REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **14/17071**

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

3/5/17
Date:

WR MOKHARI

In the matter between:

NATIONAL EMPOWERMENT FUND

Plaintiff

and

SIVUYILE SANDILE ZILWA

Defendant

JUDGMENT

Mokhari AJ:

1. The plaintiff, National Empowerment Fund Trust, has instituted action against the defendant, Sivuyile Zilwa, for payment of the sum of R3 620 173.18. On or about 12 December 2012 the plaintiff concluded a written revolving credit facility agreement ("the credit agreement") with Mandla Technologies (Pty) Ltd ("the company"). In terms of the credit agreement aforesaid, the plaintiff made

available a R5 500 000.00 facility to the defendant. The amount aforesaid was to be used towards the acquisition of stock and transport costs. The facility ("loan") was for a duration of 15 months. It is not in dispute that the plaintiff did make available to Mandla Technologies an amount of R5.5 million. It is also not in dispute that Mandla Technologies failed to repay to the plaintiff the aforesaid sum of R5.5 million as required by the credit agreement.

2. The defendant concluded a guarantee agreement with the plaintiff on 21 December 2012. In terms of the written guarantee agreement, the defendant irrevocably and unconditionally guaranteed as principal and as a primary obligation in favour of the plaintiff the due and punctual performance by Mandla Technologies of the secured obligations and further undertook to pay the plaintiff 'on first written demand all sums which are now, or at any time or times in the future shall become due, owing or incurred by the Mandla Technologies to the plaintiff pursuant to the secured obligations'. The defendant guaranteed irrevocably and unconditionally to pay to the plaintiff the sum of R5.5 million in the event that Mandla Technologies default in repaying the said sum to the plaintiff. The guarantee provided by the defendant was a continuing covering security and to commence on the effective date and be and remain in force until the release date. In terms of clause 2.1.15 of the written guarantee agreement, the release date means the date upon which the lender notifies the guarantors in writing that the guarantors are released from their obligations under and in terms of this guarantee, provided that the lender shall, within five business days of receipt of written requests from the guarantors to that effect, furnish the guarantors with such notification (provided, however, that the secured

obligations have in fact been discharged in full) to the satisfaction of the lender. Clause 2.1.16 defines secured obligations to mean any and all indebtedness or obligations of any nature whatsoever of the borrower (whether actual or contingent, present or future) to the lender from time to time under and in terms of the funding agreement, including in respect of the principal amount, interest, costs, expenses, fees and the like.

3. When the trial commenced on 20 April 2017, the plaintiff called one witness, Mr. Selvan Naicker ("Naicker"), the Financial Manager of the plaintiff. The evidence of Naicker confirmed the written agreement concluded between the plaintiff and Mandla Technologies as well as the guarantee agreement concluded between the plaintiff and defendant. He referred to the credit account statement showing payment of the amount of R5.5 million made by plaintiff to Mandla Technologies or made available to Mandla Technologies on 25 January 2013 as well as the settlement of the amount of R5 637 500.00 which was credited to Mandla Technologies on 07 March 2013, and two further disbursements made in favour of Mandla Technologies on 03 May 2013 in the sum of R615 900.00 and R2 411 517.00 on 30 May 2013 bringing the total amount owing by Mandla Technologies to R3 027 417.00 with interest of R75 685.35 bringing the total outstanding by Mandla Technologies to R3 103 102.35 and a penalty of R263 763.70 with an overall outstanding amount of R3 366 866.05 owing by Mandla Technologies to plaintiff. The aforesaid amount of R3 366 866.05 has not been paid by Mandla Technologies to the plaintiff resulting in the defendant as guarantor been liable to the debt of Mandla Technologies in the said sum of money. It was not in dispute that

Mandla Technologies did receive the aforesaid sums of money on the dates specified above.

4. On 22 April 2014, the plaintiff's attorneys, addressed a letter of demand in terms of clause 12.2 of the loan facility agreement read with clause 16 of the guarantee agreement to the defendant. In the said letter, the defendant was informed of the amount of R3 620 173.18 which was due and payable by the defendant as the guarantor of Mandla Technologies which amount ought to be paid to the plaintiff. The defendant was placed on terms that if payment was not received within seven business days from the date of receipt of the letter, legal action would be instituted against the defendant without further notice. A certificate of indebtedness was also attached to the letter. It is common cause that the defendant did not make any payment to the plaintiff resulting in plaintiff instituting this current action.

5. In response to the plaintiff's combined summons, the defendant filed a plea dated 08 September 2015 duly signed by the defendant himself but acting in his capacity as the attorney of the defendant having the right of appearance in the High Court in terms of section 4(2) of the Rights of Appearance Act of 1995. In paragraph 4.1 of the plea, the defendant denies that he concluded a guarantee agreement with the plaintiff as alleged or at all and put the plaintiff to the proof thereof. In paragraph 4.2 of the plea the defendant pleaded that the guarantee agreement was *void ab initio* in that the essential requirement that define the obligations that are supposed to be guaranteed are lacking and are not defined in the purported guarantee agreement; the secured obligations

stated in clauses 3.2 and 4, which purport to create a guarantee are not stipulated or defined, in the premises no obligations are secured by the defendant in this regard. It further pleaded in paragraph 4.2.3 of the plea that the purported guarantee agreement refers to guarantors whereas there is supposed to be one guarantor, the defendant. In paragraph 4.2.4 the defendant further pleaded that the wording of the purported guarantee agreement is that of a suretyship and not a guarantee.

6. The denial in paragraph 4.1 of the plea fell by the wayside at the commencement of the trial when it was admitted by the defendant that the defendant did conclude a guarantee agreement with the plaintiff. The defence in paragraph 4.2 also fell by the wayside during the trial when the defendant later admitted when presented with the original agreement that pages 5 and 6 of the guarantee agreement could also have been initialled by him.

7. During the cross-examination of Mr. Naicker it was put to him that the defendant was not liable to the plaintiff because the defendant's obligation lapsed when Mandla Technologies made payment of R5 637 500.00 on 07 March 2013 and any further disbursements made on 03 May and 30 May respectively were in contravention of the credit agreement thus making the defendant not liable. In pursuing this line of defence the defendant relied on clause 1.1.13 of the credit agreement which defines the final drawing date as 31 March 2013 read with clause 4.3 which stipulates that any portion of the loan facility that remains undrawn after the final drawing date shall be forfeited and shall no longer be available for draw down. However, whilst these

propositions were put to Mr Naicker, as evidence that would be led or presented by the defendant, the defendant did not particularly give such evidence in his defence when he testified. This was also not surprising given that the defendant's defence in the plea was not premised on any of the propositions that were put to Mr. Naicker during his testimony. After the plaintiff closed its case after calling Mr Naicker as the sole witness, the defendant, Mr. Zilwa, testified and also closed his case without calling further witnesses as well. Nothing much turns on the evidence of these witnesses given that the action is based on the written agreements which are express on their terms. I also did not understand the defendant to suggest that this Court should take into account extrinsic evidence not contained or foreshadowed in the agreement per se. Even if that would have been an invitation by the defendant, such invitation would have been rejected because it would not have been pleaded nor would any basis have been laid for the Court to depart from the express terms and conditions of the written agreements.

8. Besides, the belated defence by the defendant that the debt to which he would have been liable to was extinguished when Mandla Technologies made payments of R5 637 500.00 on 07 March 2013 fails to take into account the nature of the agreement that was concluded between plaintiff and Mandla Technologies which was a revolving credit account.

9. In Natal Joint Municipal Pension Fund vs Endumeni Municipality (2012) 4 SA 93 (SCA) the Supreme Court of Appeal per Wallis JA, authoritatively dealt with the approach to interpretation of documents be it statute or contracts. The SCA

cautioned against a piecemeal approach to interpretation but opted for a unitary approach. In paragraphs 18 and 19, the SCA stated as follows:

"(18) *Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarized in Bastian Financial Services (Pty) Ltd vs General Hendrick Schoeman Primary School. The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of a document, consideration must be given to the language used in the light of the ordinary rules of grammar, and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all of these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or business-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is a language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*

(19) *All this is consistent with the emerging trend in statutory construction. It clear adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schriner JA in Jaga vs Donges NO and another; Bhana vs Donges NO and another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that Courts in South Africa should now follow, without the*

need to cite authorities from an earlier era that are not a necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schriner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

> *"Problems of legal interpretation are not solved satisfactorily by a visual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."*

10. More recently, Lord Clarke as CJ said *"the exercise of construction is essentially one unitary exercise".*

11. Having regard to the nature of the agreement concluded between the plaintiff and Mandla Technologies, it would be unbusiness like to interpret it to mean that a revolving credit agreement which makes provision for the borrower to access funds from time to time for the entire duration of the contract (15 months) would access funds in circumstances where no obligation would arise from the funds subsequently withdrawn after the initial capital amount has been advanced. Besides that this defence was never raised in the plea, neither was it testified upon by Mr Zilwa, I find it to be at odds with the nature of the credit agreement that was concluded between plaintiff and Mandla Technologies.

12. The further defence that was raised also for the first time at the trial was that no demand was made to the defendant by the plaintiff and the demand made by the plaintiff's attorneys in a letter dated 22 April 2014 is not in compliance with the guarantee agreement. I find no merit in this defence as the demand

contained in the letter dated 22 April 2014 is quite specific and express as to what was required of the defendant. Similarly, the defence that a certificate of balance was not issued in the name of the defendant is without merit. A certificate of balance is intended for the benefit of the lender who without any further proof may obtain from the Court summary judgment or provisional sentence in circumstances where the necessity to call the author is obviated.

13. I am satisfied that the plaintiff has discharged its onus on the balance of probabilities that the defendant is liable to pay to the plaintiff the sum of R3 620 173.18 as evidenced by the certificate of balance issued by the plaintiff.

14. Counsel for the defendant referred me to some authorities which in my view are of no relevance to the nature of this claim. I find it not necessary to overburden this judgment by analysing those authorities.

15. As a result, I make the following order:

15.1 The defendant is ordered to pay to the plaintiff the sum of R3 620 173.18;

15.2 The defendant is to pay interest on the aforesaid amount of R3 620 173.18 at the prime rate per annum calculated from 31 October 2013 to date of final payment, both dates inclusive;

15.3 The defendant is ordered to pay the costs of suit on attorney and own client scale.

W R MOKHARI

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 20 – 21 April 2017

Date of Delivery: 03 May 2017

Representation for Plaintiff:

Counsel: **Adv T B Hutamo**

Instructed by: **Madlopha Incorporated**
54 7TH Avenue
Parktown North
Johannesburg

Representation for Defendant:

Counsel: **Adv A Ayayee**

Instructed by: **Makaula Zilwa Incorporated**
144 Katherine Street
Grayston Ridge Office Park
Ground Floor, Block C
Sandton