REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 30700/2011

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

6JUNE 2012 FHD VAN OOSTEN

In the matter between

STANDARD BANK OF SOUTH AFRICA LTD **APPLICANT**

and

JONATHAN MICHAEL MOLYNEUX-KILLIK **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] The applicant claims payment from the respondent as surety and co-principal debtor the balance of the amount owing pursuant to a home loan agreement concluded between the applicant and the principal debtor, ABJMK Investment Holdings (Pty) Ltd, on 28 February 2007 (ABJMK). The loan, in the amount of R5m, was secured by a mortgage bond in favour of the applicant, registered over the immovable property, the only asset of ABJMK. On 5 August 2010 ABJMK sold the property to Purple Fountain Properties 122 (Pty) Ltd for a purchase price of R3,3m. The nett proceeds of the sale

were paid to the applicant in reduction of the amount owing by ABJMK on the bond account. Prior to the sale of the property the last credit to the account was in September 2009 and ABJMK made no further payments after the sale resulting in the arrears in monthly payments, in March 2011, amounting to some R255 000. ABJMK was finally deregistered on 24 February 2011, resulting from non-compliance with the requirement of submitting its annual returns. The applicant now seeks an order against the respondent for payment of the balance of the account in the sum of R2 547 053.67, interest thereon, and costs as between attorney and client.

[2] The agreement of suretyship is not in dispute. The respondent's defences are twofold: firstly, a number of objections challenging the correctness of the amount claimed by the applicant and secondly, that the property was sold well below its market value to the prejudice of the respondent resulting, so it is contended, in the release of the respondent as surety. I proceed to deal with each leg separately.

[3] The applicant in its founding affidavit relies on a certificate of indebtedness in order to prove the amount of the principal debtor's, and therefore the respondent's indebtedness. In the answering affidavit the rate of interest charged by the applicant and the levying of three homeowner's insurance premiums (of R 1406.79 each for the months May, June and July 2007) are attacked. In response thereto the applicant in its replying affidavit, attached a statement of account fully setting out all transactions on the account. Counsel for the respondent submitted that the applicant was not entitled to rely on a new cause of action in reply. The argument is untenable: the applicant's cause of action remains payment of the balance of the account. The full account was attached in response to the challenges directed by the respondent to the correctness thereof. But, I need not further dwell on this aspect: the respondent was granted leave by an order of this court to file a supplementary affidavit which he has availed himself of and the applicant has responded thereto. In the supplementary affidavit the respondent raised further issues concerning the applicant's accounting.

[4] The respondent's attacks on the applicant's accounting, except for one, are without merit. The only valid objection concerning interest charges has been taken care of: the applicant has reduced the amount claimed with the sum of R39 430.34 in accordance with the rate contended for by the respondent and further seeks *mora* interest on the

amount claimed at such lower interest rate. The remaining issues, firstly, concern the homeowner's insurance premiums. In the applicant's letter of grant of the home loan facility the reference to the homeowner's insurance premium in the sum of R 1406.80 as part of the monthly bond repayments, has been deleted. The respondent contends that the applicant therefore was not entitled to levy any insurance levies. The contention is clearly wrong: in terms of clause 6 of the general terms and conditions pertaining to the loan, the applicant was empowered to insure the property at any time during the period of the loan. Clause 6.2 affords the company the right to arrange its own insurance, in which event the company was obliged to cede such insurance policy to the applicant. In the applicant's supplementary affidavit the expenditure in regard to the insurance premiums is explained thus: the company failed to insure the property as it had undertaken to do, resulting in the applicant doing so. I am alive to the fact that this information was only disclosed in the applicant's supplementary affidavit. On the other hand nothing has been put forward in the respondent's affidavits or by way of a request for the filing of a further affidavit, to show either that the company had in fact arranged its own insurance for the period in question, or otherwise to dispute the correctness of the applicant's allegations. I have accordingly come to conclusion that the charges in respect of the insurance premiums were correctly incurred and that the respondent is liable for the payment thereof.

[5] The remaining issue concerns a debit to the loan account of the amount of R272 908.04, in respect of VAT, which was paid by the applicant to SARS, resulting from the sale of the property. In this regard the respondent states that "the principal debtor would in this regard be entitled to set off VAT payments against the VAT receipt in terms of the provisions of the relevant legislation". The relevance hereof in regard to the applicant's claim escapes me. Counsel for the respondent submitted that those charges are not covered by the loan agreement and that the respondent accordingly cannot be held liable for the payment thereof. This brings to the fore the terms of the suretyship agreement. In clause 1 thereof the respondent binds himself as surety and co-principal debtor "for the payment when due of all the present and future debts of any kind" of the principal debtor. This must be read in conjunction with clause 2 which defines "debts covered by suretyship" as "incurred by the debtor in terms of the loan agreement under account number 361498136". The extent of the surety's liability in my

view is clear: it is for payment of all present and future debts of any kind relating to the loan agreement. The payment of VAT was necessary to effect transfer of the property into the name of the purchaser and the applicant's payment thereof resulted in a debt of the company. It accordingly constituted a debt relating to the loan agreement for which the respondent as surety is liable.

[6] One last observation in regard to these defences: the respondent, as the managing and later sole director of ABJMK was at all times in possession of the applicant's statements of accounts. Never was any objection raised. In this application the respondent intimated that he would engage the services of an expert to "verify" the correctness of the entries in the loan account. This has not been done and nothing of substance has however been put before me. I therefore accept as correct the reduced amount claimed by the applicant.

[7] This brings me to the defence relating to the sale of the property. As I understand the contention it is the following: one Botha was an erstwhile director of the ABJMK. The respondent admits that after his resignation as such Botha was authorised on behalf of ABJMK, to sell the property. The respondent maintains that the authorisation was subject to a minimum selling price of R3,85m, which was reflected as such in the resolution of the company. The property, as I have already mentioned, was sold for R3,3m. Although conceding that Botha was authorised to sell the property, the respondent contends that the sale was unlawful and contrary to the provisions of s 228 of the Companies Act of 1973, as he was not empowered to sell for less than R3,85m. The applicant "*qua* bondholder", the respondent states, "must have known that the ultimate sale of the property was not properly authorised by the principal debtor and this has caused me to suffer significant damages as well as real and substantial prejudice as surety". The applicant denies that it was aware of the resolution containing the alleged restriction in regard to the selling price. Attempts were made to procure the resolution in terms of which transfer was effected but those were apparently thwarted by Botha. Be that as it may, and leaving aside the doubtful merits of the respondent's allegations, I do not consider it necessary to deal with this aspect any further. Assuming the property to have been sold for less than the minimum price authorised, constitutes an issue between the respondent and Botha and does not have any relevance

concerning the applicants' claim. No steps have in any event been taken by the respondent pursuant to the discovery of the alleged unlawfulness of the sale. My conclusion accordingly is that no defence has been established and it follows that the applicant's claim must succeed.

[8] In the result judgment is granted in favour of the applicant against the respondent for:

1. Payment of the sum of R2 547 053.67.
2. Interest on the amount in paragraph 1 above at the rate of 6,8% *pa* from 31 December 2010 to date of payment.
3. The respondent is ordered to pay the costs of this application on the scale as between attorney and client.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV MD SILVER***
APPLICANT'S ATTORNEYS	***DAVID OSHRY & ASS***
COUNSEL FOR THE RESPONDENT	***ADV JL KAPLAN***
RESPONDENTS' ATTORNEYS	***LAURENCIK ATTORNEYS***
DATE OF HEARING	***6 JUNE 2012***
DATE OF JUDGMENT	***6 JUNE 2012***