

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/18432

(1)	REPORTABLE: YES / <del>NO</del>
(2)	OF INTEREST TO OTHER JUDGES: YES / <del>NO</del>
(3)	REVISED.
17/8/2012	
DATE	SIGNATURE

In the matter between:

ABSA BANK LTD

Plaintiff

and

HLATHINI SAFARIS CC

First Defendant

BERESCHAUT, PAUL

Second Defendant

LAHOUD, WARREN ANTHONY

Third Defendant

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## J U D G M E N T

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**MOSHIDI, J:**

### INTRODUCTION

[1] The plaintiff has instituted action against the defendants for payment of the sum of R800 403,07, plus interest and costs.

### THE NATURE OF THE CLAIM

[2] The claim represents the balance of monies lent and advanced by the plaintiff to the first defendant, "*the principal debtor*", from time to time as well as agreed debits on an overdrawn cheque account based on an agreement between the plaintiff and the principal debtor. The second and the third defendants bound themselves as sureties and co-principal debtors *in solidum* for the due and proper performance of the obligations of the principal debtor towards the plaintiff on 27 July 2007.

### COMMON CAUSE FACTS

[3] The following are common cause facts. The first defendant is a close corporation duly incorporated in terms of the Close Corporations Act No. 69 of 1984. The second and the third defendants were the two members of the first

defendant. The summons was served on the defendants in May 2009. On 30 June 2009, the plaintiff obtained summary judgment against the first defendant for payment of the amount of R800 403,07 plus interest thereon at the rate of 14% per annum and costs on the attorney and client scale. On 29 October 2008 the first defendant was placed under provisional winding-up order. On 20 January 2009 a final winding-up order was granted. The third defendant successfully resisted summary judgment and later filed a plea. The second defendant is not part of the present action since the plaintiff has already obtained default judgment against him. The documentation relating to the winding-up of the first defendant was handed up by consent of the parties during the trial. On 16 July 2010 the first defendant was finally deregistered as a close corporation. The reason for the deregistration as indicated in the Cipro Search document is that, *"For Annual Return Non-Compliance"*.

#### THE THIRD DEFENDANT'S AMENDMENT

[4] At the commencement of the trial the third defendant abandoned all the defences previously raised in his plea and moved for an amendment of his plea. The amendment, which was not opposed, was granted. For the sake of completeness the amended plea reads as follows:

"1. *By the Deletion of the Defendant's existing Paragraph 4 in its entirety and the substitution thereof with the following:*

'4. *Save for admitting that Third Defendant refuses to pay the sum of R800 403.07 to Plaintiff, the contents of these paragraphs are denied. In amplification of this denial Third Defendant specifically pleads that:*

- 4.1 *Final Deregistration of the First Defendant occurred on 16 July 2010, a copy of a CIPRO Search evidencing such deregistration is annexed hereto marked "AM1";*
- 4.2 *As a result of the said deregistration of the First Defendant, and on the aforesaid date the third Defendant was discharged as a surety for the debts of the First Defendant;*
- 4.3 *Accordingly, it is specifically denied that the plaintiff is entitled to payment of the amount as claimed by the Plaintiff from the Third Defendant in terms of the suretyship;*
- 4.4 *The remainder of the allegations herein contained are denied."*

#### THE SOLE ISSUE FOR DETERMINATION

[5] In the light of the amended plea, the parties agreed that the defence now raised in the amended plea should be argued and that no oral evidence was necessary. Both parties proceeded to close their respective cases.

[6] Consequently, the sole issue calling for determination in this trial is whether the final deregistration of the first defendant as a close corporation on 16 July 2010 had the effect of discharging the third defendant as surety for the debts of the first defendant, to which I shall henceforth refer to as "*the deregistration defence*". In terms of the deed of suretyship which he signed on 27 July 2007, the third defendant bound himself as surety and co-principal debtor, jointly and severally, together with the first defendant for the repayment on demand of any sum or sums owed by the first defendant to the plaintiff from whatever cause arising and for the due fulfilment of all

obligations of the first defendant to the plaintiff in respect of such indebtedness. In para [12] of the declaration the plaintiff alleged further that:

*“[12] The further and material express, alternatively implied, alternatively tacit terms of the deed of suretyship were the following:*

- 12.1 The suretyship was additional to any security which the plaintiff holds in respect of the obligations of the first defendant and the suretyship shall not detract, in any way, from other security already furnished by the third defendant, which security remains in force until terminated in writing by the plaintiff [clause 5];*
- 12.2 Any judgment granted by a court against the first defendant in favour of the plaintiff, will be binding on the third defendant [clause 6];*
- 12.3 The third defendant renounce the following meanings and consequences [which the third defendant acknowledged being acquainted];*
  - (a) that the defendant is not entitled to demand cession of the plaintiff's rights, before payment by the third defendant [of the full debt by the first defendant] to the plaintiff [clause 10.1];*
  - (b) if the third defendant disputes the existence of any amount owing by the first defendant to the plaintiff, the onus of proving it rests on the third defendant [clause 10.2];*
- 12.4 A certificate signed by any manager of the plaintiff would be proof of any applicable rate of interest of the amount owing relating to the suretyship for the purposes of judgment and should the third defendant dispute the correctness of such certificate the third defendant bore the onus in such regard [clause 14];*
- 12.5 The third defendant will be responsible, in respect of legal costs incurred by the plaintiff in the enforcement of the suretyship, for the payment of such legal costs on the attorney and own client scale; [clause 15]; and*
- 12.6 The amount that the plaintiff would be entitled to recover from the third defendant, would be limited to a capital*

*amount of R1 264 000.00 together with any such further amounts in respect of interest and costs as the plaintiff may have already accrued or which will accrue until the [clause 21]."*

### THE THIRD DEFENDANT'S ARGUMENT

[7] In advancing his argument, counsel for the third defendant relied on section 26(5) of the Close Corporations Act No. 69 of 1984, as amended, (*"the Corporations Act"*), which provides as follows:

*"If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities."*

The argument proceeded that the effect of the deregistration of the first defendant meant that the third defendant, as a member of the first defendant, became jointly and severally liable for any outstanding liabilities of the first defendant. The liabilities included the liability owed to the plaintiff, and for which liability the third defendant already stood surety. It was further argued that as a result and pursuant to the deregistration, the third defendant found himself standing surety for his own debt, which is not legally permissible. On this basis, so the argument continued, the suretyship signed by the third defendant is a nullity and the plaintiff's claim against the third defendant in terms of the suretyship is non-suited.

[8] The argument advanced on behalf of the third defendant has no merit at all for a number of obvious reasons which need not all be repeated here. Section 1 of the Corporations Act defines "*deregistration*" as "*in relation to a*

corporation, means the cancellation of the registration of the corporation's founding statement; and 'deregister' has a corresponding meaning". Section 26(4) of the Corporations Act provides as follows:

*"The deregistration of a corporation shall not affect any liability of a member of the corporation to the corporation or to any other person, and such liability may be enforced as if the corporation were not deregistered."* (my underlining)

The Companies Act No 71 of 2008, (*"the New Companies Act"*), which came into operation on 1 May 2011, amended section 26 of the Corporations Act as follows:

*"26. Deregistration.— Sections 81(1)(f), 81(3), 82(3) to (4), and 83 of the Companies Act, each read with the changes required by the context, apply with respect to the deregistration of a corporation, but a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act."*

Section 83 of the New Companies Act provides that the removal of a company's name from the Companies register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register.

[9] From the above, it is plain that the reference to "*or to any other person*", in section 26(4) includes the plaintiff. In *Boland Bank Bpk v Mouton* [1997] 4 All SA 67 (C) it was held that the liability referred to in section 26(4) is not extinguished when registration of a corporation is restored. In *Barclays National Bank v Kalk* 1981 (4) SA 291 (W), where one of the sureties was one

Kalk for the debts of a company, Dancor, Kalk raised as one of the defences the fact that the principal debtor, Dancor, was later deregistered. The Court in rejecting the defence held that the deregistration did not release Kalk of his obligations in terms of his undertaking. At p 295C-D, of the judgment, Myburgh J held that:

*"The deregistration is in certain circumstances obligatory on the Registrar of Companies. In my view there is no reason why Kalk could not apply to the Court to have Dancor restored to the register. In my view the debt due by Dancor was not extinguished but was merely rendered unenforceable while it was deregistered, and does not detract from the obligation of Kalk to pay in the circumstances of this case."*

The decision was upheld on appeal in *Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A). The argument advanced by the third defendant in the present matter that the *Barclays National Bank* case concerned a company, and not a corporation, was not helpful at all.

[10] In the light of the above it is unnecessary to consider the contention that a person cannot validly stand as surety for his own debt, save to state that it has no merit. A proper reading of section 26(4) of the Corporations Act shows that it specifically provides for a situation such as the instant matter, and clearly stipulates that the corporation's deregistration shall not affect any liability of a member to a third party, and that such liability may be enforced as if the corporation was not deregistered. In my view, the plaintiff has correctly argued that the third defendant's contention will lead to absurd consequences, as it will entail that whenever a member of a close corporation faced personal liability under the Corporations Act, such member would be

entitled to be released from the obligations as surety. The suretyship signed by the third defendant makes provision for liability as individual and joint debtor. The third defendant's indebtedness in this case is clearly joint and several.

[11] In *Kalk v Barclays National Bank (supra)*, the Appeal Court at 633H said:

*"It is not the law that a surety is freed from liability to the creditor when the principal debtor ceases to exist. If the principal debtor is a natural person and he dies, his surety remains liable to his creditor; and a surety for a company remains liable to its creditor if it is liquidated and dissolved under s 419 of the Companies Act. In short, there is no foundation for the argument that Dancor's deregistration released the appellants from liability to the Bank."*

In *Boland Bank Limited (supra)*, Rose Innes J, relying on *Barclays National Bank* in the Appellate Division, at p 73i-j said:

*"There is no conceptual difficulty whatsoever in the proposition that a close corporation ceases to exist as a juristic person upon its deregistration, but that any outstanding debts that it may have had at the time of deregistration are not thereby extinguished. Because the corporation ceases to exist, its debts become unenforceable against it, but are not discharged. In terms of section 26(5) the corporation's outstanding liabilities upon deregistration are not extinguished; they are transmitted in terms of the subsection to the persons who are members of the corporation at the time of its deregistration. Although members of the corporation were not liable for its debts while the corporation existed, section 26(5) enacts that if a corporation is deregistered while having outstanding liabilities, the members at the time of deregistration shall be jointly and severally liable for such liabilities. The wording of the subsection is clear, unambiguous and the liability which it imposes upon members is unqualified by any reference as to the duration of their liability or as to any later contingency."*

In *Commissioner for SARS v Mendes and Another* [2001] 2 All SA 316 (SE), it was held that the restoration of a close corporation's registration does not relieve the members of the liabilities imposed upon them on deregistration by section 26(5) of the Corporations Act. In the light of the above case law, the argument of the third defendant that pursuant to the deregistration of the first defendant, "*he found himself standing surety for his own debt*", and that, "*the suretyship became a nullity alternatively not legally enforceable*", makes no sense at all. It will lead to absurdity.

It was indeed no surprise that counsel for the third defendant could not find any authority or case law in support of his contention. Put plainly, section 26(4) of the Corporations Act destroys completely the third defendant's deregistration defence. It could never have been the intention of the legislature under the Corporations Act to create fertile ground for members of a close corporation who are debtors, to escape liability as sureties.

## CONCLUSION

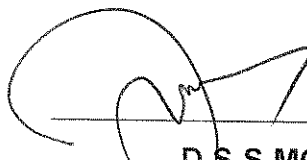
[12] For all the foregoing reasons, I am more than persuaded that the third defendant's deregistration defence is bereft of any merit and is ludicrous. The plaintiff has succeeded on a balance of probabilities to prove that it is entitled to judgment against the third defendant as claimed. It is indeed clear to me that counsel for the third defendant, in relying on the provisions of section 26(5) of the Corporations Act overlooked an important consideration. This is

that, the section in stipulating that, "*The persons who are members of such corporation at the time of deregistration shall be jointly and severally liable*", in fact imposes a direct statutory liability on the third defendant. In other words, the third defendant by statute, becomes a principal member.

### THE ORDER

[13] In the result the following order is made:

1. The third defendant shall pay to the plaintiff the sum of R800 403,07 jointly and severally with the summary judgment and default judgment already granted against the first defendant and the second defendant, respectively.
2. Interest on the aforesaid amount at the rate of 14% per annum calculated from 12 February 2009 to date of payment, such interest to be calculated and capitalised monthly as further agreed.
3. Costs of suit on the scale as between attorney and client.



D S S MOSHIDI  
JUDGE OF THE SOUTH GAUTENG  
HIGH COURT, JOHANNESBURG

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DATES OF HEARING	25-26 JULY 2012
DATE OF JUDGMENT	17 AUGUST 2012

## **S U M M A R Y**

Close corporation – deregistration of close corporation after defendant member of close corporation stood suretyship for debts of close corporation – effect of deregistration – debt due by close corporation not extinguished by deregistration merely rendered unenforceable while close corporation deregistered the obligations of surety not affected thereby.