IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. 24801/2021

REPORTABLE: *NO*

OF INTEREST TO OTHER JUDGES: *NO*

REVISED:

02/11/2022

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

CARMEL ANN STOCH First Respondent

(Identity Number: [....])

BENJAMIN STOCH Second Respondent

(Identity Number: [....])

JUDGMENT

MAHOMED, AJ

1. This is an application for the recovery of the balance outstanding on an overdue loan which the applicant advanced to the entity Hand Painted by Carmel CC.

2. The applicant seeks to recover the debt from the second respondent as surety and co- co- principal debtor. He signed as surety for the loan advanced, on 8 November 2002.[1]

3. The amount outstanding is R3 912 361.71, in terms of two separate loan agreements. The first agreement concluded was for an overdraft facility for R333 664.69 (FA 2) and the second loan was a covid emergency loan advanced in June 2020 for R3 580 696, 02.

4. The respondents were both members of the Close Corporation. They had a fallout on management of the business and in 2016, the second respondent sold his member interest to the first respondent.

5. The second respondent opposes this application, he denied being bound any longer by the terms of the suretyship agreements and he raised a point in limine, contending that the applicants ought not to have proceeded by way of motion, they were aware that there exist material disputes of fact between the parties. It is further contended that the applicants in fact apply for summary judgment in these motion proceedings. The second respondent argued for a dismissal or a referral to trial.

APPLICANTS SUBMISSIONS

6. Advocate Mathiba appeared for the applicant and informed the court that the second respondent raises disputes of facts but submitted that it is unclear as to where exactly the dispute arises.

7. Counsel submitted that the disputes can be resolved on the papers, the applicant claims repayments based on suretyship agreements and the related clauses in the agreements.[2] The applicant has included in the papers a certificate of balance as it is obliged to do as proof of outstanding debts.

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1 Caselines 01-47

2 Caselines 01-18, 01- 32

8. Counsel submitted that the second respondent signed an unlimited suretyship agreement for all debts present and in the future.

9. Furthermore, it was submitted that the second respondent raised mutually destructive defences wherein he argued that he did not sign the suretyship agreement whilst contending that he was released from the agreement. He has not pleaded in the alternative. Counsel submitted that the second respondent vacillates and has no defence.

10. Counsel proffered that the second respondent relies on a settlement agreement he concluded with the first respondent when he sold his interest to her and therefore contends that he is released from the suretyship agreement.

11. Ms Mathiba argued that the applicant is not a party to the settlement agreement and that the second respondent has not presented any written release from the applicant as proof of his release.

12. Furthermore, the agreements included non-variation clauses, unless in writing and signed by the applicant, no variation is valid.

13. It was argued that the second respondent has not presented any written "release" nor any written "proof of variations" to the agreement, from the applicant.

14. Ms Mathiba referred the court to the dicta in **PLASCON EVANS PAINTS (TVL) v VAN RIEBEECK PAINTS (PTY) LTD**,[3] and **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA**[4]

> *"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief maybe be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts*

[3] (53/84) [1984] ZASCA 51 , [1984] 2 ALL SA 366 (A). 1984 (3) SA 623, 1984 (3) SA 620 (21 May 1984)

[4] (573/08) [2009] ZASCA 1; 2009(2) SA 277 (SCA); 2009 (2) SACR 361 (SCA) 2009 (4) BCLR 393 (SCA) [2009] 2 All SA 243 (SCA) (12 January 2009)

alleged by the respondent justify such an order. The power of the court to give such relief on the papers before it is not, however confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine, or bona fide dispute of fact….

… where allegations or denials of the respondent are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers." Furthermore, the Supreme Court of Appeals in the Zuma case supra stated*:*

"if the respondent's version consists of bald, or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched, or so clearly untenable that the court is justified in rejecting them merely on the papers.[5]

15. Counsel submitted that the second respondent's defence is implausible far-fetched and improbable. The court ought to reject his version and can grant the order prayed on the papers before it.

16. Counsel referred the court to clauses 17.2 and 17.3 of the suretyship agreements which provides for agreements to be extinguished, and argued that the second respondent had five years, since he sold his member interest in the Close Corporation, in which he could have used those clauses to confirm his release, the respondents only raise this issue of release now after the motion papers were filed.

17. Counsel argued that the second respondent must decide as to whether he was released from the suretyship agreement, or he did not sign a suretyship agreement.

THE SECOND RESPONDENT'S SUBMISSIONS

18. Ms Mouton appeared for the second respondent and submitted that the second respondent is not liable as surety under either of the two agreements which

[5] NDPP v Zuma supra para 26

the applicants rely on. Counsel submitted that he has admitted to signing the suretyship agreement.

19. The evidence is that the second respondent was "released from the suretyship" agreement, when the respondents concluded a settlement agreement between them when he sold his member interest in the principal debtor. That agreement provided a value for the member interest that was payable by the second to the first respondent and which confirmed his "exit" from the Close Corporation, the principal debtor.[6]

20. Ms Mouton proffered that the first respondent handed over that settlement agreement to the applicants' representatives, Paul Kirby and Larushka Laloo, at their Constantia branch and that constituted a written notification as required by the suretyship agreement.[7] Moreover, a change in membership in the Close Corporation was acknowledged in an email by Paul Kirby.[8]

21. Counsel submitted that the applicant's bold denial of the second respondent's release was telling, particularly in that her client even identified the personnel the respondents dealt with, the applicant fails to even support its papers with an affidavit from its employees. Ms Mouton proffered that from the papers they are both still in the applicant's employ.

22. Ms Mouton submitted that this crucial evidence of the second respondent remains unchallenged.

23. Furthermore, it was submitted, the second respondent has no knowledge of the second loan advanced, he has never signed for it nor was he ever consulted about the grant of this very substantial amount as a loan to the Close Corporation.

24. Counsel alerted the court to the fact that the business which worked on a modest overdraft of R300 000 (the first loan) was suddenly granted a loan of over R3

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6 Caselines 03-17 to 45

7 Caselines 03-12 – 13 at para 28

8 Caselines 04-30

million and the second respondent was not informed or even pursued for his acceptance of this liability.

24.1. Counsel submitted that it can be argued that he was not pursued because he was no longer a surety.

25. Advocate Mouton submitted further that the agreement pertaining to the covid emergency loan for over R3 million was a special agreement, with special terms and conditions different from the applicant's usual loan agreement.

26. The special terms provided that the agreement excluded any collateral agreement entered before the signature date, logically excluding the surety signed in 2002 in respect of the overdraft. It was contended that only the first respondent's signature appears on this loan agreement[9] and as guarantor[10].

27. Ms Mouton proffered that the second respondent is deprived of the benefits of a trial as he requires to peruse documents which are in the applicant's possession that have not been discovered and to present witness testimony to effectively defend himself.

28. Ms Mouton proffered that the second respondent will look to cross examining witnesses and reminded the court that the second respondent's evidence against Kirby and Laloo remains uncontested. They were the relationship managers in respect of the principal debtor.

29. Furthermore, the second respondent will require to inspect documents to determine what steps the applicant had taken after he exited the Close Corporation, regarding change of signatures, a change in debit orders and authorisations on the account.

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[9] Caselines 01-37,

[10] Caselines 01-40

30. The suretyship in respect of the overdraft provides for an annual review by the applicant of the account and the sureties. The second respondent requires to inspect those various annual reviews done by the applicants.

31. Ms Mouton submitted the second respondent's version is not farfetched or improbable and a trial would afford him the benefits of witness testimony and access to documents to support his defence.

32. Counsel argued that the applicant ought not to have proceeded by motion and that it seeks to obtain summary judgment in casu. It was argued that the applicants seek to avoid presenting evidence in a court and avoid special costs in summary judgment, and therefor proceeded on motion despite the various disputes raised.

33. Ms Mouton argued that motion proceedings cannot be determined on the probabilities, they cannot be used to resolve factual disputes. Counsel referred the court to the decision in Zuma case supra.

34. Counsel submitted that the court must refer the matter to trial to determine through witness testimony and discovery whether "the second respondent was released from the suretyship agreement he signed in 2002 in respect of the first loan agreement.

35. Furthermore, counsel submitted that the court must order costs on a similar basis as provided for in Rule 32(9), and order that the applicants may not institute new proceedings against the second respondent until it has paid the second respondent's costs and they must be payable on an attorney client scale.

36. In reply Advocate Mathiba submitted that the motion proceedings are appropriate the dispute raised is not a real and genuine dispute that is not capable of resolution on the papers.

37. The agreement to release the second respondent was between himself and the first respondent. The second respondent has failed to furnish any written proof of release signed by the applicant.

38. Ms Mathiba contended that the second respondent signed an “unlimited surety for debts current and in the future and he is liable for the second loan as well.

JUDGMENT

39. In **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA**, supra, the Supreme Court of Appeals, restated the principles of deciding factual issues in motion proceedings, when the court stated that motion proceedings are about the resolution of legal issues based on common cause facts. Motion proceedings cannot be used to resolve factual issues as they are not designed to determine probabilities.[11]

40. I agree with Advocate Mouton that in casu there are very few common cause facts for the matter to be decided on the papers.

41. This court is unable to determine the issue of whether the second respondent was released as a surety. I have noted the applicant’s denial of that fact, but it remains unclear, why it failed to pursue the second respondent in respect of the second agreement.

42. The evidence is that the applicant obtained the first respondent’s acceptance to the terms of that agreement but failed to communicate at all with the second respondent in respect of a very sizeable loan, during challenging economic times of the covid pandemic.

43. The fact that the second respondent signed an unlimited surety for all future debts, cannot excuse a relationship manager of a bank from keeping its clients abreast of developments in the account.

44. The impression created is that the applicants were opportunistic and neglectful of their obligations as credit grantors. The applicants in my view were under every obligation, based on the particular facts of this account holder, as set out earlier, to ensure that both sureties were fully apprised of new developments and

[11] See supra at paragraph 26

particularly the new terms of the ‘special loan agreement” for covid emergency funding.

45. In terms of the principles regarding motion proceedings set out in the **PLASCON EVANS** case supra, the court must consider the facts admitted together with the respondents’ further allegations and determine if the relief sought is justified.

46. I am of the view that the second respondent raises a real and genuine dispute of fact, and this court cannot determine on the papers the issue of his release as a surety.

47. There is no evidence before this court from the applicant’s employees Kirby and Laloo and the court cannot disregard the second respondent’s version. His allegations are not far-fetched, when one considers the circumstances surrounding the granting of the second loan and the email from Kirby in which he acknowledged that the membership of the Close Corporation had changed.

48. In my view the matter is best determined at a trial.

COSTS

49. Advocate Mouton argued that the applicants knew of the disputes of fact and ought not to have proceeded by way of a motion.

50. The applicant is a seasoned litigator in both motion and trial courts, who ought to know that the disputes raised would require oral evidence and documents and could never be resolved on the papers.

51. The disputes are factual disputes. The evidence is that the second respondent has been trying to obtain documentation from the applicant’s employees without success.

52. I agree with Ms Mouton that an order as in Rule 32(9) is appropriate in the circumstances.

Accordingly, I make the following order:

1. The applicant's application is referred to trial.

2. The notice of motion in the application shall serve as the applicant's summons.

3. The founding affidavit shall serve as the particulars of claim

4. The answering affidavit shall stand as the respondent's plea.

5. The applicant's replying affidavit shall be its replication.

6. The Uniform Rules of Court apply regarding the further exchange of pleadings, pretrial and discovery procedures, including the request for further trial particulars, and amendment of pleadings, as in action proceedings.

7. The applicant shall pay the respondents costs on an attorney client scale prior to the continuation of the trial.

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 2 November 2022.

Date of Hearing: 7 September 2022

Date of Judgment: 2 November 2022

Appearances

For the applicant:	Advocate Mathiba
Instructed by:	Buba Attorneys Inc
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For the second respondent:	Advocate Mouton
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