IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR148/2022

In the matter between:

LOUISE HELEN DOLBEY **APPELLANT**

and

NEDBANK LIMITED **RESPONDENT**

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Hadebe J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Delivered on: 24 November 2023

Poyo Dlwati JP (HENRIQUES and Z P NKOSI JJ concurring):

[1] The issue for determination in this appeal is whether the trial court erred and misdirected itself when it found that the appellant had attended the respondent's premises on 30 July 2014 and signed a suretyship agreement in favour of the respondent.[1]

[2] The undisputed facts in the matter were that Richard David Dolbey (Mr Dolbey) was married to the appellant during July 2014. He was a director of Typically Midlands FLM (Pty) Ltd (the company) and also one of its shareholders. During 2014, the company entered into a loan agreement with the respondent for an amount of R7.8 million. Ms Shoba Kirpal was the respondent's business manager who dealt with the application for the loan agreement. Various suretyship agreements were concluded in order to secure the respondent's loan to the company, one of which was with the appellant. At the time that the loan agreement was concluded, the appellant was the owner of Grantham Farm, Balgowan, situated in Nottingham Road in the KwaZulu-Natal Midlands. The company went into business rescue in 2016 and as a result, the respondent called up its security.

[3] In its particulars of claim, the respondent pleaded as follows in paragraph 10 relation to the appellant: 'On or about 30 July 2014 and at Durban, the second defendant executed a deed of suretyship, limited to an amount of R2 000 000, 00 in respect of the obligations of the company'. A copy of the deed of suretyship was annexed to the respondent's particulars of claim and marked annexure "D". The appellant's response to this averment was a denial of these allegations. She pleaded various alternatives to this denial which were not really pursued during the trial. It became evident at the trial, during the cross-examination of Ms Kirpal,

[1] Reported on Saflli as *Nedbank Limited v Dolbey and another* [2021] ZAKZDHC 22.

that the appellant was denying that the signature on the deed of suretyship was hers. It was put to Ms Kirpal that the appellant would deny that she was in Durban on 30 July 2014.

[4] Ms Kirpal's evidence with regard to the signing of the suretyship agreement was that the respondent required suretyships from the directors and shareholders of the company after it advanced the funds to the company. However, because Mr Dolbey did not have any assets or property in his name, it was agreed that his wife, the appellant, who had a property worth more than R2 million registered in her name, could provide such security. She testified that the appellant signed the suretyship agreement in her presence and she signed as a witness to the appellant's signature. She reiterated that the document was signed on 30 July 2014 at her office which is situated at 90 Bram Fischer Road in Durban. This, she did after she made the appellant aware what document she was signing.

[5] Mr Kirpal denied that the appellant could have signed the suretyship agreement in the process of signing other documents for Whysalls Property CC (the CC). She conceded that the document was computer generated but that the relevant information was put in the system by the respondent's employees. She made it clear that Mr Dolbey was the one who was required to provide suretyship but because the appellant was the one with some sort of asset, it was agreed that she would be the surety because of the property in her name.[2] She testified that she had no further dealings with the company's account once it was placed in business rescue.

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[2] Appeal record at 119, lines 1-5.

[6] Under cross-examination, she conceded that the document that the appellant had signed was headed 'incorporating cession of claims' but she explained that 'suretyship' was handwritten at the top of the front page and later it had 'litigant number and suretyship general'. She conceded that there were no claims as referred to in the heading on the document that were listed. She also did not know if the appellant had any claims from the entities listed therein. She was also asked if the appellant had signed any register at her offices prior to their meeting and she answered in the positive, but no such document was produced. Ms Kirpal, though, was adamant that the loan would not have been granted to the company if proper security in the form of a surety was not in place.

[7] Ms Kirpal was adamant that the appellant had signed the suretyship agreement on 30 July 2014 in her office in Durban and in her presence. She could not recollect if she had phoned the appellant in 2016 about the suretyship agreement. That was the respondent's evidence in as far as it is relevant to the appeal before us. The appellant testified in defence of the claim. The gist of her evidence was that she did not attend Ms Kirpal's office on 30 July 2014 and therefore could not have signed the suretyship agreement.

[8] The appellant testified that she was not involved in running the company but assisted Mr Dolbey with online banking and Pastel processing. She testified that she only went to the respondent's office in May or early June 2014 to obtain an online banking token and for training on the online banking system for the company. She, however, was at work in Nottingham Road on 30 July 2014 and did not attend at the respondent's offices. When an audit trail from the Pastel accounting programme was produced at trial, purporting to be evidence that she was at work, Mr Eades, who appeared for the respondent, objected to the production of that document on the basis that it had not been proved. Ms Ploos van Amstel, on behalf of the appellant, indicated that a witness would be called

to deal with the document but that, eventually, did not happen. I will, therefore, not deal with that evidence as it was not placed properly before the trial court.

[9] The appellant testified that she, later in February 2015, attended at the respondent's offices to sign documents in relation to the CC. She conceded that Ms Kirpal did email her the suretyship agreement in early 2016, which she says was the first time when she became aware that she had signed the suretyship agreement. This was after she had mentioned to Ms Kirpal that she was moving off the farm as she had sold it. Ms Kirpal advised her that she should not have sold the farm as she had signed a suretyship agreement in favour of the respondent and the farm was the security thereof. She confirmed that the property was registered in her name. It was during that conversation that she requested Ms Kirpal to email her the suretyship agreement, which she did but nothing further happened thereafter.

[10] The appellant disputed that it was her signature in the suretyship agreement or that it was explained to her. She testified that the document, being the suretyship agreement, was headed 'incorporating cession of claims' and she could not have believed that it was a suretyship agreement if the court found that she had signed it. She also would not have signed it as three entities had been listed as principal debtors instead of one. She testified that she did not have any claims against or in favour of Nedbank nor did she cede those claims. Under cross-examination, the appellant was asked a pertinent question: 'Is it your signature or is it not your signature?' Her response was 'It - I didn't sign it at Nedbank on 30 July'. Later she was asked again 'you never signed that?' Her response was that 'I didn't sign it on 30 July'. She reiterated that she did not sign the document on 30 July 2014 as she was not in Durban.

[11] It became evident under cross-examination that the appellant was abandoning her alternate defence that if she was found to have signed the document, then it was never explained to her what it was. She conceded that the property was registered in her name in 2014 but she sold it in 2015 for about R3.5 million. She reiterated that Ms Kirpal emailed her the suretyship agreement in 2016 but she could not recall what she did after receiving the document. She decided to wait and see what would happen. She conceded that she was not the author of the Pastel printout that she testified about. She conceded that she was in a meeting in March 2015 with Mr Dolbey and Ms Kirpal where certain documents were signed for purposes of buying a truck for the CC. The truck was to be used to transport vegetables for the company. That, in a nutshell, was the appellant's case.

[12] It was on this evidence that the learned judge found in favour of the respondent. She held as follows in relation to the signing of the suretyship agreement:

'Having considered the credibility of the plaintiff's witnesses as well as that of the second defendant as a witness along with their reliability, I am satisfied that the probabilities favour a finding that the second defendant was at the plaintiff's premises on 30 July 2014 and did sign the suretyship agreement wherein she bound herself as a surety to the amount of R2 million. The second defendant's defences accordingly fall to be rejected as improbable and not reliable.'[3]

[13] Before us, the appellant submitted that the learned judge failed to consider that the respondent bore the onus when the execution and authenticity of the suretyship agreement was put in issue, as it was the party who was relying on it. According to Ms Ploos van Amstel, the respondent failed to discharge that onus, hence the learned judge erred in accepting the respondent's version that the

[3] Trial court's judgment para 32.

appellant signed the suretyship agreement. She further submitted that the learned judge erred in accepting the respondent's version despite the various shortcomings in Ms Kirpal's evidence. Mr Eades, on behalf of the respondent, submitted that the only issue for determination in the appeal was whether the trial court erred in accepting the respondent's version with regard to the appellant's signature on the suretyship agreement. He submitted that as this was mostly a credibility finding by the trial court, the court of appeal ought not to easily interfere with such finding.

[14] The appellant seeks to overturn the findings of fact and assessment of the credibility of the witnesses by the trial court. It is trite that an appellate court will not ordinarily interfere with a finding of fact by a trial judge.[4] This is because of a 'recognition of the essential advantages which the trial judge has had, as a consequence of which the right of the appellate court to come to its own conclusions on matters of fact, free and unrestricted on legal theory, is necessarily in practice limited'.[5]

Furthermore, in *Dhlumayo*, it was held that

'Upon the bare record the appellate court can seldom, if ever, be in as good a position as the trial judge even to draw inferences as to what is the more probable from the conduct of particular persons whom he has seen and whom the appellate court has not.'[6]

Hence, the appellate court will only reverse such findings where it is convinced that the conclusion is wrong. If the appellate court is left in doubt as to the correctness of the conclusion, then it will uphold the conclusion.

[15] Reverting to the facts of this matter, the high water mark of Ms Ploos van Amstel's argument on behalf of the appellant was that relevant facts have been ignored in coming to the conclusion that the trial court reached. This was in relation to the fact that the appellant disputed signing the suretyship agreement

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[4] *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 695.
[5] Ibid at 696.
[6] Ibid at 698.

and that no handwriting expert was called by the respondent to confirm the appellant's handwriting. According to Ms Ploos van Amstel, the respondent failed to discharge the onus resting on it regarding the authenticity of the agreement.

[16] In my view, the trial court did not disregard any evidence presented to it. It was alive to the trite principles applicable to the resolution of the factual disputes in civil proceedings. This is evident from the reference made to the well-known case of *Stellenbosch Farmers' Winery*.[7] I do not have to rehash those principles as they are trite. For instance, the learned judge held that it was improbable that the appellant would have done nothing after being informed that she was a surety and just waited for the summons to be issued. She found this to be improbable if one had regard to the amount claimed.

[17] The learned judge further found that the issue of the disputed signature was not pertinently raised in the plea but only during the trial. Ms Ploos van Amstel's response to this issue was that the whole of the paragraph relating to the appellant having signed a suretyship agreement was disputed. This, unfortunately, does not assist the appellant if one has regard to her evidence. For instance, she was asked as follows under cross-examination: 'Is it your signature or is it not your signature?' Her response was: 'It – I didn't sign it at Nedbank on July'. Later she was asked: 'You never signed that?' and her response was 'I didn't sign it on 30 July …(intervention)'.

[18] From the above one gets the impression that she might have signed it - even though not on 30 July 2014. I, therefore, cannot fault the learned judge's credibility findings of the appellant on this issue. What is also relevant is the fact

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[7] *Stellenbosch Farmers' Winery Group Ltd and another v Martell Et Cie and others* 2003 (1) SA 11 (SCA) at 14-15.

that she did not do anything about her discovery of being a surety until the summons was issued. More importantly, she would have realised on receipt of the email and the suretyship agreement that she did not sign the document or it was not her signature therein. But, as the evidence has shown, she did not tell anyone until the trial that that was not her signature on that document. One wonders whether the dispute about her signature was a last minute fabrication to raise a defence as a prudent defendant would not have acted in this way.

[19] The evidence relating to the audit trail was correctly not admitted as the document was not correctly proved. It did not have any evidentiary weight in the proceedings. In any event, there was no evidence that the appellant could not have first gone to Durban to sign the surety agreement and thereafter proceed to work. Even on this aspect, I am not able to fault the credibility findings of the learned judge.

[20] I also agree with the learned judge's finding that the appellant seemed to want to distance herself from Mr Dolbey, yet the evidence pointed otherwise. She could not explain why she would have access to the company's bank account and even obtain a banking token if she was not involved in its operations. She could not say why Mr Dolbey had to be in the meeting with Ms Kirpal in March 2015 when all that was to be discussed was the CC's business. I, therefore, do not have any difficulties with the learned judge's conclusions on these credibility findings against the appellant. The learned judge had the advantage of seeing, hearing and appraising the witnesses.[8] I am not persuaded that her conclusions were wrong.[9] In my view, she had considered all the relevant facts before coming to her conclusions.

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[8] *S v Francis* 1991 (1) SACR 198 (A).
[9] *S v Mkohle* 1990 (1) SACR 95 (A).

[21] Ms Kirpal might not have been accurate about the date of the meeting. But this does not detract from the fact that the respondent would not have granted a loan to the company if there was no adequate security in place. There was no dispute that Mr Dolbey did not have the necessary security. There was no dispute that the property used as security was registered in the appellant's name at the time and it was worth more than R2 million. Therefore, the objective evidence ameliorates Ms Kirpal's evidence.

[22] Whilst Ms Ploos van Amstel took issue with the requirements of s 6 of the General Law Amendment Act 50 of 1956 regarding the suretyship agreement, this was thoroughly addressed in the trial court's judgment, which conclusions I agree with. What was really placed in dispute in terms of the notice of appeal was the signature of the appellant. The learned judge believed the respondent's witnesses and was satisfied that their evidence was true and that the appellant's evidence was false. I do not believe that in this appeal we ought to be dealing with the validity of the suretyship agreement or any other issues not raised in the notice of appeal other than whether the signature was that of the appellant, or not.

[23] Accordingly, there is no merit in the grounds advanced on appeal and the following order is granted:

The appeal is dismissed with costs.

POYO-DLWATI JP

HENRIQUES J

Z. P NKOSI J

APPEARANCES

Date of Hearing	: 20 October 2023
Date of Judgment	: 24 November 2023
Counsel for Appellant	: Ms Ploos van Amstel
Instructed by	: Morris Fuller Attorneys
Counsel for First Respondent	: Mr Eades
Instructed by	: Shepstone & Wylie Attorneys