REPUBLIC OF SOUTH AFRICA

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

CASE NO: A3070/2016

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

28/2/2017
DATE

SIGNED: GB ROME, AJ

In the matter between

KHOLEKA WINIFRED MZONDEKI **APPELLANT**

and

JOB T MORAKA **RESPONDENT**

J U D G M E N T

ROME AJ:

Introduction

[1]. This matter involves an appeal in respect of what was a fairly simple claim for a money judgment in the amount of R300 000. The claim was based on a suretyship agreement dated 8 January 2010 ("the Deed of Suretyship"). The claim against the surety proceeded to trial in the Randburg Magistrates' court, default judgment having been sought against the principal debtor who did not

enter an appearance to defend.

[2]. The magistrate in the reasons for the judgment dated 6 June 2016, for reasons analysed below, dismissed the claim with costs. The creditor (the plaintiff in the Magistrate's court and the appellant herein) appealed to this Court against such judgment and order.

Facts and Analysis

[3]. Before referring to the plea to the appellant's claim, it is useful to have regard to certain provisions of the Deed of Suretyship and the cognate Loan Agreement.

[4]. The Deed records the existence of a Loan Agreement concluded between the appellant, as creditor, and the principal debtor (one Mr Makhubela).

[5]. At trial it was not in dispute that the Loan Agreement was concluded in January 2010 between the appellant and the first defendant (the principal debtor), and that the amount of the loan was R250 000. The loan had a repayment term of six months and the Loan Agreement provided for monthly interest instalments in respect of the said six month term of R12 500 per month.

[6]. In terms of clause 2 of the Deed of Suretyship, the respondent bound himself as surety to the appellant for and on behalf of the principal debtor for the due performance by the debtor of his obligations arising from the Loan Agreement.

[7]. Clause 18 of the Deed of Suretyship provided that should the debtor fail to discharge any of the obligations to the appellant, the appellant would be entitled (notwithstanding any contrary arrangements between creditor and the debtor) to payment of all the obligations then owing by the debtor.

[8]. In terms of clause 21 of the Deed of Suretyship, the respondent consented to the jurisdiction of the Magistrate's Court in respect of any action to be instituted by the appellant thereunder.

[9]. In terms of clause 24 of the Suretyship, the respondent agreed to be

responsible for all charges and expenses of whatsoever nature incurred by the appellant in securing implementation of the respondent's suretyship obligations, including all legal costs (which included all attorney and client costs).

[10]. Clause 25 contained the usual waiver of benefits to the right of division and excussion otherwise available in law to a surety.

[11]. In her particulars of claim (as amended), the appellant had referred to the conclusion of both the Loan Agreement and the Deed of Suretyship with respectively the principal debtor and the respondent. The appellant's particulars of claim further set out her allegations as to the advance of the loan, the appellant complying with all of her obligations in terms of the Loan Agreement, and the subsequent failure of the principal debtor to repay the capital amount of the loan, together with accrued interest, resulting in a due and payable indebtedness of R300 000.

[12]. The respondent's plea made for interesting reading. In it the respondent denied:

a. *in toto* the citation of the appellant, despite it emerging at trial he and the appellant were friends of many years;

b. the conclusion of the Suretyship Agreement in the first instance. He did so in the following terms:

> "*defendant denies the existence of any suretyship agreement between him and the plaintiff and puts plaintiff to the proof thereof an* [sic] *will specifically plead that the plaintiff obtained his* [i.e. the respondent's] *specimen signature from previous suretyship agreements he executed on behalf of three clients he stood surety for and who honoured their agreements with the plaintiff. The second defendant will further plead that his specimen signature was possibly scanned by the plaintiff*" (the reference to 'plaintiff' and 'the defendant/second defendant' are respectively references to the appellant and the respondent)

[13]. Moreover, in his plea and after denying his signature, the respondent then alleged that he and the appellant were "*both creditors in terms of the*

agreement entered into between them and not vice versa". This allegation is on a plain reading insensible as the "*vice versa*" of both being creditors would be that the respondent and the appellant were somehow both debtors. In any event, at trial the respondent tried to explain that he and the appellant had both somehow signed the Deed of Suretyship agreement as "co-creditors". This is dealt with below.

[14]. At trial it was not in dispute that the appellant had concluded the Loan Agreement and had indeed advanced the R250 000 amount to the principal debtor. It was further not in dispute that the principal debtor had failed to comply with his repayment obligations. The amount of the indebtedness consequently owed by the principal debtor was likewise not in dispute, i.e. the sum of R300 000.

[15]. The respondent testified at the trial. Significantly, in cross-examination he accepted that he had both signed and initialled the Deed of Suretyship. He further accepted that he is and was at the time of the conclusion of the Deed of Suretyship, an admitted advocate. As such, he did not dispute that he was familiar with the concept of suretyship agreements.

[16]. At the trial the respondent led no evidence whatsoever as to his pleaded accusation that the appellant forged his signature. The abandonment of the forgery defence was in the context of his evidence, unsurprising; such alleged fraud was utterly incompatible with the "co-creditor" defence. The respondent did not however give any explanation of why he had, in the first instance, denied his signature and had in his plea accused the appellant of forging same.

[17]. This co-creditor defence was also not pleaded in the alternative to the respondent's denial of his signature and his accusation of fraud.

[18]. This defence can only be described as a legal nonsense. The respondent did not even suggest, let alone lead, any evidence as to his advancing any money to either the first defendant (the principal debtor) or the appellant. He did not refer to any facts which made him a creditor, let alone a co-creditor of either the principal debtor or the appellant. When pressed on this point in cross-

examination, he stated that he was a co-creditor because he tendered to assist the appellant in recovering the debt in the event of a default under the Loan Agreement. He, however, did not explain nor provide any rationale as to how such alleged potential assistance would convert the Deed of Suretyship into something other than it was, i.e. an agreement between the appellant, as creditor, and the respondent, as surety, in respect of the undertaking to stand surety for the debt of the principal debtor.

[19]. The respondent's "co-creditor" defence was made even less believable by his pleaded denial of his signature. Such denial and the "co-creditor" defence, premised as it was on an admission of signature, were thus contradictory and destructive of each other.

[20]. The respondent's contention that the Deed of Suretyship was meant as something other than a suretyship agreement and according to him as a record of an agreement between creditors, was thus fanciful and without any legal basis.

[21]. This "defence" appears to have been snatched as a result of the fact that the last page of the Deed of Suretyship contained a separate signature line for respectively the signature of the creditor (the appellant) and for the respondent (the surety).

[22]. The appellant's signature appears on the Deed of Suretyship alongside the provision for the signature by the creditor. The respondent's signature appears directly alongside the appellant's signature and not in the place apparently provided for it in the document. Nonetheless, the respondent was clearly and expressly identified as the surety on the very first page of the Deed of Suretyship. Indeed, his full names and identity number are provided on the first page of the Deed of Suretyship in which he is expressly identified and referred to as "the surety".

[23]. The respondent's contention that the place where he signed the document indicates his intention to sign it as something other than as a surety and as "co-creditor" (whatever that may mean), is thus not remotely believable.

[24]. In the judgment the Magistrate did not consider what the concept of a co-creditor is, but nonetheless concluded that the respondent intended to sign the Deed of Suretyship not as surety but rather as a co-creditor. In holding that the respondent was therefore not bound by his signature, the Magistrate relied heavily on the positioning of the respondent's signature on the Deed of Suretyship, and reasoned that his signature alongside the appellant's signature (as creditor), demonstrated that the respondent's true intention was to sign as "co-creditor". As a result, so the reasoning went, the respondent had signed the agreement in error, such error was reasonable (*iustus*) and the respondent was therefore not bound by the document. The Magistrate's conclusion and reasoning was wrong in several respects.

[25]. In the first instance, no defence of *iustus* was pleaded. To the contrary, the defence was one of fraud, non-signature and forgery.

[26]. Secondly, given both the form and contents of the Deed of Suretyship, the respondent's qualification as an advocate and his understanding of what the purpose of a suretyship agreement is, it is clear that there was no error on his part, reasonable or otherwise, as to the nature of the obligations provided for in the Suretyship.

[27]. Thirdly, his version of being a co-creditor was manifestly incompatible with his primary pleaded defence of non-signature.

[28]. For the reasons already dealt with above the respondent's evidence as to his intention to sign the Suretyship as co-creditor was not credible and ought to have been rejected. Moreover even if his evidence had demonstrated that the respondent genuinely believed that the Deed of Suretyship was something other than what it manifestly appeared to be, a reasonable lay person let alone an Advocate, could not reasonably have believed that the positioning of his signature on the last page of the document was consistent with an intention to sign the Suretyship as "co-creditor" and not as surety.

[29]. The defence of "co-creditor" was therefore without any substance and the Magistrate's judgment was based on a misconception and thus falls to be overturned.

[30]. The last issue to address is the following. At the appeal hearing and for the first time the respondent raised an objection of jurisdiction. However, as pointed out at the hearing of the appeal (and as was correctly conceded by the respondent's counsel), a defence of lack of jurisdiction was not raised in the plea. In any event, the Suretyship expressly provided that the respondent had consented to the jurisdiction of the Magistrate's Court in respect of any action arising out of the Deed of Suretyship. The belated defence of lack of jurisdiction, even if it had been properly raised, was accordingly unsustainable.

Costs

[31]. Insofar as costs are concerned, the Suretyship provides for attorney and client costs. Given the respondent's conduct in first pleading fraud by the appellant and thereafter leading not a shred of evidence to support his serious accusation of forgery, and further having regard to the fanciful and contrived nature of the "co-creditor" defence, the respondent's conduct is such that it would in any event attract a punitive costs order.

Order

[32]. In the result the following order is made:

1. The appeal is upheld.

2. The order of the court *a quo* is set aside and substituted with the following

> *"The second defendant is ordered to pay to the plaintiff:*
>
> *i. The sum of R300 000-00.*
>
> *ii. Interest on the amount in 2(i.) above at the rate of 12% per annum from 23 February 2012 to date of final payment.*
>
> *iii. Costs of suit on the attorney and client scale".*

3. The respondent is ordered to pay the costs of the appeal on the attorney and client scale.

GB ROME
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT	***ADV JG BOTHA***
APPELLANT'S ATTORNEYS	***OOSTHUIZEN DU TOIT BERG & BOON INC***
COUNSEL FOR RESPONDENT	***ADV D SELALA***
RESPONDENT'S ATTORNEYS	***KD MAGABANE & ASS INC***
DATE OF HEARING	***20 FEBRUARY 2017***
DATE OF ORDER	***20 FEBRUARY 2017***
DATE OF JUDGMENT	***20 FEBRUARY 2017***