IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

DATE: 25 June 2020 SIGNATURE: ……………………….

CASE NUMBER: 91920/19

In the matter between:

FIRSTRAND BANK LIMITED **APPLICANT**

and

JOAO CARLOS DE FREITAS BARREIRO **FIRST RESPONDENT**

MARIA HELENA DE JESUS BARREIRO **SECOND RESPONDENT**

JUDGMENT

COERTZEN, AJ:

[1] The applicant applies for judgment against the first and second respondents (‘the respondents’) for payment of an amount of R928,827.76, plus interest and costs. The respondents oppose the application. The factual background is largely common cause.

[2] The respondents are married to each other in community of property. During

2013 the respondents and another individual, one Mr Pestana ('Pestana'), were the members of a close corporation, Baggio Business Investments CC ('the Corporation'). Pestana resigned as a member on 15 October 2015. The Corporation was placed under voluntary liquidation on 13 May 2019.

[3] On 25 April 2013 the first and second respondents signed a written suretyship in favour of the applicant for the indebtedness of the Corporation, as surety and co-principal debtors, for any existing and future debts of the Corporation owed to the applicant. Although the applicant relies in the founding affidavit on an allegation that the first respondent bound himself as surety, the second respondent confirms in the answering affidavit (further confirmed by the first respondent in a confirmatory affidavit), that both the first and second respondents bound themselves as sureties. The suretyship was signed by the second respondent above the words: "*Signature of the surety OR Co-signed by me, his/her spouse"*. I will accept for purposes hereof that both the first and second respondents bound themselves as sureties in favour of the applicant. In view of the conclusion reached in this judgment, it does not really matter whether, on a different interpretation of the deed of suretyship, the second respondent bound herself as surety.

[4] In terms of the suretyship, the respondents specifically renounced the benefits and defences of excussion, *errore calculi* and *non causa debiti*.

[5] On 28 May 2013 the respondents caused a continuing covering bond to be registered in favour of the applicant over their immovable property, for a capital amount of R750,000.00. In terms of the bond the respondents declared themselves indebted to the applicant in the aforesaid capital amount. The bond would continue to serve as security for all amounts, present and future, which may be due and owing by the respondents to the applicant, arising from any cause whatsoever, including any suretyship held by the applicant.

[6] During July 2013 the applicant granted a credit a facility to the Corporation on

an overdraft. The utilisation of the facility was conditional upon the first respondent providing a suretyship for the obligations of the Corporation. The bond was further conditional upon the respondents registering a general covering mortgage bond in favour of the applicant, over their immovable property. The written facility agreement signed by the first respondent on behalf of the Corporation on 20 July 2016, is a renewal of the credit facility granted to the Corporation in 2013. The Corporation defaulted in terms of its obligations in terms of the facility agreement. The full outstanding balance became due and payable to the applicant.

[7] On 12 February 2018 the respondents signed and executed a written "ACKNOWLEDGEMENT OF DEBT AND UNDERTAKING TO PAY INCORPORATING A POWER OF ATTORNEY I.R.O. IMMOVABLE PROPERTY" - ('AOD'). In terms of the AOD, the respondents acknowledged their joint and several liability towards the applicant for payment of an amount of R1,389,459.00, together with interest and costs on a scale as between attorney and client, in respect of monies lent and advanced to the Corporation. The respondents undertook to make payment of the amount due to the applicant, in monthly instalments. The full outstanding balance was to be settled by no later than 31 July 2018. In terms of the AOD the respondents consented to judgment in the event of their failure to make payment of any instalment due. The respondents granted a power of attorney to the applicant to sell their bonded immovable property in such event. The AOD does not constitute a novation, and all securities held by the applicant remained in full force and effect.

[8] The respondents failed to comply with their payment obligations in terms of the AOD. The applicant sold the respondents' immovable property for an amount of R750,000.00 and credited the account of the Corporation with the nett proceeds during October 2019. The applicant seeks to recover the outstanding balance from the respondents in these proceedings.

[9] It is common cause on the affidavits that the provisions of the National Credit Act 34 of 2005 ('NCA') do not apply.

[10] The respondents' opposition to the application, as set out in the answering affidavit, boils down to the following allegations and contentions:

a) That one would have expected the applicant to insist on a suretyship by all three members of the Corporation;

b) That Pestana was the one who initially arranged finance from the applicant on behalf of the Corporation in 2013;

c) That the respondents only realised after registration of the bond over their immovable property, that only they were required to sign surety;

d) That the applicant should have required Pestana to also sign surety, which the applicant failed to do, placing a greater burden on the respondents;

e) That the liability of the respondents towards the applicant would have been considerably less, if the applicant had insisted on security and/or collateral from Pestana;

f) That the failure of the applicant to insist on security from Pestana, prejudiced the respondents, which had the effect of releasing them from their obligations as sureties; and that they are therefore not bound by the terms of the suretyship and of the AOD;

g) That the applicant's officials advised the respondents that it was compulsory for them to sign the AOD, whilst the respondents were not legally obliged to do so, presumably because they were allegedly released as sureties.

[11] The opposition to the application was further developed in argument as follows:

a) That the respondents only intended to bind themselves as sureties, and in terms of the AOD, on condition that Pestana would have also provided security. An argument was made that a defence of *iustus error* is available to the respondents;

b) That the suretyship should be declared invalid because it does not reflect the actual intention of the parties, *i.e.* an argument that there was no *consensus* and therefore no underlying *causa* for the AOD;

c) That the applicant has a duty to "mitigate its damages" by claiming from the insolvent estate of the Corporation;

d) That the provisions of the NCA apply to the AOD, and that the applicant failed to give the required s 129-notice.

[12] The respondents did not persist with their argument on the papers that when the Corporation applied for credit, the applicant failed to perform a proper credit assessment of the Corporation. The respondents also did not persist with a point taken in the heads of argument that the date from which interest is to be calculated, in terms of the applicant's certificate of balance, has not been properly established.

[13] The suretyship signed by the respondents, is binding upon each surety who signed it, notwithstanding the fact that any co-sureties have not. The fact that the applicant did not require all the members of the Corporation to sign surety, is of no moment. Even if the applicant obtained security from all three members, the applicant was entitled to proceed against any one or more of the sureties (or the Corporation for that matter), for the full amount due.

[14] There is no general so-called 'prejudice principle' that states that a creditor must

do nothing in its dealings with the principal debtor and other sureties which has the effect of prejudicing the surety, and if the creditor does so, the latter is fully released. Prejudice caused to the surety can only release the surety (whether totally or partially) if it is the result of a breach of some or other legal duty or obligation – *Bock and others v Duburoro Investments (Pty) Ltd* [2003] 4 All SA 103 (SCA); 2004 (2) SA 242 (SCA) at par 20. The respondents have not shown the existence of such a breach on the part of the applicant. They cannot claim to have been released from the suretyship if the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the suretyship. The conduct complained of in this matter is the applicant's failure to obtain additional security from the remaining member. In the absence of an obligation or a legal duty on the applicant to have done so, the perceived prejudice suffered by the respondents would be one which they undertook to suffer - *ABSA Bank Ltd v Davidson* [2000] 1 All SA 355 (A); 2000 (1) SA 1117 (SCA) at para 19.

[15] None of the agreements between the parties or between the applicant and the Corporation, required security from the remaining member of the Corporation in addition to that which the respondents undertook to provide. There is nothing on the papers before me to suggest that the respondents were somehow misled by the applicant to believe otherwise. On the facts there was no duty on the applicant to have informed the respondents that the applicant did not require any form of security from the remaining member. Uncommunicated mental reservations harboured by the respondents are of no legal consequence - *Road Accident Fund v Mothupi* [2000] 3 All SA 181 (A) at para 16. By their signatures the respondents signified their assent to the terms of the deed of suretyship, the bond and the AOD – *George v Fairmead (Pty) Ltd* [1958] 3 All SA 1 (A), 66. The respondents have not shown the existence of a duty on the applicant to have enquired whether the expressed intention of the respondents, in agreeing to the terms of any of the agreements they have signed, reflected their true intention - *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* [1992] 2 All SA 114 (A), 119 - 120. In my view the

respondents have not shown the existence of *iustus error*. There is no evidence that the respondents at any given time raised the provision of additional security, with the applicant.

[16] The respondents have not shown that the suretyship is invalid for lack of consensus. The terms of the suretyship, the terms of the bond and the terms of the AOD all point to the existence of an antecedent debt. The onus is on the respondents to establish that no antecedent *causa debiti* existed - *South African Eagle Insurance Co Ltd v NBS Bank Ltd* [2002] 2 All SA 220 (A) at para 39. The contention that there was no underlying *causa* for the AOD can therefore not be sustained.

[17] I have already pointed out that it is in fact common cause on the papers that the provisions of the NCA do not apply to the AOD because, as admitted by the respondents, the principal debtor is a juristic person who entered into a large agreement with the applicant as contemplated in s 9(4)(b) of the NCA, where the principal debt in terms of the agreement, exceeds the applicable threshold of R250,000.00 determined in terms of s 7. It was nevertheless contended at the hearing that the AOD is a credit agreement as contemplated in s 8(4)(f) of the NCA. I disagree. It does not appear from the AOD that any charge, fee or interest is payable to the applicant in respect of the agreement or the amount that has been deferred in terms thereof, as required by the subsection.

[18] As agreed to in clause 6 of the AOD, the applicant relies on a certificate of balance, signed by a manager of the applicant, as *prima facie* proof of the amount claimed. The facility agreement, the suretyship and the bond equally make provision for a certificate of balance. The respondents dispute the certificate of balance based on their defences that they have been released as sureties and that they are not bound in terms of the AOD. It was contended in the respondents' heads of argument that the applicant placed no further information before the court to show that the amount claimed is indeed accurate. As pointed out by Cloete JA in *Rossouw and another v First Rand*

Bank Ltd t/a FNB Home Loans (formerly First Rand Bank of SA Ltd) [2011] 2 All SA 56 (SCA) at para 47: *"To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on the facts already before the court which the court would otherwise have to perform itself"*. In the absence of actual evidence by the respondents to disturb the *prima facie* evidence of the applicant, it was in my view not required of the applicant to have placed anything more before me to prove the amount of the claim. Apart from the terms of an agreement between a creditor and a debtor, I know of no other formalities which a certificate of balance must comply with, and I was referred to none.

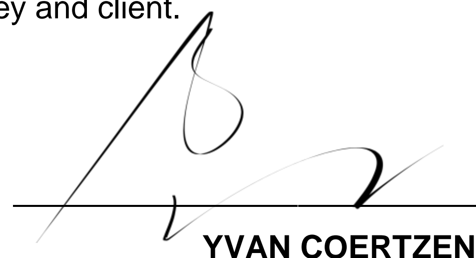
[19] It follows that the application must succeed. In terms of the suretyship, the bond and the AOD, the respondents agreed to pay attorney and client costs.

In the result, judgment is granted in favour of the applicant against the first and second respondents, jointly and severally, the one paying, the other to be absolved, for:

1. Payment of the amount of R928,827.76 (NINE HUNDRED AND TWENTY-EIGHT THOUSAND, EIGHT HUNDRED AND TWENTY-SEVEN RAND AND SEVENTY-SIX CENTS);

2. Interest to date of payment at prime plus 2% *per annum*, compounded monthly, calculated from 1 October 2019;

3. The first and second respondents are ordered to pay the applicant's costs of the application on a scale as between attorney and client.



YVAN COERTZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 15 June 2020

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading the judgment to the digital CaseLines system which utilised in this division. The date and time for hand-down is deemed to be at 10h00 on 25 June 2020.

Appearances:

Counsel for applicant: Adv NG Louw
Instructed by: RWL Inc

Counsel for first & second respondents: Adv L Keijser
Instructed by: EW Serfontein & Associates Inc.