credit card seems to have been made arid utilised by the second Defendant. The Managing Director of the first Defendant Mr. Kogi Pillay avers in his affidavit that the use of the credit card was never authorised by the first Defendant. Further, that the second Defendant hold no position in first Defendant and has no authority to transact for and on behalf of the first Defendant.

In my view, there are triable issues in this case. The authors Herbstein et al, The Civil Practice of the Supreme Court of South Africa (4th ED) at page 445 put it this way:

"It is clear from this that the court retains a discretion to refuse summary judgment even if the requirements of paragraphs (a) and (b) of sub-rule (3) are not met by the Defendant. It has been said that while it is not clear in accordance with what criteria this discretion will be exercised, an important factor weighing with the court is the extraordinary and stringent nature of the remedy accorded a Plaintiff by Rule 32, and that is only when there is no reasonable doubt about the plaintiff's claim that the application should be accended to"(my emphasis).

In the present case it cannot be said oh the facts that there is no reasonable doubt about the plaintiff's

claim.

Therefore, the application for summary judgement is dismissed and that costs to be costs in the cause. The court further orders that the matter proceed in the normal way.

S.B. MAPHALALA

JUDGE