REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

16/10/2015
DATE

SIGNATURE

DATE

SIGNATURE

CASE NO: 2014/06507

In the matter between:

MEDIA DEVELOPMENT INVESTMENT FUND INC Applicant

AND

BASILDON PETA Respondent

JUDGMENT

STRAUSS, AJ:

INTRODUCTION

1. The applicant launched an application during February 2014 against the Respondent for payment of US$125,000.00 together with interest thereof in terms of a guarantee dated 21 March 2012, signed by the respondent in his personal capacity as guarantor.

2. The respondent opposed the application and set out in his opposition that the guarantee attached to the founding papers of the application was not for the same amount or date and was signed by the respondent on behalf of Africa Media Holding (Pty) Ltd. Hereafter the applicant promptly filed a supplementary affidavit annexing the correct guarantee as referred to in its notice of motion, and advanced a bona fide error as explanation for attaching the incorrect guarantee. On the face of it the explanation seemed reasonable and the respondent took no issue with the filing of the supplementary affidavit nor did he reply thereto.

3. The guarantee on which the respondent opposition is therefore based is also a guarantee by the respondent, but in this guarantee he acts for and on behalf of Africa Media Holdings Limited guaranteeing payment of a loan and/or debt owed by the Free State Times Limited to the applicant limited to the amount of US$300,000.00.

4. The guarantee on which the applicant now seeks payment is only for an amount of US$125,000.00 and is against the respondent in his personal capacity. The respondent confirmed to the court that their defences to the application remained the same and they chose not to file a further affidavit after the applicant had attached the correct guarantee to the supplementary affidavit on which its case was based.

5. The applicant thereafter filed a replying affidavit and the matter became before me as an opposed motion after both parties had filed heads of argument.

BACKGROUND FACTS

6. The applicant is a non-governmental entity based in New York that provides independent organisations involved in media with financial assistance. The relationship between the applicant and the respondent dates back to 2008 and it appears that the respondent previously approached the applicant with a request for financial assistance for the Lesotho Times newspaper.

7. During 2010, the respondent again approached the applicant with another request for financial assistance for the newspaper, the Free State Times (FST). It is not in dispute that at all material times the respondent represented that he was a majority shareholder of Africa Media Holdings (Pty) Ltd (AMH), and that AMH was the majority shareholder of FST. The applicant agreed to provide the required financial assistance.

8. Between December 2010 and January 2012 various amounts were advanced for the funding needs of FST and as at January 2012 the total amount of a loan advanced to FST was US$1, 4 million.

9. There were two guarantees issued in this matter. The first guarantee issued was for an amount of US$350,000.00 for the loan agreement concluded on 25 January 2012 between the applicant and FST. This guarantee was signed by the respondent on behalf of African Media Holdings, standing surety for the debts of FST.

10. The other guarantee was in favour of the applicant in terms whereof the respondent personally undertook to pay the amount of US$125,000.00 for the loan of FST. This guarantee was dated 21 March 2012 and is the guarantee on which the applicant seeks payment.

11. The defences of the respondent are twofold. The first being that there is a further agreement governing the rights and obligations between the parties, such agreement being a deferred payment agreement duly signed by the applicant and the respondent on behalf of African Media Holdings (AMH) on 19 December 2012.

12. The respondent argues that the terms of the loan agreement between FST and the applicant was that the entire loan would be paid no later than 30 April 2012. The respondent states that the applicant did not institute any action for recovery of these amounts due to the fact that the applicant signed a deferred payment agreement with the respondent on 19 December 2012, deferring payment to 31 January 2015.

13. The respondent argues that the deferred payment agreement clearly and unequivocally defines the liabilities as liabilities of AMH to the applicant arising under a deed of suretyship for the full amount of US$1,425,000.00. The respondent therefore argues that the deferred payment agreement was a novation of all and ay of the agreement entered into between the parties in regards to the outstanding loan of FST to the applicant.

14. The second defence raised by the respondent is a dispute of fact. The respondent argues that the logical reason why the applicant decided not to attach the deferred payment agreement to its papers and was to avoid factual disputes. It is argued that the applicant had deliberately chose not to disclose the existence of the deferred payment agreement and another

deed of suretyship executed by AMH on 7 May 2012, in favour of the applicant, in order to prevent disputes of fact.

15. The respondent argues that on the basis of the deferred payment agreement and the deed of suretyship, dated 7 May 2012, between AMH and the applicant, the applicant should have cited AMH instead of the respondent in this application and could not proceed by way of application against the respondent. The dispute, it is said, is that the court is now faced with a dispute of who is liable for the debt claimed by the applicant. The respondent in person or AMH? The respondent argues that the only way this can be solved, is by way of oral evidence on trial.

16. The applicant admits the existence and signing of the deferred payment agreement as well as the two guarantees and the surety signed by AMH. The applicant denies that it did not attach them to prevent factual disputes, the applicant argues that these documents are simply not relevant in this application for payment against the respondent personally.

17. The applicant argues that the liabilities in terms of the deferred payment agreement are liabilities between AMH and the applicant and is independent from the agreement of FST's liabilities to the applicant under the FST loan. The applicant further argues that the respondent has to show that the deferred payment agreement was intended by the parties to novate the loan agreement of FST with the applicant, and was also intended to novate the guarantee signed by the respondent to guarantee payment of the US$125,000.00.

18. There is no mention made of novation in the deferred payment agreement and due to the fact that there is no reference to, or that FST is not a party to the deferred payment agreement, the applicants states this is fatal to the respondent's defence of novation. Thus there being no mention in the deferred payment agreement made that indicates a "clear" "cogent" and "unequivocal" intention on both parties' side to novate the FST debt to the applicant to AMH.

19. The applicant argues that it would not have foregone its claim against FST under the FST loan by replacing it with a claim against AMH.

20. The applicant further argues that the presumption is that the applicant intended on strengthening its claim against FST and AMH by concluding the deferred payment agreement.

21. The applicant is imploring the court not to read novation into the deferred payment agreement due to the fact that it would subvert the express wording of the document and would result in this Court contracting for and on behalf of the applicant and AMH.

22. The applicant argues that the deferred payment agreement could create a second obligation in respect of AMH's indebtedness to the applicant created by the deed of suretyship and the applicant argues that the consequence is that the applicant may sue AMH under either the original deed of suretyship or the deferred payment agreement, but that it may be precluded from doing so until such time as the deferred payment agreement has matured.

23. The applicant argues that at best for the respondent the deferred payment agreement constitutes a *pactum de non patendo*, that is an agreement not to sue FST contingent on AMH performing under and in terms of the deferred payment agreement, which has shown not to be done as neither FST or AMH performed under the deferred payment agreement.

24. The applicant contends that the dispute raised by the respondent is not a genuine dispute of fact, but a dispute of law and that it is a matter of legal argument to be determined by the court.

25. The applicant argues that the dispute raised by the respondent is a matter of contractual interpretation, i.e. this court will be called on to interpret the deferred payment agreement in order to decide whether it has novated FST's obligations to the applicant under and in terms of the FST loan.

THE LAW

26. It is so that where there is a dispute of fact on the papers an applicant can only succeed if those facts averred in the applicant's affidavit that have been admitted by the respondent, together with the facts alleged by the respondent justifies an order. This was set out in the trite case of ***Plascon-Evans Paints v Van Riebeeck Paints.***

27. It is settled that interpretation is a matter of law and not fact. The interpretation is a matter for the court to decide and not for a witness.

This was set out in ***KPMG Chartered Accountants SA v Securifin Ltd & Another 2009 (4) SA 399 (SCA) at paragraph 39.***

28. The law of novation is defined as the replacing of an existing obligation by a new one, where the existing obligation is discharged in full. This is set out in Christie on Contracts, 6th Edition, page 466 and 467. It is essentially a matter of intention and consensus. There must be a "clear" "cogent" and "unequivocal" intention on the parties that a novation was intended as set out in ***Rodell Financial Services (Pty) Ltd v Naidoo & Another 2013 (3) SA 151 (KZP) at paragraph 12.***

29. There is in our law a presumption against novation and it is the onus of the party alleging the novation to show that a novation was indeed intended by the parties. It is presumed that a creditor intends strengthening and/or confirming an existing right with a new contract that is creating a second obligation rather than destroying it through novation. This is also set out in the Rodell case at paragraph 12 referred to *supra*.

30. There can be no objection in principle to a second obligation arising in respect of an existing debt. This is set out in ***Adams v SA Motor Industry Employers' Association 1981 (3) SA 1189 (A) at 1198D.***

31. Thus, two independent obligations can co-exist in respect of the same performance or common debt unless novation is intended, which is not presumed, two obligations can and do co-exist. Also set out in the Adams case *supra*.

32. If a second contract does not novate the first contract the debtor faces the possibility of being sued on either of them. This is no hardship as the debtor has agreed to both contracts and the risk of being sued under and in terms of both contracts. The right of a creditor to enforce the original contractual obligation may be suspended until the maturity of the second contract or obligation. However, where the debtor is in breach of its obligations under the second contractual obligation, the creditor will be entitled to enforce his rights under the first contractual obligation.

33. The only way that an arrangement between a creditor and a third party can novate a debtor's debt is an assumption of the liability by a third party for the debt of another. However, as with novation there would need to be a clear cogent and unequivocal intention of the parties for the third party to assume the liability of the debtor and for a debtor to be released. One would need to look at a clear and unambiguous wording of the contract in question to ascertain whether such a novation was intended by the parties. This was set out in ***Total South Africa v Bekker N.O. 1992 (1) SA 617 (A) at 628A.***

34. The New York law is applicable to the guarantee on which the applicant seeks payment. It is, however, settled law that a foreign jurisdiction or arbitration clause does not exclude the jurisdiction of the courts of the Republic of South Africa to hear a matter. Parties cannot exclude the jurisdiction of this Honourable Court by their own agreement. This is set out in ***Foize Africa (Pty) Ltd v Foize Beheer BV & Others 2013 (3) SA 91 (SCA) at paragraph 21.***

35. In terms of section 1 of the Law of Evidence Amendment Act, 1988 any court may take judicial notice of the law of a foreign state insofar as such law can be ascertained readily and with sufficient certainty. In practical terms this means that if the law of a foreign state is readily ascertainable with sufficient certainty such law may be argued by the parties without requiring evidence from someone with the necessary expertise and the court may take judicial notice of such law.

36. Our courts have held that foreign law being ascertained readily and with sufficient certainty often is dependent upon access to authoritative sources such as textbooks. This is set out in ***Harnischfeger Corporation & Another v Appleton & Another 1993 (4) SA 479 (W) at 485H.***

37. The respondent has not alleged that there is a difference between New York law and South African law regarding guarantees or suretyships. As such the court is entitled to proceed in accordance with the presumption. The court was provided with an affidavit by an expert setting out the law as to guarantees in New York as well as over a thousand pages of case law and textbooks references in regard to foreign law and counsel for the applicant indicated to the court which relevant pages had to be read of the authorities bundle provided to the court.

38. The court without having regard to all the authorities provided will therefore act in accordance with the presumption that such law is the same as South African law as it is set out sufficiently in the papers and I could ascertain is with sufficient certainty.

39. Finally, South African courts are entitled and empowered to grant judgment sounding in foreign currency. This is set out in ***Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A) at 774B – 777C.***

40. A guarantee in South African law is often confused with the concept of suretyship. One of the meanings of the word guarantee is an undertaking of the guarantor to pay as a primary obligation the debt of the principal debtor. In such case the guarantee is a primary obligation existing independently and not contingently on the underlying obligation. A guarantor's obligation as an obligation independent of that of the debtor is to indemnify the creditor in respect of losses suffered through the debtor's non-performance. Thus, if the creditor suffers loss when it turns out that a debtor's contract is invalid the guarantor's obligation remains in force and he will have to pay those losses, this is set out in Caney's, The Law of Suretyship, 6th Edition, at page 32.

41. It was set out by the applicant in its heads and also in the case law that a guarantee under New York law is a contract of secondary liability in which one promises to answer the debt of another and as such a form of surety. Similarly to South African law whether a contract in question is a suretyship or guarantee they do not depend on the use of technical wording, but upon the clear intention of the parties. In New York law a guarantor typically contracts to fulfil an obligation upon the default of the principle of *obligor*.

42. It was further argued that under New York law any contract of guarantee must satisfy the criteria, i.e. be in writing, there must be a meeting of minds, and arguments that the guarantor or surety did not ascent to the contract of guarantee because of ignorance or mistake, as at the legal effect thereof, is usually rejected by courts. The use of technical words is not essential to the validity of the contract, but there must be a clear intent that one party as surety binds himself to pay a debt contracted by a third party to the creditor. I find this position to be the correct position in law.

43. The guarantee in this matter, dated 21 March 2012 states that the respondent irrevocably, absolutely and unconditionally guarantees the prompt payment of FST, as and when due and payable, of the amounts under the FST loan up to an amount of US$125,000.00. In this guarantee the respondent irrevocably undertakes to pay to the applicant the sum or sums not exceeding the total amount of the obligations upon receipt by the respondent of demand by the applicant in writing.

44. It is an absolute and unconditional irrespective of any lack of validity or enforceability of the FST loan, or any agreement or instrument relating thereto, any change in the time, manner and place of payment of or in any other amendment, waiver or consent to any departure from the FST loan, or any release or amendment, or waiver of, or consent to any departure from any other guarantee for all or any of the amounts owing, nor any other circumstance which might otherwise constitute a defence available to or a discharge of FST or any other guarantor in respect of the amounts owing.

45. I find, that having regard to the interpretation of the deferred payment agreement, that it is not a novation of the loan by FST and the subsequent guarantee signed by the respondent personally. I find, that the guarantee is an irrevocable, absolute and unconditional guarantee. As such the respondent is liable as co-principal debtor with the applicant for the debts owing under and in terms of the FST loan. The applicant is thus not obliged to exhaust its legal remedies against FST.

46. The guarantee is valid notwithstanding any lack of validity or enforceability of the FST loan. As such the applicant may enforce the guarantee against the respondent regardless of whether FST is able to escape liability under the FST loan. The guarantee provides that it shall remain valid notwithstanding any change in time, manner or place as set out above. As such, any delay by the applicant in enforcing its rights under the guarantee is not a bar to the application.

47. The guarantee is governed by and in accordance with New York law and the parties consented to the non-exclusive jurisdiction of the court of New York. As the respondent lives within the jurisdiction of this court this court is entitled to apply New York law and that this court has sufficient jurisdiction to hear this application. This court will, however, need to apply New York law in order to ascertain whether the respondent in this matter is liable to the applicant and in terms of the guarantee.

48. Further I find that if the deferred payment did constitute an amendment or variation of the FST loan, such amendment or variation of the FST loan

would be invalid in light of the non-variation clause contained in the FST loan and also in the guarantee.

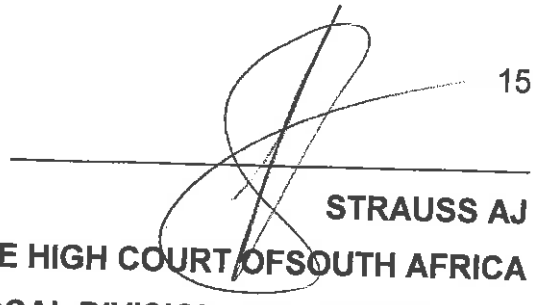
49. Under New York law an oral amendment of the FST loan would not affect or impact the applicant's ability to enforce the terms of the loan and thus the applicant's ability to claim from the respondent under the guarantee.

50. The FST loan matured and became payable from 30 April 2012. It is common cause that neither FST nor any other party, albeit AMH or the respondent, has made payment of the amounts owing under and in terms of the FST loan. The applicant made demand for the US$125,000.00 from the respondent in terms of the letter of demand sent by the attorneys on 7 October 2013.

51. Consequently and in terms of the New York law this court finds that the respondent became liable to the applicant under the guarantee following the applicant's demand.

52. I therefore make the following order:

a. The respondent is ordered to pay the applicant an amount of US$125,000.00.
b. The abovementioned amount shall accrue interest at the rate of 15.5% per annum from 7 October 2013 until date of payment.
c. The respondent shall pay the costs of the application.



STRAUSS AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT	J M HOFFMAN
INSTRUCTED BY	: NORTON ROSE FULBRIGHT
COUNSEL FOR THE RESPONDENT	:TC TSHAVHUNGWA
INSTRUCTED BY	:TSHISEVHE,GWINA,RATSHIMBILANI
HEARD ON	: 8 OCTOBER 2015
JUDGMENT ON	:16 OCTOBER 2015