**REPUBLIC OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**
**JOHANNESBURG**

**CASE NO. 11221/2018**

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

In the matter between:

**MITRE WOOD PRODUCTS CC**
**(Registration No. 2006/131534/23)** Applicant

and

**JABU LUTHER SHUNGUBE**
(ID No. …) First Respondent

**VINCENT GATLEY**
(ID No. …) Second Respondent

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**JUDGMENT**

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REDMAN AJ:

[1] The respondents are the co-directors of Indalo Shopfitters (Pty) Limited (in liquidation). Indalo is indebted to the applicant in the amount of R874 648,95 in respect of goods sold and delivered. On 17 November 2017 a letter of demand was addressed by the applicant to Indalo in accordance with the provisions of section 345(1)(a) of the Companies Act, 1973 demanding payment. On receipt of the demand the second respondent addressed an e-mail to the applicant's attorney advising that due to unforeseen circumstances Indalo was unable to meet its commitments. On 24 January 2018, the applicant launched an application for the winding-up of Indalo which was set down for hearing on 15 March 2018.

[2] On 30 January 2018, the first and second respondents signed an Acknowledgment of Debt in terms of which Indalo acknowledged that it was indebted to the applicant in the amount of R874 648,95 and undertook to repay the amount in monthly instalments. The Acknowledgement incorporated suretyships in terms of which the respondents bound themselves, jointly and severally, as sureties and co-principal debtors *in solidum* with Indalo for payment of Indalo's obligations to the applicant under the Acknowledgement of Debt.

[3] The following provisions of the Acknowledgement of Debt incorporating the suretyships are relevant –

- Indalo acknowledged that it was indebted to the applicant in an amount of R874 648,95 being in respect of goods sold and delivered, together with interest at the prime rate of interest charged by the applicant's bankers from time to time, plus 2%.

- Indalo undertook to liquidate the capital and interest by way of twelve equal monthly instalments of not less than R72 887,71 with the first instalment to be paid by 28 February 2018.
- In the event of Indalo defaulting in the due performance of any of its obligations in terms of the Acknowledgement of Debt, then in that event –
    - the full balance then outstanding in terms of the Acknowledgement of Debt would become due and payable;
    - the applicant at its election could proceed on the basis of the Acknowledgement of Debt, or on the basis of any other action which may have been instituted against Indalo by the applicant prior to date of signature of the Acknowledgement of Debt.
- By their signatures the respondents bound themselves jointly and severally as sureties and co-principal debtors, *in solidum*, with Indalo for payment of all Indalo's obligation to the applicant in terms of the Acknowledgement of Debt and renounced the legal benefits and exceptions *non numeratae pecuniae, non causa debiti,* revision of accounts*, errore calculi* and *de duobus vel pluribus res debendi*, and declared themselves acquainted with the meaning and effect of those exceptions and of the renunciation of the benefits thereof.
- The respondents agreed that all the terms and provisions of the Acknowledgement of Debt would apply equally to them in their capacities as sureties and co-principal debtors

[4] In breach of its obligations under the Acknowledgement of Debt, Indalo failed to make payment of the first instalment of R72 887,71 by 28 February

2018, and on 15 March 2018 the application for the winding-up of Indalo which has been launched by the applicant was granted.

[5] On 19 March 2018, the applicant brought the current application wherein it seeks judgment against the first and second respondents, jointly and severally, for payment of the amounts due to the applicant under the Acknowledgement of Debt and Suretyships, together with interest.

[6] The respondents admit having signed the Acknowledgement of Debt incorporating the suretyship undertakings, and concede that the amount claimed is due by Indalo.

[7] In their answering affidavits the respondents contend that they signed the suretyship undertakings on condition that the applicant withdrew the liquidation application which had been brought against Indalo. They suggest that they only signed as sureties and co-principal debtors on the understanding that the applicant would withdraw the liquidation application immediately.

[8] The second respondent further contends that his wife, to whom he is married in community of property, did not consent in writing or otherwise to him entering into the suretyship and alleged that the signing of such suretyship "*due to its nature, as more fully set out ...* [in his affidavit], *is not in the ordinary scope of business."*

**MISREPRESENTATION / CONDITION**

[9] There Is no doubt that there is a dispute of fact on the papers as to the circumstances giving rise to the conclusion of the Acknowledgement of Debt. The respondents contend that an agreement was reached between the applicant, represented by their attorney, and the respondents that they would bind themselves as sureties and co-principal debtors in respect of the debt

due by Indalo on condition that the applicant withdraws the liquidation application. The applicant, on the other hand, concedes that there was an agreement but suggests that it was not on the terms alleged by the respondents, The applicant avers "*that subject to Indalo and the respondents executing and concluding the AOD / suretyship agreement, strict compliance by them with the terms of payment set forth therein the liquidation application would be held in abeyance but not withdrawn, until such time as the total indebtedness was paid in full*".

[10] The approach to disputes of fact in affidavits has been crystallised in a number of judgments. In *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), Cameron J described the test as follows:

> "[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,* this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.
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> [56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

[11] The applicant argues that albeit that a dispute of fact has arisen on the papers, it is neither material nor believable. I have carefully considered the

allegations made by the parties in relation to the discussions which took place between the applicant's attorney and the respondents leading up to the finalisation of the Acknowledgement of Debt. It is evident that, prior to the institution of the liquidation application, neither of the respondents had bound themselves as sureties and their decision to do so appears to have been influenced by the pending liquidation application and the assurances given to them by the applicant's attorney.

[12] The respondents assert that it was necessary that the liquidation application immediately be withdrawn as this was a pre-requisite for certain funding which had been negotiated on behalf of Indalo from the IDC and the DTI. The respondents provide scant information relating to the funding which had been allegedly negotiated and fail to attach any evidence corroborating this averment.

[13] The respondents argue that by agreeing that the suretyship was conditional upon the immediate withdrawal of the liquidation application, the applicant's attorneys had fraudulently misrepresented the true position, alternatively the conclusion of the suretyship in the absence of such condition vitiated the suretyship.

[14] For the purposes of determining this matter on affidavit, I am not required to assess the probabilities unless I am satisfied that there is no real and genuine dispute or that the respondents' allegations are so far-fetched and untenable or so palpably implausible to warrant their rejection.

[15] Although the respondents have not counter-applied for a rectification of the agreement or explained the reason as to why they appended their signatures to an agreement which did not record the true intention of the parties, I cannot conclude that their version is so implausible that it can be

rejected out of hand. There was clearly some discussion and an agreement reached between the parties relating to the liquidation proceedings. Whether that agreement entailed the immediate withdrawal of the liquidation application, or merely a temporary suspension thereof, is a matter which should properly be tested by oral evidence. I am cognisant of the fact that clause 4.2 of the written agreement preserves the applicant's right at its election to proceed on the Acknowledgement of Debt or any other action which may have already been instituted against Indalo prior to the date of signature thereof. This, however, merely constitutes a probability favouring the applicant's version.

[16] In the light of my conclusion it is unnecessary at this juncture to make a determination on whether the defence of the second respondent under the Matrimonial Property Act, 88 of 1984 is sustainable.

[17] In the circumstances, I make an order in the following terms:

1. The matter is referred to trial.
2. The notice of motion and founding affidavit are to stand as the summons.
3. The answering affidavit is to stand as the notice of intention to defend.
4. The applicant is to deliver its declaration within twenty days of date hereof.
5. The normal rules of court relating to trial and discovery process will be applicable to the further conduct of the proceedings.
6. The costs of the application will be costs in the cause.

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N REDMAN
Acting Judge of the High Court

Heard: 8 October 2018
Judgment delivered: ___ November 2018

Appearances:
For Applicant: M Mostert
Applicant's Attorneys: Martini-Patlansky
Tel: 011 487 1091
Ref: Mr Patlansky M 671

For Respondents: A Russell
Respondents' Attorneys: Pule Incorporated
Tel: 011 463 6693
Ref: Mr Forster MAT11516