



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

Case no: 17544/2022P

In the matter between:

THE BUSINESS ZONE 747 (PTY) LTD

APPLICANT

and

MEHDY ZARREBINI

RESPONDENT

Coram: Koen J

Heard: 5 September 2023

Delivered: 11 September 2023

ORDER

Judgment is granted in the following terms:

1. The respondent is ordered to pay to the applicant the amount of R3 496 214.25.
2. The respondent is ordered to pay interest on the amount of R3 496 214.25 at the rate of 4.5% per annum, calculated as provided in the loan agreements.

3. The respondent is ordered to pay the costs of the application.
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JUDGMENT

Koen J

Introduction

[1] The applicant (Business Zone¹) claims payment of the sum of R3 496 214.25 from the respondent, Dr Mehdy Zarrebini, as surety for the indebtedness of Van Dyck Carpets (Pty) Ltd (the debtor) to the applicant, together with interest and costs.

Factual Background

[2] Business Zone seeks final relief in the application. It is trite that it can only succeed if the facts as alleged by the respondent, together with facts in the applicant's affidavits which are admitted, or if not formally admitted cannot be denied and are therefore regarded to be admitted, justify the relief claimed.²

[3] The relevant material facts in the founding affidavit are as follows:

- (a) The deponent, Mr Michael Craig Buck, describes himself as the managing director of 'the applicant.' He refers to 'the applicant', in abbreviated style, as 'Business Zone.' The 'applicant', as per the heading to the affidavit, which is part of and incorporated into the body of the affidavit by reference, is reflected as 'The Business Zone 747 (Pty) Ltd (Registration No 2004/037286/23)'. Mr Buck is the sole director of Business Zone;
- (b) Mr Buck states that he is duly authorised to institute the proceedings pursuant to a board resolution of the applicant dated 12 August 2022, which provides:
- 'Resolution of a Meeting of the Directors of the Business Zone 747 (Pty) Ltd (Reg No 213/094017/07) held at Durban North on 12th day of August 2022**

¹ The founding affidavit refers to the applicant as 'Business Zone,' that being short for 'The Business Zone 747 (Pty) Ltd'.

² *Plascon Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A) at 634.

Resolved that:

1. The Company institute action through its attorneys Cliffe Dekker Hofmeyr against the Sureties involved in respect of the Van Dyck liability, including but not limited to Dr Zarrebini;
2. Michael Craig Buck be authorised to represent the company in such proceedings and to sign and all do to prosecute the claim/s to the end result.'

(The resolution was signed by and certified as a true copy by Mr Buck).

- (c) Business Zone, is described in the body of the founding affidavit, as a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with registration number 2004/037286/23.
- (d) During the period from June 2018 to December 2019 Business Zone, in each instance described as 'The Business Zone 747 (Pty) Ltd (Reg No: 2004/037286/23)', and the debtor concluded three written loan agreements and various addenda thereto, 'in terms of which Business Zone lent *and advanced*³ sums of money' to the debtor, in a total amount of R4 950 000 as follows:
- (i) R1 200 000 in terms of the first loan agreement and first addendum thereto;
 - (ii) R2 750 000 in terms of the second loan agreement;
 - (iii) R1 000 000 in terms of the third loan agreement.
- (e) The loan amounts would bear interest at the rate of 4.5% from the commencement date, being the date upon which the loan amounts were paid to the debtor, until the capital sum had been paid in full.
- (f) The debtor failed to make payment to Business Zone and accordingly 'the amounts loaned in terms of the Loan agreements and the addenda remained due and outstanding.'
- (g) In terms of a written deed of suretyship dated 16 April 2018 the respondent bound himself as surety and co-principal debtor for the repayment on demand of all or any such sum or sums of money which the debtor may from time to time owe, or be indebted to the creditor, its successors or assigns in existence, or

³ Emphasis added.

which may come into being in the future.⁴ The creditor is reflected in the suretyship as 'The Business Zone 747 (Pty) Ltd (reg No: 2004/037286/23);

- (h) The following payments, totalling R1 453 785.75 were received in respect of the debtor's indebtedness:
- (i) R770 785.75 on 24 November 2021;
 - (ii) R294 000 on 22 February 2022;
 - (iii) R32 000 on 15 December 2021;
 - (iv) R357 000 on 27 September 2022.
- (i) The difference between the amounts loaned and advanced (R4 950 000) and the payments made (R1 453 785.75) accordingly amounts to R3 496 214.25, that being the amount claimed from the respondent.
- (j) The purpose of the application is alleged to be to seek 'a money judgment order' against the respondent in the amount of R3 496 214.25 'as per the certificate of balance . . . in accordance with the provisions of Clause 2 of the Suretyship and Guarantee signed in favour of the creditor by Dr Mehdy Zarrebini dated 16th April 2018.'
- (k) The certificate of balance completed by Mr Buck and is dated 28 November 2022. It refers to clause 2 of the Suretyship and records:
- 'I hereby certify as provided therein that the indebtedness of Van Dyck Carpets (Pty) Limited, the Debtor, as at the date hereof and in respect of Capital only, is the sum of Three Million, Four Hundred and Ninety-Six Thousand Rand, Two Hundred and Fourteen Rand and Twenty-Five Cents (R3 496 214.25) excluding interest and any other costs or fees to which the Creditor is entitled in terms of the Loan Agreements and the Suretyships.'
- (l) Clause 2 of the Suretyship provides:
- 'the indebtedness of the said DEBTOR to the said CREDITOR(S) shall at any time be determined and proved by written certificate of the said CREDITOR, and such certificate shall be binding on us and be conclusive proof of the amount of our indebtedness and will be valid as a liquid document against us in any competent Court.'

⁴ There was also another surety: Idada Trading 81 (Pty) Ltd.

[4] Attached to the answering affidavit of the respondent, are two extracts of records in the offices of the Companies and Intellectual Property Commission (CIPC), marked Annexures 'AA1' and 'AA2', revealing the following:

- (a) The Business Zone 747 CC, a close corporation registered on 26 April 2004, was assigned registration number 2004/037286/23. It was converted to a company with number K2013094017. Its only active member was Leon Selwyn Centner. Its status is reflected as 'CONVERSION CO/CC OR CC/CO';⁵
- (b) The Business Zone 747 (Pty) Ltd, a private company registered on 7 June 2013, was assigned registration number 2013/094017/07. Its status is reflected as being 'IN BUSINESS' and that it was converted from B2004037286. Its only director is Mr Buck.⁶

[5] In the answering affidavit the respondent alleges that:

- (a) It is common knowledge that the reference number '23' at the end of a registration number is only applicable to close corporations, whilst private companies bear the reference number '7';
- (b) At the time of entering into the loan and suretyship agreements an entity termed The Business Zone 747 (Pty) Ltd with registration number 2004/037286/23 could not have existed, nor could it have entered into any agreements as it had no legal standing whatsoever – that is a conclusion of law the respondent seeks to draw;⁷
- (c) Further that:

'24.7 At all material times a conversion of a close corporation to a private company The Business Zone 747 with registration number 2013/09401/07 occurred as marked 'AA2.' Such conversion could only have occurred as envisaged in item 2 of schedule 2 of the Companies Act No 71 of 2008. Respondent is advised that the provisions on conversion of a close corporation to a company are:

⁵ Per annexure 'AA1'.

⁶ Per annexure 'AA2'.

⁷ 'The *Plascon Evans* principle does not, however, apply to disputes of a legal character, or disputes about legal conclusions or inferences to be drawn from common cause facts' (*VLP Property CC v Martjohn Trading CC* [2022] ZAGPJHC 242 para 4).

24.7.1 Every member of the close corporation must become a shareholder of the company⁸ – this has clearly not occurred;

24.7.2 As per schedule 2, item 2 of the Companies Act, the shares to be held by the shareholders also need to be a proportion to the members interest held in the close corporation;⁹ – this clearly did not occur.

24.7.3 The juristic person that existed prior to conversion will exist in the form of a company;¹⁰

24.7.4 All assets, liabilities, rights and obligations that vested in the close corporation or between the close corporation and its members, creditors or any third parties continue to exist.¹¹

24.7.5 Subsequent to the conversion from a close corporation to a company the name of the company must be used after conversion on all the forms and dealings and as such the company needs to be sited and not the close corporation.

24.8 None of these facts were disclosed to Respondent at the time of signature of the suretyship.

24.9 It is contended that at the time of signing the suretyship, the entity recorded as the creditor did not exist resulting that the suretyship document did not comply with section 6 of the General Law Amendment Act, Act 50 of 1956 and as such the said agreement is void *ab initio* as per the relief claimed in the counter application.

24.10 Respondent will thus seek relief that the suretyship agreement relied upon by the Applicant in respect of the Respondent be declared to be void *ab initio*.

Discussion

[6] A number of preliminary points were raised by the respondent in opposition to the claim of Business Zone. These relate to:

⁸ This is not a correct statement. Item 2(1) of Schedule 2 of the Companies Act 71 of 2008 provides that 'Every member of a close corporation converted under this Schedule is entitled to become a shareholder of the company resulting from that conversion. . .' but the fact that they are entitled to become shareholders does not necessarily mean that they 'must become a shareholder of the company'.

⁹ This is not so. Item 2(1) of Schedule 2 of the Companies Act states: 'Every member of a close corporation converted under this Schedule is entitled to become a shareholder of the company resulting from that conversion, but the shares to be held in the company by the shareholders individually *need not* necessarily be in proportion to the members' interests as stated in the founding statement of the close corporation concerned.' (my emphasis)

¹⁰ This is consistent with what is provided in Item 2(2)(a) of Schedule 2 of the Companies Act.

¹¹ This is consistent with what is provided in Item 2(2)(b) of Schedule 2 of the Companies Act. These vest in the company.

- (a) The identity of the applicant. This issue raised a plethora of subsidiary issues including inter alia: whether an entity 'The Business Zone 747 (Pty) Ltd (registration number 2004/037286/23)' exists and can, in law, exist as the applicant; whether the applicant should have claimed rectification of the registration number of Business Zone reflected in the various agreements and suretyship; whether the resolution by The Business Zone 747 (Pty) Ltd (registration number 2013/094017/07) could and has authorised the application by The Business Zone 747 (Pty) Ltd (registration number 2004/037286/23); and whether a valid and enforceable suretyship could come into existence if the creditor in the suretyship does not exist.¹²
- (b) The validity of the resolution, and applicant's choice of procedure in pursuing an application as opposed to an action. The respondent's contention is that the resolution authorised Mr Buck to commence an action and not application. Further, he contends that there are material disputes of fact, the most significant being the discrepancy in the registration numbers 2004/037286/23 and 2013/094017/07 insofar as they are used in relation to the company, The Business Zone 747 (Pty) Ltd.
- (c) The amount of the claim.
- (d) Alleged irregular interest calculations used in calculating the amount claimed.

These are considered *seriatim*.

The identity of the applicant

[7] Section 6 of the General Law Amendment Act 50 of 1956 stipulates that: 'No contract of suretyship entered into after the commencement¹³ of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety.'

The contract of suretyship is required to identify the creditor, debtor and surety.

[8] The respondent contends that there are two corporate entities: The Business Zone 747 CC (registration no 2004/037286/23) and The Business Zone 747 (Pty) Ltd

¹² A valid suretyship requires an identifiable creditor, debtor and surety - *Fourelamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 344G.

¹³ The General Law Amendment Act 50 of 1956 commenced on 22 June 1956.

(registration number 2013/094017/07). He further also alleges that when the loan agreements were concluded, and the suretyship was signed, there was no such entity as 'The Business Zone 747 (Pty) Ltd (Registration No 2004/037286/23)', hence that there was no creditor in existence, and consequently that the provisions of the General Law Amendment Act have not been complied with.

[9] It is clear from the CIPC documents that the creditor to the suretyship is, and always has been one corporate entity only. It is the corporate shell currently registered under the name 'The Business Zone 747 (Pty) Ltd', a private company, which has been assigned registration number 2013/094017/07. Previously, and until its conversion registered on 7 June 2013, which was prior to the various loan agreements, addenda and the suretyship coming into existence, it was a close corporation by the name of 'The Business Zone 747 CC', which had been assigned registration number 2004/037286/23. The registration number 2004/037286/23 reflected under the name 'The Business Zone 747 (Pty) Ltd' is on the respondent's own version clearly incorrect and simply a transposition of registration numbers. The corporate entity which the debtor and respondent bound and intended to bound themselves¹⁴ to is, since 7 June 2013 known as 'The Business Zone 747 (Pty) Ltd', and its correct registration number is 2013/094017/07. The legal position is therefore as the respondent correctly states in the first two sentences of paragraph 24.7 of the answering affidavit.

[10] No real dispute of fact arises in regard to what should be the correct registration number of The Business Zone 747 (Pty) Ltd, which cannot be resolved on the affidavits.¹⁵

[11] The respondent's argument that 'The Business Zone 747 (Pty) Ltd', registration number 2013/094017/07 somehow did not come into existence because Mr Centner, the sole member of 'The Business Zone 747 CC' had not become a shareholder of the company, is also without merit. There is nothing to explain what happened to Mr

¹⁴ The factual position is analogous to that in *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (N).

¹⁵ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 53.

Centner's membership in the close corporation. Shareholding in the private company is not reflected in the CIPC records. As to what happened to Mr Centner's membership is, in any event, irrelevant. Membership in a close corporation that is converted to a company merely creates an entitlement to become a shareholder on conversion, but it does not mean that Mr Centner had to become a shareholder. The provision in Schedule 2 to the Companies Act on which the respondent relies is a regulatory provision and not a precondition to the conversion of a close corporation to a private company.

[12] The respondent knew that he was dealing with 'The Business Zone 747 (Pty) Ltd' when signing the suretyship. He appended his signature to the suretyship intending to and granting the suretyship in favour of an existing corporate entity, not a non-existent juristic persona. Seizing on the patent error regarding the incorrect registration number as a defence is opportunistic. The error in the registration number of 'The Business Zone 747 (Pty) Ltd' is furthermore not a mistake that induced the conclusion of the suretyship.¹⁶ The respondent has been well able to recognize the connection of 'The Business Zone 747 (Pty) Ltd' with the claim¹⁷ notwithstanding the incorrect registration number having been used in conjunction with its name.

[13] There is furthermore no need for rectification. The registration number of 'The Business Zone 747 (Pty) Ltd', is not a material term of the loan agreements. It is not a legal prerequisite for a company to reflect its registration number in all agreements it concludes.¹⁸ The identity of the creditor to which the respondent bound himself as surety is clear.

¹⁶ *Khan v Naidoo* 1989 (3) SA 724 (N).

¹⁷ *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* [2021] ZASCA 178 para 20.

¹⁸ Section 32(1)(b) of the Companies Act provides that a company may not misstate its name or registration number 'in a manner likely to mislead or deceive any person.' That has not been the respondent's complaint. Section 32(3)(a) provides that a person 'use the name or registration number of a company in a manner likely to convey an impression that the person is acting or communicating on behalf of that company, unless the company has authorised that person to do so.' That complaint has also not arisen. Section 32(4) provides that every company must have its name and registration number in all notices and other official publications of the company and in all bills of exchange, promissory notes, cheques and orders for money or goods and in all letters, delivery notes, invoices, receipts and letters of credit of the company. This requirement does not seem to extend to loan agreements and suretyships.

[14] I conclude that the issue of the incorrect registration number being reflected with the name 'The Business Zone 747 (Pty) Ltd', does not require any further attention: it has become an undisputed fact on the test prescribed in *Plascon Evans*, that the correct name and registration number of the applicant/creditor in the loan agreements and suretyship are 'The Business Zone 747 (Pty) Ltd', registration number 2013/094017/07. Further, the incorrect reference to the registration number of 'The Business Zone 747 (Pty) Ltd', being 2004/037286/23, whereas it should be 2013/094017/07, does not give rise to a real factual dispute on a material issue.¹⁹

[15] The respondent's 'defence' regarding the existence of the applicant and its citation is accordingly without merit.

[16] That finding disposes of a number of further defences raised. The resolution on which Mr Buck relies, is correctly a resolution of 'The Business Zone 747 (Pty) Ltd registration number 2013/094017/07,' which is the proper applicant, creditor and lender.

The resolution and the applicant's choice of procedure

[17] The respondent had also contended that the resolution authorised Mr Buck and the applicant's attorney to only launch an action, as opposed to an application.

[18] Even if the wording of the resolution on a strict interpretation might be confined to an 'action', Mr Buck is the sole director of The Business Zone 747 (Pty) Ltd registration number 2013/094017/07 and he signed the founding affidavit launching the application. It is difficult to think of a more appropriate mandate being exercised by a company than its managing and sole director signing the founding affidavit prepared by the applicant's attorneys launching a high court application. Wisely, the respondent's counsel did not persist with this point.

The indebtedness of the respondent

¹⁹ *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

[19] Essentially what remains to be considered is the respondent's alleged indebtedness to the applicant.

[20] The respondent contends that the applicant could not rely on the certificate of balance as constituting conclusive proof. That point is well taken. The decision in *Ex Parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd*²⁰ established that a contractual provision that a certificate of balance emanating from a creditor unilaterally specifying the amount of an alleged debt due and providing that such certificate will constitute conclusive proof, is *contra bonos mores*. That is however not the end of the enquiry as regards the applicant's claim.

[21] What the applicant seeks is a judgment sounding in money in the sum of R3 496 214.25 as being the capital amount outstanding in respect of the written loan agreements. That is the primary obligation it seeks to enforce. This judgement has found that the various agreements concluded with the applicant, were concluded validly. They are accordingly, in the language employed by the respondent in paragraph 24.1 of the answering affidavit, 'deemed to be valid'. Accordingly, 'the terms and conditions of each of the agreements or addendums . . . [are] admitted' by the respondent. That admission includes the amounts of the loans.

[22] The loans total R4 950 000. The payments conceded by the applicant to have been made in reduction of the total capital amount of the loans is R1 453 785.75. The concessions favour the respondent. The balance remaining, due and owing after taking the payments into account, is R3 496 214.25. The calculation of the judgment debt is thus established in the founding affidavit, albeit that it is not presented in a separate schedule. The facts emerging from the founding affidavit provide a basis, in no uncertain terms, as to how the amount claimed in the notice of motion is calculated. The calculation of the claim can be established independently of the certificate of balance. I am not persuaded that the respondent did not know what case he had to meet, based on a holistic reading of the founding affidavit in its full context.

²⁰ *Ex Parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and others and Donnelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A).

[23] If the respondent contended that the amount should be less than the R3 496 214.25, then the onus was on him to prove any further payments that had been made in reduction of the capital amount.²¹ He has not done so. The fact that he is a surety, as opposed to being the principal debtor,²² does not change that legal position.

Interest calculations

[24] The respondent also contended that the interest was calculated incorrectly, or otherwise irregularly. This argument can be dismissed on two grounds. First, the respondent has failed to adduce any particularity of the alleged irregularity in the calculations. It was incumbent on the respondent, as the party alleging such irregularities, to provide details thereof.²³ It failed to do so. Secondly, the amount claimed, as shown above, is in respect of the outstanding capital, and does not include any interest. The amount claimed therefore cannot possibly be contaminated by any alleged irregular interest calculations, whatever these may be.

Conclusion

[25] I am satisfied on a perusal of the papers after weighing up all the evidence presented²⁴ that the applicant has proved its claim and that the respondent has not raised a valid defence to the relief prayed being granted.

Costs

[26] The applicant has been successful and is entitled to its costs.

Order

[27] The following order is granted:

²¹ *Pillay v Krishna and another* 1946 AD 946.

²² The position is also not quite that. It seems that the respondent was involved with the management of the debtor. It is however not necessary to make any further findings in that regard.

²³ In *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* [2013] ZASCA 29; 2013 (4) SA 557 (SCA); [2013] 2 All SA 501 (SCA) para 4 it was held that 'A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond.'

²⁴ *Soffiantini v Mould* 1956 (4) SA 150 (E).

1. The respondent is ordered to pay to the applicant the amount of R3 496 214.25.
2. The respondent is ordered to pay interest on the amount of R3 496 214.25 at the rate of 4.5% per annum, calculated as provided in the loan agreements.
3. The respondent is ordered to pay the costs of the application.

KOEN J

APPEARANCES

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