IN THE HIGH COURT OF UTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No: 7151/2021

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED
09 January 2023

In the matter

PG GROUP (PTY) LTD

APPLICANT

And

MATTHEW RICHARD AMORETTI

RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on Caselines electronic platform. The date for hand-down is deemed to be 09 January 2023

Summary: Application for summary judgment arising from a credit agreement that the applicant had granted to the principal debtor. The cause of action is based on the acknowledgement of debt which the respondent had signed on behalf of the principal debtor. The claim for summary judgment is based on suretyship agreement between the applicant and the respondent. The applicant contended that the respondent was

sued in his personal capacity and therefore the principles of surety did not find application.

The main defence raised by the respondent is that at the principal debtor was in liquidation at the time he signed as a director and on behalf of the principal debtor and therefore the suretyship contract was invalid as he did not have authority to sign.

The trite legal principle that suretyship contract is accessary in nature restated. The liability of a surety is dependent on the obligations of the principal debtor.

JUDGMENT

Molahlehi J

Introduction

[1] This is an opposed application for summary judgment in terms of rule 32 of the Uniform Court Rules (the Rules). The relief sought by the applicant,[1] is payment in the sum of R401 222. 56 in the original amount prayed for in the summons, less payment received in the amount of R500 000.00 on 18 April 2021 after the institution of the action proceedings by the applicant. The claim against the respondent is based on the surety concluded on 9 October 2019.

[2] The main opposition to the application is based on the following legal points raised by the respondent's Counsel in the heads of argument:

(a) the agreement does not comply with the National Credit Act.

(b) the acknowledgement of debt relied upon by the applicant is invalid as the respondent did not have the authority to sign it on behalf of the principal debtor.

[1] The applicant is the plaintiff in the action proceedings.

[3] The respondent also challenged the authority of the deponent to the affidavit in support of the application. The challenge is based mainly on whether he had the knowledge to attest to the facts supporting the application. He further contends that he has a *bona fide* defence which entitles him leave to defend the applicant's action.

[4] The applicant raised a preliminary point relating to the respondent's delay in filing the affidavit resisting the summary judgment application. The affidavit opposing the summary judgment application was some twelve days late in terms of the time frames prescribed by the rules.[2]

[5] In response to the above the respondent contended that the summary judgment application was initially set down on 5 August 2021. He further submitted that on that day the court after considering the submissions made by both parties granted him leave to file the affidavit opposing the application for summary judgment. This in other words means that the court condoned the late filing of the affidavit opposing the application for summary judgment.

The background facts

[6] The dispute between the parties flows from the agreement, which was concluded in October 2018 with African Fenestration Solutions (Pty) Ltd, the principal debtor. Following the agreement, the applicant and the respondent,[3] concluded a suretyship agreement.

[2] Uniform Rule 32(3)(b) prescribes an affidavit resisting summary judgment must be served 5 days before the day on which an application is to be heard.

[3] The respondent is the defendant in the action proceedings instituted by the plaintiff.

[7] The applicant provided credit to the principal debtor in terms of the agreement. It is alleged that the principal debtor breached the agreement in that it failed to effect payment per the terms of the agreement. It is in this regard common cause that the applicant performed its duties in terms of the agreement.

[8] Following the breach of the agreement, the applicant commenced legal proceedings against the principal debtor.

[9] On 9 October 2019, the parties engaged in settlement negotiations, which resulted in the written acknowledgement of debt (the AOD) between the principal debtor and the applicant. The settlement agreement included the surety agreement between the applicant and the respondent. The respondent signed the AOD on behalf of the principal debtor as its director.

[10] The agreement between the parties in July 2020 restructured the payment obligations regarding the (AOD). The terms of the restructured payments were signed by the respondent and were made an addendum to the AOD.

[11] On 28 October 2019 the final liquidation order was issued by the Court against the principal debtor. It is important to note that the application for the liquidation of the principal debtor was made on 16 September 2019.

The legal principles

[12] For the applicant to succeed in an application such as the present he or she has to identify points in law and facts upon which the claim is based. He or she should further explain why the defence pleaded by the respondent does not raise any issues for trial. In other words, the plaintiff has the onus of showing that the defendant does not have a *bona fide* defence on the case's merits.[4]

[13] The defendant, on the other hand, has to provide sufficient particularity of the facts upon which he or she relies on in opposing the application. It is upon the facts availed by the respondent that the Court will assess whether there exists a *bona fide* defence to the applicant's claim. The respondent may also challenge the application on the basis that the application does not satisfy specific legal requirements for a valid summary judgment.

The contention of the parties

[14] It is clear from the particulars of the claim that the applicant's cause of action is based on a suretyship agreement in which, according to it (the applicant), the respondent bound himself as surety and co-principal debtor.

[15] The applicant contends that the respondent, in signing the acknowledgement of debt, amongst other things:

> "11.1. declared that all admissions and acknowledgements of indebtedness by the principal debtor would be binding on him, personally, and

[4] See Breitenbach v Fiat SA (Edms) BPK 1976 (2) SA 226 (T) at 227F.

11.2. renounced the benefit of the exceptions of division and *de duobus vel pluribus reis debendi* and agreed that he would be liable in *solidum,* jointly and severally with the principle debtor."

[16] The applicant further contends that this Court should not determine the validity of the AOD against the principal debtor because the respondent signed the document in his personal capacity and further that he is sued in his personal and not representative capacity of the principal debtor. For this reason, the applicant's Counsel argued that the enforceability of the AOD against the respondent is not subject to its validity against the principal debtor. It was also argued that because the respondent signed the agreement in his personal capacity, the agreement created separate obligations that applied to him alone.

[17] The respondent contends that the applicant's cause of action is unsustainable because it is based on a settlement and addendum, which are invalid in that, at the time of signing, he did not have the power or authority to sign on behalf of the applicant.

[18] The alleged invalidity relied upon by the respondent is based on the contention that at the time of the signing of the AOD and the addendum the principal debtor was already in liquidation.

The general principle

[19] It is trite that a contract of suretyship is accessary to the contractual relationship between the principal debtor and the creditor.[5] In this regard the Supreme Court of Appeal (the SCA) held in Van Zyl v Auto Commodities (Pty) Ltd,[6] that:

> "11 It follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligations of the principal debtor.
>
> A consequence of this is that if the principal debtor's debt is discharged, whether, by payment or release, the surety's obligation is likewise discharged. If the principal debtor's obligation is reduced by compromise, the surety's obligation is likewise reduced. If the principal debtor is afforded time to pay, that ensures the benefit of the surety. If the claim against the principal debtor prescribes, so does the claim against the surety. This will be subject to any terms of the deed of suretyship that preserve the surety's liability notwithstanding the release or discharge of, or any other benefit or remission afforded to, the principal debtor."

[20] In Liberty Group Limited v Illman, [7] the Supreme Court of Appeal (SCA) dismissed an appeal brought by the appellant, Liberty Life Limited, concerning an issue similar to that in the present matter where the anterior issue was whether a surety who also binds him or herself as a co-principal debtor becomes a co-debtor with the principal debtor.

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[5] See CF Forsyth and JT Pretorius Caney's The Law of Suretyship sixth edition page 38.
[6] (279/2020) [2021] ZASCA 67 (3 June 2021).
[7] (1334/2018) [2020] ZASCA 38 (16 April 2020).

[21] The SCA, in that case, had to resolve the debate regarding the binding effect of a surety binding himself as a co-principal debtor. The one view that was raised during the debate, in that case, was that the effect of suretyship is that the surety would be jointly and severally liable with the principal debtor. The other view was that because of its accessorial nature, the surety's liability is tied to that of the principal debtor.

[22] In resolving the two opinions, one of which is similar to the one raised in the present matter, the SCA had to review its previous decisions on the subject matter in the following cases, Kilroe-Daley v Barclays National Bank,[8] Neon and Cold Cathode Illuminations (Pty) v Ephron,[9] and Jans v Nedcor Bank.[10] The SCA, per Makgoka JA, restated and confirmed the legal principle of our law to be the following:

> ". . . A surety and co-principal debtor does not undertake a separate independent liability as a principal debtor; the addition of the words' co-principal debtor' does not transform his (the surety) contract into any contract other than one of suretyship. The surety does not become a co-debtor with the principal debtor, nor does he become a co-debtor with any of the co-sureties and co-principal debtors, unless they have agreed to that effect."

The effect of winding-up of a company

[23] It is important to note that the winding-up of a company commences not at the time the Court issues the winding-up order but at the time the application is filed with the Court. [11] In this respect section, 348 of the Companies Act provides:

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[8] (1334/2018) [2020] ZASCA 38 (16 April 2020).
[9] [1978] 2 All SA 1; 1978 (1) SA 463 (A).
[10] [1978] 2 All SA 1; 1978 (1) SA 463 (A)
[11] [1978] 2 All SA 1; 1978 (1) SA 463 (A).

"A winding-up -up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

[24] The purpose of section 348 of the Companies Act is as stated in Lief, N.O. v Western Credit (Africa) (Pty) Limited,[12] designed to prevent:-

"…a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up -up order and the granting of that order by a Court . . ."

[25] In Pride Milling Company (Pty) Ltd v Bekker No and Another,[13] the SCA held that the effect of a winding-up of a company is the following:

". . . is to establish a *concursus creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors."

[26] In the present matter, the effective day of the winding-up is 16 September 2019, when a third party filed a winding-up application against the principal debtor. The consequence of that application was that the powers of the respondent to act on behalf of the principal debtor were frozen. He no longer had the authority to act on behalf of the principal debtor, including signing any agreement on its behalf.

[27] The applicant does not take issue with the above principles but contends that the respondent, in signing the agreement, bound himself personally for the debts in the settlement agreement. This proposition is based on the provisions of the settlement agreement, which provides as follows:

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[12] 1966(3) SA 344 (W) at 347 B-C
[13] [1978] 2 All SA 1; 1978 (1) SA 463 (A).

"**AND WHEREAS** the second defendant, Matthew Richard Amoretti...as additional security in respect of the balance owing to the plaintiff has agreed to signing personal surety in favour of the plaintiff. The second defendant in his capacity as surety, wishes to interpose and bind himself to this settlement agreement and the terms thereof pursuant to the suretyship and in his capacity as surety and co-principal debtor, jointly and severally with the debtor."

AND WHEREAS this agreement is subject to the suspensive condition that the first and second defendants signed the aforesaid personal suretyship."

[28] In applying the principles of interpretation as enunciated in Natal Joint Municipal Pension Fund v Endumeni Municipality,[14] which requires the consideration of (a) the text, (b) the context and (c) the purpose, I cannot entirely agree with the applicant's interpretation of the above clauses of the settlement agreement. It is clear from the proper reading of the clauses that the parties envisaged the conclusion of a

[14] 2012 (4) SA 593 (SCA) at para 18. The SCA adopted the approach to interpretation to be the following:

"[T]he present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production.... The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . The "inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

surety contract in addition to the settlement agreement. The "additional security" that the parties speak about in their agreement is nothing but a suretyship agreement. Thus the respondent cannot, by virtue of the accessorial nature of the suretyship, be said to be anything but surety who did not attract any liability except that of suretyship.

[29] Based on the above alone, the respondent has raised a *bona fide* defence with the particularity that discloses a *bona fide* defence. And concerning costs, I see no reason why they should not follow the results.

Order

[30] In the premises the applicant's summary judgment application is dismissed with costs.

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E Molahlehi

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, JOHANNNESBURG.

Representation:

For the applicant: Adv S P Stone

Instructed by: Lindy Sinclair Attorney.

For the respondents: Adv G Fourie

Instructed by: Ramushu Mashile Twala Inc

Heard on: 31 August 2022

Delivered: 09 January 2022