HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

15/10/2015
DATE

SIGNATURE

CASE NO: 53742/2015

In the matter between:

STATUSFIN FINANCIAL SERVICES PTY LTD **Applicant**

and

J.H.J CARSTENS **Respondent**

CASE NO: 53738/2015

In the matter between:

STATUSFIN FINANCIAL SERVICES PTY LTD **Applicant**

and

J.H.J.R VAN ANTWERP **Respondent**

JUDGMENT

1. Two applications for provisional sequestration were argued simultaneously before this court. The facts are largely the same in both applications and consequently one judgement in respect of both matters is indicated.

2. The background to the applications is briefly the following. Mrs J.H.J Carstens, the respondent in case number 53742 /2015 and Mrs J.H.J.R. Van Antwerp, the respondent in case number 53739/2015, are respectively the mother and grandmother of Mr D.R.M. Carstens, to whom I shall refer as "the insolvent". Mrs van Antwerp was 89 years of age when the events in this matter occurred. During August 2011 the applicant granted financial assistance to the insolvent in the amount of approximately R12,88 million. The insolvent failed to comply with his repayment obligations. At the time the insolvent also owed large amounts to Absa Bank Ltd and Fincrop which he was also unable to pay.

3. On 25 October 2012 the applicant and the insolvent concluded an admission of debt and consolidation agreement. In terms of this agreement the insolvent admitted that he owed the applicant a capital amount of R 12 640 052,18 as at 23 October 2012 which debt flowed from the finance earlier granted by the applicant to the insolvent. The agreement further recorded that the applicant

would lend to the insolvent an amount of R 26 500 000,00 which amount would be sufficient to pay the insolvent's debt owed to Absa bank Ltd in the amount of R 10 800 000, 00 and his debt owed to Fincrop in the amount of R 2 100 000, 00.

4. The applicant and the insolvent further agreed, according to the applicant, that the applicant would be entitled to security to secure the consolidated debt by virtue of a number of security instruments, including first mortgage bonds over farm properties owned by the insolvent, as well as suretyships by the current respondents, Mrs Carstens and Mrs van Antwerp, and also in terms of special and general notarial bonds.

5. Apart from the aforesaid the applicant made further advances in large amounts to the insolvent to enable him to put new crops into the ground.

6. The insolvent failed to make the required payments to the applicant in terms of the consolidation agreement and advances made to him and the applicant applied for the sequestration of the insolvent. The insolvent was provisionally sequestrated on 16 April 2014 and finally sequestrated on 25 September 2014. The claim of the applicant in the insolvent estate was, at 5 May 2017, the amount of R 27 776 142, 76.

7. According to the applicant Mrs Carstens as well as Mrs van Antwerp each signed a suretyship agreement in terms of which they bound themselves as surety and co-principal debtor in favour of the applicant of each and every

amount which the insolvent owed to the applicant at the time when the suretyship was signed or any amount which the insolvent may in future owe to the applicant irrespective of the cause thereof. The suretyship agreement was signed by Mrs Carstens on 27 September 2012 and, according to the applicant, Mrs van Antwerp signed her suretyship agreement on 29 October 2012.

8. As security for the obligations of Mrs Carstens, the applicant registered a mortgage bond over the immovable property, a farm, of Mrs Carstens which, according to the applicant, is valued at the amount of R2 800 000,00. As security for the obligations of Mrs van Antwerp, the applicant registered a mortgage bond over two immovable properties, two farms, of Mrs van Antwerp which, according to the applicant, are valued in the total amount of R3 600,00.

9. The applicant submitted that the two respondents are jointly and severally liable with the insolvent and that even if provision is made for a possible dividend to be derived from the insolvent's insolvent estate, the respondents are hopelessly factually insolvent. It was on this basis that the applicant, on 9 July 2015, launched the aforesaid two applications against the respondents respectively. This court, consequently, has to adjudicate the applicant's applications for provisional sequestration of Mrs Carstens and Mrs van Antwerp respectively.

10. Both the respondents opposed the applications against them. They both disputed their indebtedness to the applicant on a number of grounds. The first

ground on which Mrs Carstens relied was that a valid suretyship agreement was not entered into between the parties for the reason that there had been no consensus as to the nature of the documents she had signed. The first ground on which Mrs van Antwerp relied was that she did not sign a suretyship agreement with the applicant. I shall refer to these two defences again herein below.

11. The balance of the grounds relied upon by the respondents for opposing the respective applications against them and disputing any indebtedness to the applicant, are the same. According to both the respondents they were released as a surety as a result of the applicant's breach of a legal duty or obligation in respect of any one or more of the following: The applicant concluded an unlawful acknowledgement of debt and consolidation agreement with the insolvent; the applicant wrongfully charged incorrect interest to the insolvent's outstanding debt; the applicant sequestrated the insolvent based on debts which were not due; the applicant sequestrated the insolvent based on an unlawful agreement; and the trustees of the insolvent, effectively acting on instructions of the applicant, sold immovable property of the insolvent's estate at less than half its value to a partner in the applicant's attorneys' firm. The respondents further submitted that their sequestrations would not be to the advantage of creditors and, lastly, submitted that this court, in exercising its discretion, ought to refuse the sequestration of their respective estates.

12. I shall now deal with the first ground of defence of the respondents mentioned above. Mrs Carstens admitted that she signed the document containing the suretyship agreement but stated that when the deed of suretyship was presented to her it was presented as part of a parcel of documents and it was not explained by the applicant's representative, Me Erasmus, that the respondent was binding herself as surety. It was stated that Me Erasmus simply explained that the respondent was to sign documents in relation to farmland she had leased to the insolvent whereby she would waive her rights, as lessor, to the crop yield on the farmland in favour of the applicant so as to enable the insolvent to obtain production credit from the applicant. It was further stated that Me Erasmus had completed the document in her own handwriting and had only indicated to the respondent where on the documents she needed to initial and sign. The documents had also not been provided to her after she had signed same.

13. Mrs Carstens further stated that she had no reason to sign a suretyship agreement and to expose herself to any liability in respect of the insolvent. She had no debts and could easily lease out agricultural land for an income and there would have been no purpose in taking any risk on behalf of any person to sign as surety. She never intended to bind herself as surety and co-principal debtor of the insolvent.

14. It was accordingly submitted that there had been no consensus whatsoever between Mrs Carstens and the applicant in respect of the suretyship

agreement and that the suretyship agreement was consequently void *ab initio*, alternatively, that the agreement stands to be cancelled *ex tunc*.

15. On her part, Mrs van Antwerp denied that she signed the suretyship agreement as alleged by the applicant. She does not recognise the signature appearing on the suretyship agreement as hers. That signature also does not coincide with her signature, as is evident from a comparison between her signature on her answering affidavit and the one appended to the suretyship agreement. Mrs van Antwerp also stated that she does not recall anyone presenting her with the suretyship agreement or any witnesses or anyone else requiring her to sign the suretyship agreement. She also denied that the persons who signed as witnesses, and who, according to the applicant, represented the applicant, attended her farm on the alleged date.

16. Mrs van Antwerp also stated that she had no reason to expose herself to any liability in respect of the insolvent and that she had no debt and could easily have leased out her agricultural land for an income. There would consequently have been no purpose in taking any risk on behalf of any person and to sign as surety. She further stated that she never intended to bind herself as surety and co-principal debtor of the insolvent. According to Mrs van Antwerp she is accordingly not bound by the document relied upon by the applicant.

17. The first grounds of opposition of the respective respondents raise real and fundamental factual disputes. In an opposed application for a provisional order of sequestration, such as is the case in the present two matters, the necessary

prima facie case which the applicant has to make out in order to succeed with its applications, would only be established if the applicant can show that on a consideration of all the affidavits filed, a case for sequestration has been established on a balance of probabilities. Where, on the affidavits, the balance of probabilities is against the applicant or where there is no balance either way, no *prima facie* case is established and a provisional order cannot be granted. *Cf* Kalil v Decotex Pty Ltd and another 1988 (1) SA 943 (A) from p 976 and the cases therein referred to.

18. Neither of the parties requested any of the disputes to be referred to oral evidence, the applicant specifically stating that it is not doing so, and that issue consequently does not have to be further considered.

19. Consequently, and based on the aforesaid principles, where a respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the court will not grant a provisional order. The onus on the respondent, which is an evidential burden, is not to show that it is not indebted to the applicant but merely requires that the respondent shows that the alleged indebtedness is disputed on *bona fide* and reasonable grounds. *Cf* Badenhorst v Northern Construction Enterprises Pty Ltd 1956 (2) SA 346 (T) at 347H - 348B; Kalil (*supra)* at 981B and the cases therein referred to.

20. It was submitted on behalf of the respondents that the good faith requirement relates to the respondent's subjective state of mind and is intrinsically related

to the objective reasonableness requirement as to whether the defences are valid in law if proven at trial, in that bald allegations lacking in particularity would not likely persuade the court of the respondent's *bona fides*. I agree with this submission. *Cf* Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 (WCC) [25] - [26]. It consequently has to be decided whether any of the grounds relied upon by the respondents in disputing their indebtedness to the applicant, have been shown to be *bona fide* and reasonable. Consequently it has to be decided whether the facts upon which each of the respondent's grounds of opposition are premised, have been sufficiently set out, and whether such grounds constitute valid defences in law. If that had been shown, the applicant's application stands to be dismissed. If the respondent has failed to establish either of the foregoing, the next question would be to consider whether the court should exercise its discretion in favour of the granting of the application or not.

21. I have already mentioned that Mrs Carstens stated that it was explained to her by Me Erasmus that she was required to sign documents in relation to the farmland which she had leased to the insolvent whereby she would waive her rights as lessor to the crop yield thereon in favour of the applicant and that this had to be done to enable the insolvent to obtain production credit. That she was prepared to do. She was, however, never advised that one of the documents which was part of the bundle of documents, contained a suretyship agreement and Me Erasmus merely referred Mrs Carstens to specific pages

and indicated thereon where she needed to initial or sign. Me Erasmus told her that she would provide her with a copy of the documents in due course. That, however, never happened.

22. Mrs Carsten's stated that at no point did she have any reason to doubt Me Erasmus' sincerity. Furthermore that there was no reason why she would have exposed herself to any liability in respect of the insolvent, for the reasons given by her, and that there would have been no purpose in her taking any risks on behalf of any business person or anybody else, to sign as surety. She never intended to bind herself as a surety and co-principal debtor of the insolvent.

23. In the replying affidavit the deponent denied that Mrs Carstens was not aware of the fact that she was signing a suretyship agreement and stated that no misrepresentations had been made by Me Erasmus. In support of these statements a confirmatory affidavit of Me Erasmus was attached which, however, adds no additional facts to support the denial on her behalf. In the replying affidavit it was further stated that Me Erasmus regularly signs as a witness to similar agreements with other customers. Furthermore that she never gave an undertaking to afford Mrs Carstens with copies of the documents. It was further submitted on behalf of the applicant that the insolvent is the only son of Mrs Carstens and that in her mind the insolvent was busy with a successful farming operation and that she thus had a good reason to sign as a surety.

24. Mrs Carsten could of course not respond to this last mentioned submissions by the applicant in the replying affidavit but it may be remarked that the veracity thereof is not altogether clear for the reason that at that time, the insolvent owed in the region of, or in excess of, R26 million to his creditors which he was not able to repay. In fact, according to the applicant's own papers, they even had to make further advances to him of large amounts to enable him to put his next crop into the ground. There is very little, if any, evidence before this court to arrive at the conclusion that Mrs Carstens could have thought that the insolvent was "busy with a successful farming operation" and that she had "a good reason to sign as a surety". If she had known of the insolvent's crop failures, as one would imagine she had, and if she had been informed of the millions that he owed, which the applicant's representative should have informed her about, it is hard to imagine that she would have been prepared to stand surety for his debts and, what is more, to have been prepared to lose her farm in the process.

25. The disputation by the applicant, in the replying affidavit, of Mrs Carstens' version was raised in the tersest of forms and gives no assistance to the applicant in seeking to rebut her version of the facts. The fact that Mrs Carstens did not enquire about copies of the documents does not support the applicant's version. She never sought the documents in the first place and it was a unilateral undertaking by Me Erasmus. Failure to provide her with the

documents would therefore not have caused her to suspect anything untoward as there was no need for her to have such documents in her possession.

26. During argument before this court it was submitted on behalf of the applicant that this court should also consider the fact that Mrs Carstens, subsequent to signing the suretyship agreement, and on 9 November 2012, signed a power of attorney to enable an attorney to register a mortgage bond in favour of the applicant over her immovable property. It was submitted that this fact destroys the version of Mrs Carstens that she was unaware that she was a debtor of the applicant as a result of signing the aforesaid suretyship agreement.

27. In the founding affidavit the applicant alleged in paragraph 57 the following: "The applicant has also registered a mortgage bond over the said immovable property under the mortgage bond number B54390/13, and a copy of the mortgage bond is attached hereto, marked as annexure 'K'". The aforesaid power of attorney was attached to the mortgage bond but not specifically referred to. In response to this paragraph Mrs Carstens admitted in her answering affidavit the allegations in paragraph 57 but then stated the following: "However, I repeat, what I said above in respect of the suretyship agreement that was provided to me to sign by Ms Erasmus *mutatis mutandis.* Wherever documentation was required of me to sign to enable the mortgage bond to be registered, had to have been similarly put between the pile of papers with Ms Erasmus simply referring me to specific pages to initial and sign. I also repeat the reasons why I would not have encumbered my property

as I raised in respect of the suretyship agreement above *mutatis mutandis*." In the replying affidavit of the applicant the deponent thereto merely stated the following in response to Mrs Carstens' answer: "The contents of this paragraph exposes the respondent's attempts to deny her own signature to documents. The allegations are vague in the extreme."

28. Again, Mrs Carstens had put forward an answer which, if proved at the trial, would destroy the version put forward by the applicant. There is simply not sufficient evidence on the papers before this court to find that her version is not *bona fide* and reasonable.

29. Consequently, having regard to the evidence before this court it cannot, in my view, be said that the balance of probabilities favour the version of one party above the other. The defence of Mrs Carstens is consequently *bona fide* and reasonable with the result that the applicant's application cannot succeed.

30. I now turn to the first defence of Mrs van Antwerp. I have mentioned above that Mrs van Antwerp stated that she had no recollection of anyone attending her home to present her with the suretyship agreement referred to by the applicant. She also stated that the signature on the suretyship agreement is not hers and that it differs from her signature which appears on the answering affidavit.

31. Mrs van Antwerp furthermore stated that there was no reason why she would have exposed herself to any liability in respect of the insolvent, for the reasons

given by her, and that there would have been no purpose in her taking any risks on behalf of any business person or anybody else, to sign as surety. She would never have been amenable to bind herself as a surety and co-principal debtor of the insolvent.

32. In the replying affidavit the deponent denied that Mrs van Antwerp had no recollection of anyone attending her home to present her with the suretyship agreement she signed for the debts of the insolvent. The deponent on behalf of the applicant then referred to a power of attorney attached to the replying affidavit as annexure "REP 3" and dated 29 October 2012, which the deponent stated Mrs van Antwerp signed in order to allow a mortgage bond to be registered over her two immovable properties. The applicant also stated that the suretyship agreement was signed in the presence of two witnesses which are both high-ranking officials in the employ of the applicant and that they had signed as witnesses. It was further stated that the applicant took an informed decision to dispatch two high-ranking officials in order to procure what is otherwise a relative simple matter, namely the signature of a person binding herself as a surety. It was further stated that the witnesses also ensured that Mrs van Antwerp was made aware of what she was requested to sign and that she knew exactly what she was doing and that she was healthy and able to understand what she was requested to sign.

33. These factual allegations appeared in the replying affidavit of the applicant for the first time and consequently one does not know what Mrs van Antwerp's

response thereto would be. The evidence of the two witnesses to the suretyship agreement can therefore not on its own be used to reject the version of Mrs van Antwerp or to find against her on the probabilities.

34. Reference was also made on behalf of the applicant to a different power of attorney which had been attached to the mortgage bond which was attached to the founding affidavit. However, the founding affidavit made no mention of such a power of attorney and consequently Mrs van Antwerp was not called upon to comment thereon. Regarding the power of attorney attached to the mortgage bond it is not permissible to decide a matter on the basis of something contained in, or based on, an annexure to an affidavit but which is not covered by the relevant affidavit. To do so may very well result in prejudice to the respondent because evidence may have been available to the respondent to refute the new case on the facts. This accords with the general proposition that trial by ambush is not allowed. *Cf* Genesis Medical Aid Scheme v Registrar, Medical Schemes and another 2017 (6) SA 1 (CC) at p 52; Minister of Land Affairs and Agriculture v D & F Wevell Trust and the cases therein referred to.

35. This court is thus also in respect of the application against Mrs van Antwerp confronted with two mutually exclusive versions. On the one hand it is understandable and thus probable that the applicant would have wanted to obtain security for the debts of the insolvent and it is equally probable that the applicant would have been keen to be able to lay its hands on the two farms of

Mrs van Antwerp and, for that matter, the one farm of Mrs Carstens. However, it is equally probable that Mrs van Antwerp and Mrs Carstens would hardly have been prepared to gamble and most probably lose their only assets and in fact their livelihood on a farming venture of the insolvent which had proved to be running at a total loss. I have mentioned this aspect above. These considerations consequently do not assist the court in deciding whether the version of the applicant or the version of Mrs van Antwerp is the more probable version.

36. Mrs van Antwerp had put forward an answer which, if proved at the trial, would be a full answer to the applicant's case against her. There is simply not sufficient evidence on the papers before this court to find that her version is not *bona fide* and reasonable.

37. Consequently, having regard to the evidence before this court it cannot, in my view, be said that the balance of probabilities favour the version of one party above the other. The defence of Mrs van Antwerp is consequently *bona fide* and reasonable with the result that the applicant's application cannot succeed.

38. As a result of the aforesaid findings in respect of the two applications before this court it is not necessary to refer to the other defences on which the two respondents respectively relied.

39. As far as costs are concerned, there is no reason why the costs of the respective applications should not follow the event.

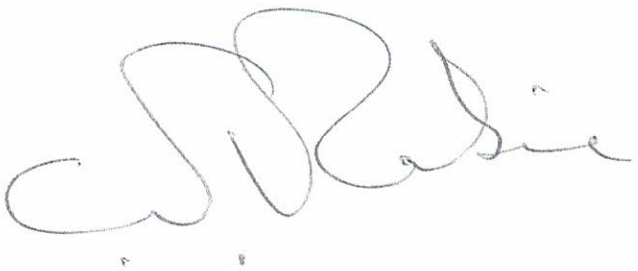
40. In the result the following order is made:

In respect of the application against Mrs Carstens, case number 53742/2015:

1. The application is dismissed with costs.

In respect of the application against Mrs van Antwerp, case number 53738/2015:

2. The application is dismissed with costs.



C.P. RABIE

JUDGE OF THE HIGH COURT