

In the KwaZulu-Natal High Court, Durban  
Republic of South Africa

Case No :2860/2011

In the matter between :

Penta Shipping Holdings (Pty) Ltd

Applicant

and

Nzenga Investments (Pty) Ltd

First Respondent

Nkosinathi Thusi

Second Respondent

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Judgment

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Lopes J

[1] In this matter the applicant (as plaintiff) seeks summary judgment against the first respondent (as defendant), and against the first and second respondents jointly and severally, together with interest and costs.

[2] The applicant's cause of action may be summarised as follows :-

(a) First Claim

- i) on the 12<sup>th</sup> July 2005 the applicant bound itself as surety and co-principal debtor on behalf of the first respondent in favour of ABSA Bank Limited ('ABSA') for the repayment on demand of all sums then

owed, or which in the future would become owing, to ABSA from any cause arising;

- ii) ABSA in turn bound itself as guarantor for the due payment by the first respondent of amounts which it then owed or in the future would owe to Transnet, up to a maximum of R2 000 000;
- iii) on the 30<sup>th</sup> November 2009 Transnet made written demand for payment of the sum of R2 000 000, and on the 18<sup>th</sup> January 2010 the applicant, as it was bound in law to do, paid ABSA that sum;

(b) The second claim

- i) on the 18<sup>th</sup> July 2006 ABSA issued a guarantee (the second guarantee) on behalf of the first respondent in favour of Transnet;
- ii) in terms thereof ABSA guaranteed the debts of the first respondent to Transnet arising out of a credit account agreement concluded between the first respondent and Transnet, up to a maximum of R2 000 000;
- iii) on the 10<sup>th</sup> August 2006 that guarantee was reduced to an amount of R1 107 719;
- iv) on the 27<sup>th</sup> October 2004 ABSA had issued a further guarantee in favour of Transnet (the third guarantee) ;
- v) the third guarantee was initially in the sum of R400 000, but on the 1<sup>st</sup> July 2005 increased to the sum of R1 000 000;
- vi) on the 3<sup>rd</sup> February 2010 Transnet made written demand for payment in terms of the second and third guarantees;

- vii) on the 22<sup>nd</sup> February 2010 ABSA debited the bank account of the first respondent with the sum of R2 107 719 being the amount payable by ABSA to Transnet in terms of the second and third guarantees;
- viii) the first respondent's bank account then became overdrawn to the extent of R1 493 715,20 which was payable immediately;
- ix) in terms of the suretyship agreement referred to above, the applicant was liable to, and did, make payment to ABSA of that amount.

[3] On or about the 19<sup>th</sup> October 2004 the second respondent executed a written deed of suretyship in which he bound himself as surety for, and co-principal debtor jointly and severally with, the first respondent in favour of ABSA for the repayment on demand of any sums of money which the first respondent owed or would in the future owe to ABSA from whatever cause arising, and for the due fulfilment of all obligations of the first respondent to ABSA in respect of such indebtedness.

[4] In terms of that suretyship, where one or more persons signed as surety for the obligations of the first respondent in favour of ABSA, each party would be jointly and severally liable as surety and co-principal debtor for such obligations.

[5] Accordingly, the second respondent was jointly and severally liable with the first respondent and the applicant for the debts of the first respondent.

[6] The first respondent having failed to pay its debts to ABSA the plaintiff was compelled to pay the amount aforesaid to ABSA in terms of the surety agreement.

[7] The plaintiff accordingly claims payment from the first respondent of R1 000 000 and R746 857,60 (being half of the R1 493 715,20). In addition the plaintiff claims against the first and second defendants jointly and severally, the sum of R1 000 000 and the further sum of R746 857,60 (together with interest against the first respondent only) and costs against both respondents.

[8] Pursuant to that indebtedness the applicant issued summons against the first and second respondents who opposed the action. In due course the applicant applied for summary judgment.

[9] The first and second respondents opposed the application for summary judgment and their defence was set out in an affidavit deposed to by the second respondent.

[10] In the summary judgment affidavit put up by the second respondent on behalf of both respondents, a number of allegations were made in an attempt to justify a bona fide defence. Save for the two references set out below, the essential averments made by the plaintiff in its particulars of claim are not denied. In sub-paragraph 4 the second respondent alleges that in or about

February 2005 an oral agreement was concluded with the late K M Sullivan ('Sullivan') representing the plaintiff and the first defendant represented by himself,

'the material express *alternatively* implied *alternatively* tacit terms and/or conditions of which were, *inter alia*, as follows :-

- i the plaintiff would, *inter alia*, inject capital and equipment into the first defendant as and when required to do so as well as pass containerised business through the first defendant's Alrode depot, and in particular to maintain the first defendant's rail account with TFR (Transnet) in order for the first defendant to transport containerised cargo for its customers, as also to ensure that the first defendant operates smoothly as a business enterprise.  
...
- iv the shareholding in the first defendant would be on an equal basis between the plaintiff and myself ...
- e) the guarantees furnished by the plaintiff to TFR were in order for the first defendant to maintain a revolving credit facility with TFR, and were part and parcel of the capital contribution made by the plaintiff into the business of the first defendant.
- f) There is, ergo, no liability to the plaintiff on the part of the first defendant and/or myself.'

[11] The plaintiff's counsel drafted the plaintiff's short heads of argument which

were served on the respondents' attorneys on the 21<sup>st</sup> September 2011.

[12] No doubt upon reading those heads of argument the respondents' legal representatives appreciated and understood the shortcomings in the second respondent's opposing affidavit. Presumably pursuant to that realisation, the respondents delivered a supplementary opposing affidavit on the 27<sup>th</sup> October 2011, the day before the hearing.

[13] Mr *Kemp* SC, who appeared for the plaintiff together with Mr Wallis, indicated at the outset of their argument that the plaintiff would not oppose delivery of the supplementary opposing affidavit.

[14] That supplementary opposing affidavit proceeds to amplify the basis of the respondents' defence. From what is stated therein it is clear that there was a history of dealings between the plaintiff and the second respondent as the erstwhile owner and representative of the first respondent.

[15] In the applicant's particulars of claim the applicant dealt only with the legal documentation founding its claim against the respondents – i.e. the suretyship agreements and the guarantees issued by ABSA Bank to Transnet. That being so, I have no version of events with which to compare the allegations made by the second respondent in his opposing affidavits.

[16] In the supplementary opposing affidavit the second respondent sets out that :-

- (a) the applicant and the first respondent decided to combine business forces for their respective benefit;
- (b) part of the agreement was that the applicant, together with King Rest Container Park (Pty) Ltd and the second respondent would all become one-third shareholders in the first respondent;
- (c) the capital contribution of the applicant to the first respondent would be by way of sureties and guarantees as well as the provision of some business;
- (d) as between the shareholders of the first defendant, the plaintiff would have no recourse to recover from the other shareholders or the first defendant any amounts which it was liable to pay out pursuant to the suretyships and guarantees provided for it and on its behalf; and
- (e) on that basis the principle of the recovery by the applicant of its aliquot share pursuant to the suretyship agreement concluded by the second respondent in favour of ABSA, would not apply.

[17] This arrangement eventually fell through on the 17<sup>th</sup> November 2009 when the applicant's representative informed the first respondent that it would make no further contributions in terms of the underlying agreement.

[18] The second respondent raises the further issue that the suretyship agreement relied upon by the applicant for the payment of its aliquot share was concluded with the bank well prior to the shareholding agreement having been concluded.

[19] I agree with Mr *Kemp*'s submission that the respondents' version of the agreements concluded between the applicant and the first respondent are somewhat improbable. Is that, however, enough for me to disbelieve them to the extent that I could safely say that the respondents have not made out a bona fide defence? Given that the applicant did not in its summons set out the basis upon which the relationship between the applicant and the first respondent was founded, I only have the version of the respondents before me in that regard. This defence is not in the category of a bare denial or a denial of knowledge of any of the events. Most of the applicant's averments are admitted. In this regard I agree with the statement of Patel J in *Mercantile Bank Ltd v Star Power CC and Another* 2003 (3) SA 309 (TPD) at page 311, paragraph 7 where he stated :-  
'To test the *bona fides* of the defendants it is necessary to contextualise the defendant's averments in their totality, rather than simply selecting a particular averment and then characterising it as bald, vague or laconic.'

[20] If the averments made by the second respondent are true, then the respondents will have raised a triable issue, which if proved at trial, would constitute a defence to the applicant's claim. As the original denial has been



considerably amplified in the supplementary opposing affidavit, I am left with some doubt that the applicant has an unanswerable case. In those circumstances the applicant is not entitled to summary judgment.

[21] I accordingly make the following order :-

- (1) the application for summary judgment is refused;
- (2) the defendants are given leave to defend the action;
- (3) the costs of the summary judgment application are reserved for decision by the trial court.

Date of hearing : 28<sup>th</sup> October 2011

Date of judgment : 2<sup>nd</sup> November 2011

Counsel for the Applicant : K J Kemp SC with P J Wallis (instructed by  
Van Velden Pike & Partners)

Counsel for the Respondent : I Moosa (instructed by J Surju)