IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 79372/2014

DELETE WHICHEVER IS NOT APPLICABLE

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

21.02.2017
DATE

[redacted]
SIGNATURE

22/2/2017

In the matter between:

FIRST RAND BANK LIMITED
t/a RMB PRIVATE BANK Applicant

And

ETIENNE- PIERRE BEDEKER 1st Respondent

ETIENNE BEDEKER INC 2nd Respondent

THE PROPERTY BRIDGING FINANCE COMPANY 3rd Respondent

JUDGMENT

RAJAB-BUDLENDER AJ

1 The Applicant seeks payment of R864 351, 67 in consequence of a suretyship agreement concluded by the 1st-3rd Respondents in terms of which they bound themselves jointly and severally for any liabilities which may arise on behalf of Thornbrook Tuscan Villas (Pty) Ltd ("the principal debtor"), towards the Applicant. The principal debtor entered into a loan agreement with the Applicant to finance the development of a sectional title scheme known as "Villa Thornbrook" which consisted of 12 sectional title units numbered sequentially 13 to 24.

2 The loan was provided by the Applicant in terms of a "Single Credit Facility" to which a specific account number was allocated. Each of the 12 sectional title units served as security for the loan by way of a mortgage bond over it being registered in favour of the Applicant.

3 The principle debtor has since been liquidated. The Applicant therefore alleges that it is entitled to recover the full amount owing to the Applicant by the principal debtor, from the Respondents. The Respondents oppose the application on various grounds which I deal with below.

The Applicant's case

4 The Applicant's case is as follows:

4.1 The Applicant concluded a credit agreement with the principal debtor which was secured by the 12 sectional title units in Thornbrook Tuscan Villas.

4.2 Whenever one of the sectional title units was sold, it was released from the mortgage bond and a portion of its realised profit would then be used to settle a portion of the outstanding amount of the

loan. The Applicant would then issue a document which reflected the revised unit numbers which had not yet been sold, and on which the remaining amount of the debt owed was reflected.

4.3 The first agreement, which preceded the credit agreement from which the debt at issue in this case arose, was concluded on 26 September 2007.

4.4 This was substituted on 15 January 2009 and 9 units served as security for the indebtedness which may arise from the agreements (3 units having been sold and redeemed in the interim.)

4.5 The agreement was extended twice, on 23 March 2009 and 13 July 2010.

4.6 In the premises, the final agreement governing the relationship between the applicant and principal debtor was concluded on 15 January 2009, amended on 23 March 2009 and again amended on 13 July 2010. Consequently, the document dated 23 July 2010 is the most recent terms of the agreement between the Applicant and the principal debtor.

4.7 The principal debtor was subsequently liquidated and the liquidation process was initiated. In terms of the administration of the estate of the principal debtor, the Applicant received a provisional dividend in the amount of R1 230 000. 00

4.8 After receipt of this amount, the principal debtor's account with the Applicant was closed on 28 August 2014 reflecting an outstanding amount of R864 351.67 – which is now sought from the 1st to 3rd

Respondents. From the liquidation process, the Applicant is entitled to receive a further dividend of R185 057.88. At the date of the hearing of this matter, no further dividend had been received by the Applicant.

5 The Applicant contends that the Respondents are liable for the indebtedness by virtue of suretyship agreements, concluded as follows:

5.1 On 15 January 2009, the Respondents concluded a suretyship agreement for any indebtedness which may arise from the 15 January 2009 agreement.

5.2 The 23 March 2009 amendment contained an acknowledgment on the part of the sureties that their indebtedness extended to the 23 March 2009 agreement; and

5.3 The July 2009 amendment contained an acknowledgment on the part of the sureties that their indebtedness extended to the July 2009 agreement.

The Respondents' case

6 The Respondent opposes the relief sought on the basis that the certificates of indebtedness are contended to be replete with errors and do not constitute proof of the amount owed, and that the Applicants are therefore unable to correctly prove their claim.

7 The Respondent claims that when a sectional title unit was sold, the Applicant would open a new single credit facility with a new outstanding

capital balance, for which only the remaining sectional title units would then serve as security in terms of the mortgage bond.

8 In short, the Respondents' argument is that the original loan agreement dated 15 January 2009 was not amended on 23 March 2009 and 23 July 2010 but instead each later single credit facility agreement constituted a completely new agreement that replaced and novated the preceding agreement. They therefore deny that the Applicant can now rely on a certificate of balance in terms of the single credit facility dated 15 January 2009 as that agreement has been novated and no rights or obligations arising therefrom continue to exist. This state of affairs, according to the Respondents continued after 23 July 2010 as the principal debtor sold off units which were then released from the mortgage bond and resulted in new SCF's being concluded from time to time. The Respondents also appear to contend that the surety agreements that they signed on 15 January 2009 do not extend to the present indebtedness because they were not concluded in terms of the currently existing agreement.

9 In addition, the Respondents challenged the authority of the deponent to the founding affidavit.

The agreements in dispute

10 The core of the dispute between the parties turns on the status of the agreements between the parties. I therefore turn to examine the relevant agreements.

11 The earliest document recording the relationship between the parties is dated 11 December 2008. It is on the face of it, an offer of a credit facility in the amount of R5 million, for sectional title units 15, 17 and 18-24 of Villa Thornbrook. The document records that the Respondents are the sureties and are liable for "*all sums due or to become due to the Bank arising out of the facility.*" Under "Special Conditions" the document records that the first advance under this facility will be used to repay the outstanding balance under a different and pre-existing facility accepted by Thornbrook Villas on 26 September 2007 where after that facility would be cancelled and replaced with this facility.

12 The document is signed by Thornbrook Villas, represented by the 1st Respondent, on 15 January 2009. This is the same date on which the suretyship agreements attached to the papers, are signed.

13 There are three suretyship agreements. These are signed by all three of the Respondents, and dated 15 January 2009. Each of the agreements contain the following relevant clauses:

13.1 Clause 12 provides that the sureties bind themselves for the due and punctual payment by the debtor of all sums of money, which may now be or which may hereafter become owing by the debtor to the Bank in terms of the single credit facility loan agreement/s entered into.

13.2 Clause 4 provides that this suretyship shall be *a continuing covering security* for all amounts now owing by the debtor to the Bank in terms of the agreements and shall remain of full force and effect notwithstanding any fluctuation or reduction in, or extinction

for any period whatever, of the indebtedness of the debtor to the Bank in terms of the agreements;

13.3 Clause 6 provides that no alteration or variation of the agreements or any increase in the facility sum forming the subject matter of the agreements which may arise as a result of an agreement between the Bank and the debtor shall in any way release the sureties from liability in terms of the agreement.

13.4 Clause 14 provides that a certificate signed by any authorised employee of the Bank (whose authority it shall not be necessary to prove) shall constitute prima facie evidence of the outstanding balance owning and due and payable by the sureties to the Bank and/or the rate of interest. This certificate shall be prima facie proof of the contents thereof for the purpose of provisional sentence, motion proceedings, default judgment or any other legal proceedings by the Bank against the sureties.

13.5 Finally, clause 24 of the suretyship agreement provides that the surety's liability shall be limited to the payment of all sums due or to become due to the Bank by the debtor "in terms of or arising out of the RMB Private Bank Single Credit Facility dated 11 December 2008 notwithstanding anything to contrary."

The extension agreements

14 Notably, each of the subsequent amendments (namely that of 23 March 2009 and 23 July 2010 contain under the section titled "Surety Consent" an acknowledgment that in signing the agreement, the sureties acknowledge and agree that their obligations in terms of the suretyship

agreement dated 15 January 2009 shall extend to this single credit facility. It goes on to state that "*this acknowledgment shall not be construed as substituting, varying or novating any of our existing obligations in terms of the suretyship agreement save as provided in this letter.*" Both the 23 March 2009 and 23 July 2010 agreements are signed by the Respondents.

15 Having considered the clear language of the single credit facility agreements, as well as the signed surety agreements, I am of the view that it was at all times perfectly clear that the nature of the agreement between the parties was one of a continuing covering security agreement and that accordingly, the amount of the indebtedness would fluctuate over time as the debt was paid. Moreover, the extension agreements of 23 March 2009 and 23 July 2010 were not novations but were valid extensions of the main agreement between the parties. Therefore, the SCF agreement relied on by the Applicant was not a new SCF only entered into on 23 July 2010. The suretyship agreements signed by each Respondent accordingly remain valid and enforceable.

The Certificates of Indebtedness

16 There is some dispute about the validity of the certificates of indebtedness attached to the papers. There are three certificates of balance attached to the papers. The Respondents dispute the accuracy of those certificates.

17 The Applicants concede that the original certificate of balance contained an error in that the dates of the relevant agreements referred to were

incorrect. Pursuant to the Respondents issuing notices in terms of Rule 30A, Rule 18 and Rule 35(12), the Applicant filed a supplementary affidavit to which a new certificate of balance was attached. Neither the account number nor the amount of indebtedness differed in this corrected certificate- only the dates of the agreements referred to changed.

18 The Applicant refers to the purpose of the certificate as evidenced by clause 15.6 of the single credit facility itself (the terms and conditions). This provides that the certificate is intended to be *prima facie* evidence of:

18.1 The outstanding balance owing to the Bank; and

18.2 The rate of interest payable.

19 The Applicant contends that despite an error in the dates of the agreements, the critical information remained unchanged and the certificate remains prima facie proof of the amount owed. Therefore, the Applicant submits that nothing turns on the error in dates. In this regard, the Applicant correctly relies on *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 382F-383A in which (also in the context of a suretyship agreement,) the Appellate Division held that an error in the certificate of indebtedness does not require that the entire certificate is to be disregarded by the Court.

20 The Respondents' objection to the certificates appear to be that they incorrectly refer to the various agreement dates and that they constitute amendments to the agreement rather than new agreements. I am of the

view that as indicated by clause 15.6 of the Loan Agreement, the certificate is intended to constitute prima facie proof of the amount due and rate of interest. I am further of the view that the minor errors in the certificates are not material and have been sufficiently correctly.

The amount owed

21 The Respondents themselves appear somewhat confused in their argument. Although the Respondents appeared during the hearing of this matter, and in their heads of argument, to have contested whether they owed anything to the Applicant at all, in a letter dated 8 August 2014, Mr Bedeker, acknowledged liability for an amount to be determined. He asked for a breakdown of how the amount claimed was calculated and offered to open a new amount in his personal capacity for the remaining amount, to be paid in monthly instalments by him.

22 The Applicant declined to do so.

23 The Applicant explains the calculation of the amount claimed as follows:

23.1 The Applicant proved a claim against the insolvent estate of the principal debtor. In this claim, unit 16 was incorrectly included in the security referred to. The Applicant alleges that the incorrect reference to unit 16 is of no consequence as the estate was administered to only reflect units 19, 20 and 21. This is clear from the Reconciliation Statement of the Liquidation and Distribution Account of the principal debtor.

23.2 In terms of the administration of the estate the Applicant received a provisional dividend in the amount of R1.230 000.00 made up as follows:

23.2.1 On 2 April 2014, a payment of 750 000.00 was made to the Applicant in respect of units 19 and 20 and on 25 June 2014, a further payment of 480 000.00 was made in respect of unit 21.

23.2.2 On 28 August 2014, the account of the principal debtor with the Applicant was closed reflecting a closing balance of R864 351.67. This is the amount reflected on the certificates of balance. The Applicant further attaches statements of the principal debtor's account in proof of this amount.

23.2.3 From the liquidation process, the Applicant is still entitled to a further dividend of R185.057.88. At the date of the hearing, no further divided was received by the Applicant. In anticipation of this dividend, the Applicant's letter to the Respondents dated 27 August 2014 calculated the amount owed as R622 723.94. However, in the absence of that dividend being paid to the Applicant, it remains entitled to claim that amount from the Respondents as sureties, in terms of the suretyship agreement.

24 The Respondents have not provided any evidence to persuade me that the amount claimed on the certificate of indebtedness and in this application, is incorrect. The Applicant has, in contrast, provided a full

and substantiated explanation of how the amount claimed was calculated and why it is correct.

25 Moreover, at the hearing of this matter, it was argued on behalf of the Respondents that the Applicant had placed multiple versions before this Court and that accordingly the matter could not be decided on the papers. I am not persuaded of this argument. The Applicant's version has remained that the Respondents signed surety for the entire amount owed, notwithstanding fluctuations over time. The Applicant also contended throughout that the loan was secured by various sectional title units, which itself changed over time, as each unit was sold and the overall amount due to the Applicant was reduced.

26 The Applicant has conceded to inaccuracies in the dates on the certificates of indebtedness. As I have found above, such inaccuracies did not alter the critical information contained there, namely the amount owed, the account number and the rate of interest.

27 Finally, the Respondents allude to the fact that this matter is incapable of being resolved on the papers. I do not agree. All relevant documents are contained in the papers. The Respondents do not dispute this, nor do they allege that there are other documents with which they have not been provided. All documents requested by the Respondents in terms of the Rules, were provided and form part of the papers before me. The Respondents do not contend that they did not sign the suretyship agreements, or the single credit facility agreement or subsequent extensions. The documents speak for themselves. It is trite that the interpretation of a contract is a matter of law and not of fact. (*KPMG*

Chartered Accountants (SA) v Securifin Ltd and Another 2009 (4) SA 399 (SCA))

28 This court is accordingly in a position to interpret the contract without the need for a referral to oral evidence as to its nature or terms.

Challenge to the authority of the Applicant's deponent

29 Finally, the Respondents have challenged Mr Verster and Mr Botha's authority to depose to the affidavits on behalf of the Applicant

30 The authority of both Mr Verster and Mr Botha, to depose to the affidavits on behalf of the Applicant is clear from a delegation of authority document attached to the papers. This document is attached to a Resolution of the Board of Directors of the Applicant dated 24 November 2008. The Resolution states *inter alia* that the Chief Executive Officer of the Applicant is authorised to delegate any his powers to any official of the Bank and that sub-delegations of such powers are authorised. The Applicant accordingly attaches a sub-delegation of authority document which makes clear that the CEO of the Applicant delegates the power *inter alia* to institute legal action and sign any documents required for purposes of legal proceedings, to Mr Verster, who in turn delegates such power to Mr Botha.

31 Mr Botha deposed to the founding affidavit and supplementary affidavit while Mr Verster deposed to the supplementary founding affidavit and the Replying Affidavit. Counsel for the Respondents contended at the hearing that there was no proof of delegation to Mr Verster by the CEO.

32 Counsel for the Applicant correctly contended that it is irrelevant whether the deponent to the affidavit is authorised to depose to the affidavit. The real question is whether the party instituting the action had the authority to do so. As held by the Supreme Court of Appeal in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19:

> *"In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.*
>
> *The appellants did not avail themselves of the procedure so provided. (See Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705C - J.)"*

See also: Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA)at para 14.

33 In the present case, the Respondents do not challenge the authority of the Applicant's attorneys to institute these proceedings. In the circumstances, the challenge to Mr Verster's authority must fail.

Costs

34 In its notice of motion, the Applicant sought punitive costs against the Respondent. Neither party addressed me at the hearing or in their heads of argument on the issue of why punitive costs were called for in this case. In the circumstances, I am of the view that an ordinary order of costs is appropriate.

35 **I therefore make the following order**:

35.1 The Respondents are ordered (jointly and severally, the one paying the other to be absolved) to make payment to the Applicant of the following:

35.1.1 The amount of R864.351.67

35.1.2 Interest on the amount of R864.351.67, calculated daily and compounded monthly at a rate of 8,25% per annum, calculated from 10 September 2014 to the date of this order.

35.2 **The Respondents are directed (jointly and severally, the one paying the other to be absolved) to pay the costs of this application.**

N. RAJAB-BUDLENDER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

Date of Judgment:	22 **~~21~~ February 2017**
Counsel for the Applicant:	**Adv J. Roux**
Instructed by:	**Delport Van Den Berg Inc**
Counsel for the Respondents:	**Adv S.D. Wagener SC**
Instructed by:	**Gerhard Wagener Attorneys**