Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no: 3247/2009

Date Delivered: 15/04/2011

In the matter between:

SLIP KNOT INVESTMENTS 777
(PTY) LTD **APPLICANT**

Versus

BLUE MARINE PROPERTIES CC **1ST RESPONDENT**

PATRICIA MAE FORLEE **2ND RESPONDENT**

JUDGMENT

SANDI J:

[1] The applicant, Slip Knot Investments 777 (Pty) Ltd (hereafter referred to as "the applicant") is an investment company with its principal place of business in East London. The first respondent is a close corporation with its main place of business in Port Elizabeth. The second respondent, a business woman, is its sole member.

[2] The applicant seeks the following order against both first and second respondents:-

1. "That the second respondent be directed forthwith to sign the personal suretyship document binding herself as surety jointly and

severally to the applicant for the payment by the first respondent of its loan, a copy of which personal suretyship is annexed hereto marked annexure "JD6".

2. That the second respondent be directed, forthwith to sign the agreement of loan, recording the loan of R2 830 000.00 by the applicant to the first respondent, a copy of which agreement of loan is annexed hereto marked annexure "JD8".

3. That the second respondent be directed forthwith to take all steps necessary, and to sign all documentation necessary, for the registration of a surety bond over Erf 773, Fairview, Port Elizabeth, in favour of the applicant, a copy which surety bond is annexed hereto marked annexure "JD7".

4. That in the event that the second respondent fails to sign the aforesaid personal suretyship, agreement of loan and fails to take the necessary steps and to sign all documentation necessary for the registration of a surety bond over Erf 773, Fairview, Port Elizabeth in favour of the applicant, within ten days of the granting of this Order, the sheriff for the district of Port Elizabeth be hereby authorised to sign all such documentation and to take all such steps necessary on her behalf.

5. Further and/or alternative relief.

6. That the first and second respondents, jointly and severally the one paying the other to be absolved, pay the costs of this application."

[3] In terms of an agreement of sale entered into between the first respondent and Wonderwonings Eiendomme (Pty) Limited in August 2008, the first respondent, represented by the second respondent purchased Erven 316–433 in Port Elizabeth at a price of R28 300 000.00. The agreement required a 10% deposit of R2 830 000.00. Because the first respondent was in no position to pay the purchase price it required a financial investor. The applicant became such investor.

[4] At the instance of the applicant Investec Private Bank issued a guarantee in respect of the deposit.

[5] Discussions were held between the applicant and the second respondent (representing the first respondent) the contents of which were reduced to writing in letters dated 17 and 19 September 2008.

[6] Both these letters were signed by the second respondent in her personal capacity and in her capacity as sole member of the first respondent.

[7] These two letters were addressed by respondents' attorneys to the applicant.

[8] The letter dated 17 November 2008 reads as follows:

> 17 September 2008
>
> Dear Mr Du Plessis
>
> **Re: PROPERTY DEAL: BLUE MARINE PROPERTIES CC**
>
> We refer to the above and to the writer's telephone conversation with you moments ago, and confirm that we have reached agreement regarding the deal as follows:
>
> 1. Slip Knot Investments ("SKI") will today issue a bank guarantee for R2 830 000.00, being the 10% deposit on the purchase price of the land purchased by Blue Marine Properties ("BMP") from Wonderwonings Eiendomme (Pty) Ltd, i.e. Erven 316–433, remainder portion 1226 Fairview, Port Elizabeth;
>
>   1.1. BMP will sign an acknowledgement of debt in favour of SKI for R2 830 000.00 plus interest at prime +1% calculated from the date of payment of the guarantee, repayable within 18 months of payment of the guarantee; BMP shall be entitled to repay the deposit of R2 830 000 or request SKI to withdraw the guarantee at any stage, without affecting the joint venture option set out in 3 below;
>
>   1.2 Patricia Mae Forlee will bind herself as surety for and on behalf of BMP;
>
> 2. Instead of registering a surety bond over Ms Forlee's property, we will register a private bond in favour of SKI over the erven purchased (i.e.

erven 316-433 remainder portion 1226 Fairview, Port Elizabeth) for the amount of R2 830 000.00, which bond would be registered simultaneously with the transfer of the property into the name of BMP, upon which date the guarantee would be paid;

3. BMP will grant SKI an option to enter into a joint venture agreement on a 50/50 basis, which option shall be exercised by SKI in writing by 15 November 2008; the further terms and conditions of the joint venture agreement shall be agreed on at a later stage.

4. Ms Forlee will furnish you with her personal balance sheet within 2 weeks of signature hereof, i.e. by 1 October 2008.

Kindly fax the requested guarantee to us on 0866 362 443 as a matter of urgency, bearing in mind the cut-off time of 16h00 today, and let us have the original via courier.

Thanking you kindly.

Yours faithfully
GOLDEBERG & DE VILLIERS INC

Per:

I, the undersigned Patricia Mae Forlee, in my personal capacity and in my capacity as sole member of Blue Marine Properties, do hereby accept the above terms and conditions.

[9] The second letter dated 19 September 2008 reads as follows:

19 September 2008

Dear Mr Du Plessis

Re: PROPERTY DEAL: BLUE MARINE PROPERTIES CC

Further to our telefax of the 17th instant, we confirm the following:

1. Slip Knot Investments (“SKI”) will amend the bank guarantee for R2 830 000.00 to make it irrevocable and unconditional;

2. Patricia Forlee will apply to Absa Bank for their consent to the registration of a third party surety bond over Erf 773 Fairview in favour of SKI;

3. If Absa refuses such consent, SKI will settle the outstanding debt due to Absa and a first mortgage bond shall be registered in its favour over the said property for R2 830 000.00 plus the outstanding bond amount due to Absa, in which case interest at prime +1% per annum will accrue on the outstanding bond amount from date of payment of such amount and on the R2 830 000.00 from date of payment of the guarantee;

4. If Absa consents thereto, a third party surety bond will be registered over Erf 773 Fairview in favour of SKI for an amount of R2 830 000.00. This bond will replace the first mortgage bond over the

property purchased by BMP (Erven 316-433 remainder portion 1226 Fairview) ("BMP property);

5. If and when a first mortgage bond is registered in favour of SKI over the BMP property, then the surety bond shall be cancelled simultaneously with registration of such first bond;

6. Our client, Ms Forlee, will be liable for costs of registration of the mortgage bond/s and cancellation of the Absa bond, if necessary;

7. BMP will still retain the right to repay the R2 830 000.00 deposit to SKI at any stage, without affecting the joint venture option, in which case any registered surety or first bond shall be cancelled;

8. The transferring attorneys have undertaken not to demand payment on the guarantee prior to the registration of transfer, unless BMP breaches the sale agreement;

9. We will let you have the following by Tuesday 23 September:

   9.1 copy of deeds search indicating the extent of Erf 773 Fairview;

   9.2 automated valuation of Erf 773 Fairview from Windeed;

   9.3. copy of our client's latest bond statement.

We confirm that you will amend the guarantee and send it through to Mostert and Bosman, and a copy to us, before 16h00 on Monday.

Thanking you kindly.

Yours faithfully
GOLDBERG & DE VILLIERS INC

Per:

I, the undersigned, Patricia Mae Forlee, in my personal capacity and in my capacity as sole member of Blue Marine Properties, do hereby accept the above terms and conditions.

[10] It is on the basis of these two letters that the applicant seeks the relief set out in the notice of motion.

[11] The applicant avers that it has complied with all the terms and conditions of the agreement entered into between it and the second respondent and that it paid the deposit of R2 830 000.00 to the

seller on 24 December 2008. It also avers that the first and second respondents have not done so

[12] The applicant's attorneys have provided the second respondent, in her personal capacity and in her representative capacity as a sole member of the first respondent with the following documents:

(a) a loan agreement;

(b) a personal suretyship agreement;

(c) a surety bond for registration of Erf 773, Fairview Port Elizabeth.

A demand has been made on the second respondent to sign the above documents.

[13] The basis for the applicant's insistence on being furnished with these documents is to be found in the letters dated 17 and 19 September 2008.

[14] Accompanying the documents sent to the second respondent for her signature is an unsigned extract of a resolution of the Board of Directors of the applicant part of which reads as follows:

> "That Jean Prierrie Du Plessis, acting in his capacity as a director of the company, be and is hereby authorised and empowered to:-
>
> (a) negotiate the final terms and conditions of the Deed of Suretyship referred to in the preceding resolution; and

> (b) sign the Deed of Suretyship and all other deeds or documents which may be necessary for the implementation of the abovementioned deed of suretyship;"

[15] A similar provision is to be found in the unsigned extract of a resolution of the directors of the applicant dealing with the loan agreement.

[16] The second respondent refuses to sign the documents referred to above alleging that subsequent to the agreements dated 17 and 19 September 2008 the applicant agreed to furnish guarantees for the balance of the purchase price; that the applicant and the first respondent would take transfer of the property jointly and severally; they would put in services on the property and sell a portion of it to repay applicant for the purchase price; the property would be developed and sold and the profits shared equally.

[17] The second respondent avers that because the applicant breached the terms of the above agreement which resulted in the forfeiture to the seller of the deposit paid, she was not obliged to furnish a surety bond.

[18] There is a dispute between the parties on this issue which I do not find it necessary to resolve. The real and crisp issue before me is whether or not this Court can issue an order *ex post facto* compelling the second respondent to sign the documents referred to above. The second respondent says that the draft surety bond

contains onerous clauses to which she would not have agreed. I need not deal in detail with such averments as they are fully set out in the first respondent's affidavit. However, I think I should mention that in none of the letters dated 17 and 19 September 2008 is it stated that the bond will be registered in the sum of R2 830 000.00 together with an additional amount of R566 000.00. No mention is made of the sum of R566 000.00.

[19] Regarding the acknowledgement of debt the second respondent also states that it contains onerous clauses which have not been discussed with the first respondent. She makes similar averments regarding the draft suretyship document.

[20] As I have stated above these are issues that I need not resolve in order to reach a just decision in this matter

[21] During argument I questioned applicant's counsel regarding the status of the letters dated 17 and 19 September 2008 and I asked him pertinently whether or not it was the applicant's contention that the two letters constitute a deed of suretyship. Counsel advised me that they are not. He submitted that the two letters referred to above constitute evidence which entitles applicant to an order that the second respondent should sign the deed of suretyship and the other documents referred to in the notice of motion.

[22] Indeed the two documents do not constitute a deed of suretyship. They are a recordal of an agreement to enter into further agreements in the future. Section 6 of the General Law Amendment Act, no.50 of 1956 provides that:

> "No contract of suretyship entered into after the commencement of this Act *(22 June 1956)* shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."

In *Fourlamel (Pty.) Ltd vs Maddison* 1977 (1) SA 333 (A) at 342H-343C Miller JA said the following about the objects of the legislature in enacting this section:

> "However many objects the Legislature may have had in mind in enacting sec. 6 of Act 50 of 1956, one of them was surely to achieve certainty as to the true terms agreed upon and thus avoid or minimize the possibility of perjury or fraud and unnecessary litigation... The Legislature may also have been influenced by other considerations, for example, that suretyship being an onerous obligation, involving as it does the payment of another's debts, would-be sureties should be protected against themselves to the extent that they should not be bound by any precipitate verbal undertakings to go surety for another but would be bound only after their undertaking had been recorded in a written document and signed by them or on their behalf."

In terms of s 6 of the Act, to be valid, the terms of a suretyship must be embodied in a written document signed by or on behalf of the surety. In *Sapirstein and others v Anglo African Shipping CO (SA) Ltd* 1978 (4) SA 1 (A) at 12B the Appellate Division held that:

> "What s6 requires is that the "terms" of the contract of suretyship must be embodied in the written document. It was contended by counsel for the plaintiff that this meant that the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt must be capable of ascertainment by reference to the provisions of the written document... I agree with this conclusion."

In *Plascon Evans Banks Transvaal Limited v Virginia Glassworks Pty Ltd and others* 1983 (1) SA 465 (O) at 470G-H it was held that:

> "...the suretyship agreement defining the duration of the sureties'

> liability is a term of the suretyship... As such it must be in writing by virtue of the legislative provisions of s6 of Act 50 of 1956, and the same applies to material variations thereof."

[23] Applicant's counsel conceded that the letters referred to above are not deeds of suretyship. Indeed, that is so because they do not comply with the provisions of s 6.

[24] The two letters dated 17 and 19 September 2008 record an agreement between the applicant and the respondents to enter into further agreements in due course without specifying the terms of those agreements.

[25] The first respondent challenges some of the terms set out in these documents. According to her they were not discussed and agreed upon. She avers that some of the clauses contained therein are so onerous that she would never have agreed to. In addition she alleges (rightly or wrongly) a breach by the applicant of the oral agreement concluded between the parties subsequent to the letters of the 17 and 19 September 2008.

[26] The two unsigned resolutions purported to have been passed by the directors of the applicant purport to give Du Plessis authority to negotiate the terms of the future agreements.

[27] The result is that there is no surety agreement, no surety bond or acknowledgement of debt before me.

[28] It seems to me that the only purpose of the application is an attempt by the applicant to circumvent the provisions of s 6 of the Act by attempting to obtain a Court order to coerce the respondents to acknowledge and sign the said documents after the event in order to protect the interests of the applicant.

[29] I do not think that this Court has authority to do so.

[30] I have considered the affidavit of attorney Schoeman, a conveyancer, filed on behalf of the applicant and I am afraid to say that it takes the applicant’s case no further. The fact that the documents in question are standard in form does not endow this Court with the authority to ignore the provisions of s 6 of the Act.

[31] There is no valid contract of suretyship before me that complies with the provisions of s 6 of the Act. No surety bond has been furnished by the second respondent and, as required by the applicant, there is also no signed acknowledgement of debt.

[32] Nowhere in the applicant’s papers is there any allegation that the applicant and the respondent reached consensus on the terms of the deed of suretyship. In *Heathcote v Finwood Papers (Pty)*

Limited [1997] 2 ALL SA 28(E) at 34f Jones J (Ludorf and Erasmus JJ concurring) held that:

> "Once the finding is made that the spaces were left blank because of lack of *consensus*, the conclusion is inevitable that the deed of suretyship is invalid for want of completeness, and that it cannot ground a cause of action. It also cannot be rectified."

[33] In this matter the applicant does not seek a rectification of the deed of suretyship. I doubt that it would have adopted such a course of action as I am of the view that it would not have been able to seek rectification of a non-existent deed of suretyship.

At page 35 of the *Heathcote (supra)* judgment Jones J held that:

> "But the question is not, simply, what the parties intended. It is whether or not they recorded that intention in writing."

As I have already stated above the evidence of the letters dated the 17 and 19 September 2008 is of limited value only, namely to record tersely the future intention of the parties.

[34] A case which is somewhat similar to the present is that of *Prins v Absa Bank Ltd* 1998 (3) SA 904 (C). In that matter the surety believed that he was signing a deed of suretyship of limited duration and amount whereas the bank claimed that it was for an unlimited period. Aware of the surety's misapprehension when signing the document the bank official who supervised the signing of the deed of suretyship did not correct it. It was held that it was unreasonable for the bank to rely on the unlimited suretyship. In *Kerr*: *The Principles of the Law of Contract* 6th Ed at pg. 104 the writer

comments that the *ratio decidendi of* this case is that if at the end of negotiations about an agreed subject matter (the limited suretyship) one party to the negotiations without disclosing to the other the diversions from the subject of the negotiations, presents to the other a document the terms of which reflect a different transaction (an unlimited suretyship) there is no contract.

[35] It would seem therefore that in the present case the applicant unilaterally prepared the deed of suretyship and the other documents relevant to this application without first seeking the respondents' consensus thereto, and without disclosing to the respondents the other clauses contained in the document which were not the subject of discussion between them.

[36] In the present matter the applicant cannot be heard to say that the second respondent agreed to sign the suretyship agreement in the form presented by it or in any other form whatsoever. The second respondent agreed to bind herself in the future on terms to be negotiated and agreed upon. See: *Pizani and Another v First Consolidated Holdings (Pty) Limite*d 1979 (1) SA 69 (A).

[37] To my mind the applicant and the second respondent entered into what is referred to by Corbett JA in the matter of *Hirschowtz v Moolman and Others* 1985 (3) SA 739 (A) at 766 as a *pactum de*

contrahendo, namely an agreement to enter into a contract in the future. In that matter Corbett JA held at 766D:

> "In general a *pactum de contrahendo* is required to comply with the requisites for validity, including requirements as to form, applicable to the second or the main contract to which the parties have bound themselves."

[38] A reading of both the applicant's and the respondents' affidavits indicate that no consensus was ever reached between the parties when the above documents were prepared.

[39] The surety bond required from the second respondent in respect of Erf 773 Fairview was on the basis that there could be a valid deed of suretyship in existence. Absence such deed of suretyship the second respondent is not obliged to register a surety bond over her property.

[41] The draft resolutions of the applicant's Board of Directors authorising Du Plessis to negotiate the final terms and conditions of the deeds of suretyship prepared by the applicant's attorneys are an indication that negotiations would take place between the parties at some time in the future.

[42] In the circumstances, there is no basis upon which I can grant the order sought by the applicant. The application must fail and it is dismissed with costs.

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B Sandi
Judge of the High Court;
Eastern Cape, Grahamstown

APPEARANCES

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