FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4193/2010

In the matter between:

THE SPAR GROUP Plaintiff

and

MARK GRAEME WEBBER Defendant

JUDGEMENT: RAMPAI J

HEARD ON: 2 DECEMBER 2010

DELIVERED ON: 27 JANUARY 2011

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[1] This is an application for summary judgment. The plaintiff's action against the defendant is based on two claims. Firstly, the plaintiff sues the defendant for the shortfall in the sum of R66 926,40 alleged to be the unpaid portion of a grand debt in respect of certain drop-shipment transactions. Secondly the plaintiff also sues the defendant for the legal costs in the sum of R168 696,82 alleged to be the unpaid total of taxed costs. The defendant opposes the application and prays for leave to defend the action.

[2] In its particulars of claim, under prayer one, the plaintiff prayed for payment of the sum of R66 926,40 plus interest *a tempore morae* thereon at the rate of 15% per annum calculated from the 27th February 2009 until the date of final payment. Meanwhile the first claim was settled. Consequently the plaintiff abandoned its request for summary judgment as regards the first claim (annexure "a" defendant's heads of argument).

[3] The application was first enrolled for hearing on the 28 October 2010. By agreement between the parties my brother, C B Cillié J, postponed it to 4 November 2010 and reserved the decision concerning the wasted costs occasioned by such postponement for later adjudication.

[4] On the 4th November 2010 the matter was allocated to my brother, G F Wright, J. Once again the application was postponed, on that second occasion, to the 2 December 2010 and a similar reservation made concerning the wasted costs. The order was likewise by agreement *inter partes.*

[5] Seeing that the plaintiff has already abandoned the first relief sought in terms of prayer 1 of the particulars of claim dated the 11 August 2010 and has accordingly only moved for an order in terms of prayers 2, 3 and 4 of the particulars of claim – the first claim falls away. The first five defences raised by the defendant were concerned with the first claim. They too, obviously all fall away. From now on I shall say no more about them and the claim which gave rise to them.

[6] Now the undisputed historical backdrop needs to be narrated. It provides lucid exposition which clarifies the dispute about the second claim.

[7] The defendant was the sole member of a now defunct business enterprise, called Marbid Hardware CC at Clarens. On 8 November 2006 the close corporation applied to the plaintiff for credit facilities. The credit application was made in writing (annexure “a”, summons). The defendant represented the close corporation and signed the credit application on its behalf.

[8] The plaintiff duly granted such an application. The close

corporation purchased stock not only from the plaintiff but also from a whole range of other hardware suppliers. From time to time goods were then delivered direct to the close corporation by certain approved drop-shipments suppliers on order from the close corporation. The payment for the goods so drop-shipped was guaranteed by the plaintiff. The drop-shipment supplier concerned would then bill the plaintiff for goods sold and delivered to the close corporation.

[9] In turn the plaintiff picked up the bills and settled the accounts of the dropshipment supplier. The plaintiff was entitled to make a profit in connection with each dropshipment transaction. The plaintiff would after settling the supplier's account, debit the stock account of the close corporation. The close corporation was obliged to make regular payments to the plaintiff on such stock account.

[10] Marbid Hardware CC trading as Build It Clarens and Build It Guild of South Africa concluded a written contract termed membership agreement at Clarens on the 23 May 2007. The Guild has as its members hardware wholesalers and

retailers. It has been set up for the purpose of facilitating the implementation of the system of voluntary group trading by wholesalers and retailers of hardware, building materials and related products formulated and promoted by Spar, in other words, the plaintiff (clause 2, annexure “b”).

[10] The close corporation, as time went on, did not regularly comply with the terms and conditions of the credit agreement. As on 27 February 2009 Marbid was indebted to the plaintiff in the sum of approximately R1 million. On that day the defendant again personally bound himself, jointly and severally, as surety and co-principle debtor *in solidum* with Marbid in favour of the plaintiff (annexure “c”) for the due and punctual performance by Marbid of all its contractual obligations (annexure “a”) towards the plaintiff.

[12] During or about March 2009 the plaintiff cancelled all the credit facilities agreement Marbid had with the plaintiff. As a result of the cancellation Marbid could no longer procure further stock from either the plaintiff or any drop-shipment supplier to sustain its commercial operations.

[13] The plaintiff then initiated legal proceedings against Marbid for the perfection of its security held under a general notorial covering bond registered over all the moveable assets of Marbid. On the 18 June 2009 the plaintiff obtained a provisional perfection order against Marbid.

[14] The defendant, in his capacity as the only member of Marbid Hardware CC passed a special resolution to have the close corporation liquidated. On 23 June 2009 Marbid, the plaintiff's principal debtor, was liquidated by virtue of its deregistration by the registrar of close corporations.

[15] This court confirmed the provisional perfection order as the final perfection order on 8 October 2009. The result of such confirmation was that by virtue of such final perfection order the plaintiff became a secured creditor in the judicial winding-up of Marbid in respect of its movable property up to the maximum capital sum of R1 million.

[16] Subsequently the plaintiff proved a claim of R804 755,03 in the insolvent estate of Marbid. The liquidators paid a dividend of R737 828,63 to the plaintiff, leaving a shortfall

of R66 926,40 as an unpaid portion of the dropshipment transactions. This was the basis of the plaintiff's first claim (prayer 1, summons).

[17] The principal debtor, Marbid Hardware CC, was directed in terms of the court order of 8 October 2009 to pay, on the scale as between attorney and clients, the costs of the application pertaining to the legal proceedings for the perfection of the general notarial covering bond held by the plaintiff. The plaintiff's bill of costs was taxed and allowed by the taxing master in the amount of R168 696,82 on 9 June 2010. This then is what the plaintiff's second claim is all about.

[18] The plaintiff's cause of action against the defendant is based on suretyship agreement. The suretyship is unlimited. The plaintiff caused a summons to be issued against the defendant as surety for and co-principal debtor on 19 August 2010 for the payment of the sum of R168 696,82. The sheriff served the summons on 31 August 2010. The defendant filed a notice of intention to defend on 15 September 2010. The plaintiff filed notice of

application for summary judgment on 5 October 2010. The defendant filed his opposing affidavit on the 22 October 2010. The application was postponed on two occasions as previously pointed out.

[19] The divisional credit manager of the plaintiff, Mr N M Makue, made an affidavit in support of the plaintiff's application for summary judgment. He verified the cause of action, confirmed the defendant's indebtedness, and the amount claimed. He expressed the opinion that the defendant had no *bona fide* defence to the plaintiff's action and that he had delivered notice of intention to defend for the sole purpose of delaying the plaintiff's action.

[20] In his opposing affidavit the defendant denied the allegations that he had no *bona fide* defence to the plaintiff's claim and that he delivered notice of intention to defend with the sole purpose of delaying the finalisation of the plaintiff's action.

[21] The defendant admitted, among others, the plaintiff's averments: that he was the sole member of the business

entity known as Marbid Hardware CC which once traded as a franchise of Build It Guild at Clarens in the Free State Province; that the plaintiff had granted a credit facility to Marbid; that the plaintiff had advanced stock to Marbid by virtue of direct warehouse purchase transactions and also by virtue of indirect drop-shipment transactions; that he personally signed a surety agreement for and on behalf of the close corporation in favour of the plaintiff; that the close corporation also signed a membership agreement with Guild; that in terms of that agreement the close corporation took out an insurance policy as it was obliged to, for the purpose of providing indemnity or security to the plaintiff against possible loss resulting from possible failure by the close corporation to comply with the terms and conditions of the credit agreement; that the plaintiff also held a general notarial covering bond over the movable property of the close corporation as a form of further security and that initially the close corporation regularly settled the plaintiff's accounts as agreed.

[22] It was also undisputed by the defendant that, with the passage of time, the close corporation failed to maintain

regular and due payments, that as a result of such inability, its indebtedness to the plaintiff steadily increased; that the plaintiff cancelled the credit agreement; that the close corporation stopped trading; that the close corporation was eventually liquidated; that the plaintiff successfully obtained the provisional perfection order which was in due course confirmed as a final perfection order against the movable property of the close corporation; that the legal costs incurred by the plaintiff in connection with such legal proceedings were taxed and allowed in the amount as claimed by the plaintiff and that the close corporation was contractually bound to pay such costs on the scale as between attorney and client.

[23] Notwithstanding such admissions, the defendant averred that for any amount he could be held accountable or liable for, Refine Underwriting was, on behalf of Absa Insurance Company Limited, obliged to effect such payment to the plaintiff. The essence of the defendant's defence was that notwithstanding the suretyship agreement, the plaintiff was contractually precluded from directly suing him in the first instance without, first and foremost, submitting its claim to

the insurance underwriter. The correlative of this was that the plaintiff did not have a complete cause of action or a right immediately to enforce against him.

[24] It is trite that the surety, when sued by a debtor's creditor, can raise all the defences that were open to the principal debtor. This is so because the creditor's claim against the surety has as its foundation precisely the same claim as against the principal debtor. **BANK OF THE OFS v CLOETE** 1985 (2) SA 859 (E) on 862G to 863J. The defence(s) advanced by the defendant in this case, are not defences *in persona* to the principal debtor. Therefore the defendant as surety is entitled to advance them in much the same way as Marbid, the principal debtor, could have.

[25] In this type of applications it is incumbent upon a defendant to sufficiently extend to the court all the material facts on which the defence rests so as to bridge the onus placed upon the defendant. The *crux* of the onus is that a defence should be *bona fidely* advanced. The test is and has always being that the defendant must only aver facts which, if they were proved at the trial, would entitle him to

the relief sought. It is certainly not the test that the defendant, must in this proceedings for summary judgement, prove his defence – **FNB v MEYBURGH** 2002 (4) SA176 (E) at para [9] and [10].

[26] In this instance, the edifice of the defendant's defence in respect of the plaintiff's second claim related to an insurance policy contract that has been concluded with a third party, namely: Refine, for the due and punctual performance of obligations made by Marbid to the plaintiff. As part of the contractual obligations of Marbid to the plaintiff in terms of the credit agreement, Marbid had to take out an insurance policy contract with Refine as a form of security. The obligation of Marbid to take out an insurance policy for the benefit of the plaintiff was expressly provided for in the membership agreement (annexure "b"). It was a tripartite agreement. The parties were Marbid Hardware CC, The Guild SA and The Spar Group Limited.

[27] The salient terms and conditions of the insurance policy contract issued by Refine were that:

"13.

The salient terms of this agreement were:

13.1 **Refine** guaranteed all payments from **Marbid** to the plaintiff to the maximum amount of **R500 000,00**, from effective date **2 October 2007.**

13.2 This policy covered all purchases that **Marbid** was to make from the plaintiff (both warehouse and drop shipment transactions).

13.3 This policy would also cover all guild fees that were to be payable to the Build-It guild and any other fees or charges due and payable by **Marbid** to the plaintiff from time to time, including all interest on such outstanding amounts.

13.4 **Marbid** was to pay a premium to **Refine** totally **R2 432,00** per month."

[28] The aforegoing material terms and conditions of the insurance policy contract were summarised in a letter from Refine Underwriting Managers (Pty) Ltd to Marbid Hardware CC dated 2 October 2007. Although certain documents, which were collectively but regrettably, labelled as annexure "mgw1" were unsigned, the letter in question was duly signed by a certain Mr Timothy Paramasiram.

This letter together with the letter from the plaintiff's attorneys, Matsepes, addressed to the defendant's attorneys Symington & De Kok dated 23 November 2010 annexed to the defendant's head of argument irrefutably proved that a signed copy of such insurance policy contract indeed existed somewhere. In my view annexure "mgw1" cannot be simply ignored because certain of its parts were unsigned documents. Nothing significant really turns on the point.

[29] Clause 5 of the suretyship agreement (annexure "c") provides:

> "5. We renounce the beneficium ordinis seu excussionis et divisionis and agree and declare that this suretyship is in addition and without prejudice to any other securities now held or hereafter to be held from or on behalf of the debtor and that it shall remain in force as a continuing covering security, notwithstanding any intermediate settlement of account and notwithstanding our death or legal disability. Furthermore this suretyship shall similarly remain in force as a continuing covering security as regards us or one or more of us, notwithstanding it may

> have ceased to bind one or more of the other undersigned, if any, on account of liquidation, insolvency or otherwise."

[30] Mr Cillié, counsel for the plaintiff, submitted, on the strength of this particular clause that the plaintiff was not obliged to first seek indemnification from Refine before turning to the defendant as surety for compensation for its loss occasioned by the failure by Marbid to duly and punctually perform.

[31] Mr Grobler, counsel for the defendant, sharply differed. He submitted that it was an implied term of the interrelated agreements (annexures "a", "b", "c" and "mgw1") between all the parties concerned, that the plaintiff was contractually obliged to submit the claim to Refine in terms of the insurance policy contract, first and foremost, before the plaintiff could turn to the defendant to enforce its right of recourse.

[32] The plaintiff's second contention was that, at any rate, the insurance policy contact issued by the insurance

underwriter, Refine, did not cover the taxed costs currently claimed by the plaintiffs from the defendant. Yet again the defendant joined issue on this plaintiff's second submission. He contended that the insurance policy contract did cover such legal costs and that Refine erroneously distinguished the second component of the plaintiff's claim from the first and thereby erroneously repudiated (annexure "a"-defendant's heads of argument).

[33] It would seem that Refine was initially unwilling to indemnify the plaintiff at all for whatever reason. It seems to me that the belated payment of the plaintiff's first claim by Refine, only a few days before the hearing of the application, was prompted by the averments contained in the defendant's opposing affidavit. If the initial stance of Refine in respect of the first claim was shown to have been incorrect, as the letter from Matsepes implicitly seems to suggest, it is not unthinkable that its current construction of the policy contract in respect of the second claim might also similarly be proved to be incorrect later at the trial.

[34] The insurance policy contract, annexure "mgw1" expressly

covers the following:

> "√ All purchases from The Spar Group Ltd (both Warehouse and Drop shipment Transaction)
> √ Guild fees
> √ **Any other fees or charges due and payable by the Customer as agreed with Spar from time to time**, including interest on outstanding amounts."

[35] The crux of the dispute focused around the construction of the third item above. It was the defendant's case that the wording of the phrase "any other fees and charges due and payable" was sufficiently broad to encompass legal fees and disbursements. Mr Grobler argued that there appeared to be no reason why reference to the generous words "any other fees or charges" should be restrictively construed to exclude legal fees and disbursements incurred by the plaintiff in its dealings with the principal debtor, Marbid. This contention raises an arguable point, in my view.

[36] It must also be pointed out that the plaintiff's entitlement to legal costs on the special scale as between attorney and

client emanates from the wording of the credit agreement (annexure “a”, summons) which credit agreement was the foundation of the rest of the agreements, namely the membership agreement, (annexure “b”), the suretyship agreement, (annexure “c”), the insurance agreement, (annexure “mgw1”) and last but not least Refine’s belated acceptance of liability in respect of the first component of the plaintiff’s claim, (annexure “a”) the letter ex Matsepes, attorneys for the plaintiff attached to defendant’s heads of argument. Since it was foreseeable that the principal debtor might default and that the plaintiff would then resort to a litigation process to enforce its rights, the defendant’s contention that indemnifying the plaintiff for litigation costs was tacitly agreed and indeed contemplated in the phrase “any other fees or charges” of the policy contract – does raise plausible and triable issue.

[37] Ordinarily in a case where a vehicle driven by X collides with another driven by Y, it is not open to Y, whose negligence has caused the accident, to contend that X must first sue Y’s comprehensive insurer, Koloi Insurance Co (Pty) Ltd for instance. This is so because X would not

have been a party to the comprehensive insurance policy contract between Y and Koloi. In the instant case the facts are different. The plaintiff, as I have already pointed out, was a signatory to the membership agreement whereby the principal debtor was obliged to enter into an insurance policy contract to secure the plaintiff. Therefore the two scenario's cannot be equated to each other as counsel for the plaintiff contended they should.

[38] In these circumstances, I am persuaded that the defendant has sufficiently set out material facts and the grounds on which his defence is founded. I am not required to thoroughly adjudicate the merits of the dispute to ascertain whether the defendant has proven his defence. My function at this junction is to see whether the defendant has averred facts which, if proved at the hearing proper, would entitle him to the relief of him being exonerated. On the facts, it cannot be said that the defendant has no *bona fide* defence and that he has delivered notice of intention for the sole purpose of *mala fidely* delaying the finalisation of the plaintiff's case. I am of the firm view that the defendant has in good faith raised justiciable issues disentitling the plaintiff

to the harsh relief by way of summary judgment. I would therefore be inclined to refuse the plaintiff's application.

[39] Accordingly I make the following order:

39.1 The plaintiff's application for summary judgment is refused;

39.2 The defendant is granted leave to defend the action as regards the second claim thereof;

39.3 The costs hereof shall be costs in cause.

M. H. RAMPAI, J

On behalf of plaintiff: Adv. H. J. Cilliers
Instructed by:
Matsepes Inc.
BLOEMFONTEIN

On behalf of defendant: Adv. S. Grobler
Instructed by:
Symington & De Kok
BLOEMFONTEIN

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