IN THE GAUTENG DIVISION OF THE HIGH COURT

PRETORIA, REPUBLIC OF SOUTH AFRICA

CASE NO: 45327/11

In the matter between:

28/2/2014

SOUTH AFRICAN SECURITISATION PROGRAMME (PTY) LIMITED First Plaintiff

SASFIN BANK LIMITED Second Plaintiff

SUNLYN (PTY) LIMITED Third Plaintiff

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

27/02/14
DATE

SIGNATURE

BULA TECHNOLOGIES (PTY) LIMITED First Defendant

RICHARD ISAACS Second Defendant

LEOCARDO FORBAY Third Defendant

JUDGMENT

Tuchten J:

1 The plaintiffs are associated companies. I shall refer to the first plaintiff as SAS and the second and third plaintiffs as Sunlyn and Sasfin respectively. Sunlyn and Sasfin operate in the financial

services industry. Sunlyn acts as the marketing arm of Sasfin. It looks for credit agreements,[1] such as rental and instalment sale agreements, in the market. When it finds a potential customer (to which I shall refer as a dealer") which has made its goods available to a lessee or purchaser under a written credit agreement, it procures an offer from the dealer to cede the agreement to Sunlyn. Sunlyn then simultaneously offers to cede the agreement to Sasfin. If Sasfin approves the transaction, it proceeds to pay the user the agreed price on behalf of Sunlyn. The relevant written cession agreements make provision for the cessions, both to and away from Sunlyn, to take place upon payment of the agreed price.

2 SAS operates in the derivatives market. Under a written agreement between SAS, Sasfin and others, Sasfin must from time to time cede such credit agreements as may be agreed between them to SAS for incorporation into its derivative instruments.

3 The first defendant ("Bula") entered into a written agreement of hire (the first rental agreement) with Dream Weaver Trading 134 (Pty) Limited ("DW") on 17 March 2008 in terms of which it rented from DW a switchboard and certain peripheral hardware at a monthly rental of R7 255,97. Bula concluded a second agreement of hire (the second

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[1] In this judgment use the expression credit agreement in the wide sense, not the narrow sense in which that expression is used in the National Credit Act, 34 of 2005.

rental agreement) with DW on 5 November 2008 at a monthly rental of R3 674,11. The terms of both these agreements appear from the written terms of business between Bula and DW, upon which the parties agreed generally to do business, and schedules specific to the first and second agreements. The schedules identify the goods to be hired and fix the monthly rental. I shall refer to the first and second rental agreements collectively as the two credit agreements.

4 The second and third defendants stood surety for the debts of Bula. Both the second and the third defendants signed a deed of suretyship in favour of DW on 5 March 2008. Clause 1 of the suretyship reads:

> Subject to the terms and conditions set out below, the undersigned are hereby bound jointly and severally as sureties and co-principal debtor/s with the User (as defined in the Agreement of Hire)[2] **for all amounts which are now or might in the future become payable** by the User to [DW] or our cessionary/ies in the event of a cession **in terms of the agreement of hire or arising out of or incidental to any other cause howsoever arising**. [my emphasis]

5 Clause 10 of the suretyship obliges the sureties to pay any legal costs that may be awarded against them as between attorney and own client.

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2 The User is defined as Bula.

6 It is not in dispute that the goods which were the subject of the two credit agreements were delivered to Bula, were free of defects and were used by Bula.

7 DW was a customer of Sunlyn and Sasfin. DW offered to cede the two credit agreements to Sunlyn in terms of a written agreement between them described as their main cession agreement. Sunlyn in turn offered to cede them to Sasfin which decided to accept the cessions. Sasfin offered the two credit agreements to SAS.

8 Bula defaulted on its obligations under the two credit agreements. The effect of this default was that all the rentals then outstanding, plus interest calculated from day to day at 15% per annum on the unpaid amounts, became due for payment by Bula.

9 SAS took out a summons in this court against Bula and the two sureties as first, second and third defendants respectively. The summons was later amended to include Sasfin and Sunlyn as second and third plaintiffs respectively. The plaintiffs claimed that the three defendants were jointly and severally liable to SAS alternatively Sasfin alternatively Sunlyn for the rentals due under the two credit agreements, which the plaintiffs calculated, as at 26 July 2011, at

R282 217,25 and R138 888,58 respectively, together with interest and costs as between attorney and own client.

10 Bula and the second defendant did not defend the action and I was told that applications for default judgment are pending against them. The third defendant did defend. The case before me relates to the issue of the third defendant's liability to the plaintiffs as described in paragraph 9 above.

11 In the third defendant's plea to the claim of SAS before amendment to include the other two plaintiffs, the third defendant admitted the two credit agreements and the deed of suretyship to which the third defendant was a party. But in the amended plea, these admissions are controverted by assertions that the third defendant bore no knowledge of the terms of the two credit agreements and "denies the suretyship and submits that the agreement does not comply with Section 6 of the General Laws Amendment Act ...". The two credit agreements and the suretyship were proved. Counsel for the third defendant did not argue that the suretyship did not comply with the statute. Counsel for the third defendant conceded during argument that the plaintiffs had established the quantum of their claims.

12 The first issue remaining for decision, as identified by counsel for the third defendant, is whether the plaintiffs have established the cessions upon which they rely. Counsel for the parties agreed that the crucial cession was the cession alleged to have taken place away from DW and to Sunlyn. It was agreed between counsel that if this cession were established, the cessions away from Sunlyn to Sasfin and away from Sasfin to SAS would be accepted as having been established; so that subject to the third defendant's other defences. SAS, rather than any one of the other plaintiffs, would in principle be the plaintiff entitled to judgment.

13 The second issue remaining for decision is whether the third defendant should be held liable, on the suretyship, for the amount owed by Bula in respect of the claim on the second rental agreement.

14 Two submissions were made by counsel for the third defendant in relation to the cessions, alleged by the plaintiffs to have been made by DW to Sunlyn, of DW's rights under the two credit agreements. The first is that the cessions were dependent on payment having been made by Sunlyn to DW of the agreed consideration for the cessions and that payment had not been proved.

15 Evidence which comprehensively covered this point was given by Mr Gray, a representative of DW, and Mr Vorster, the payment manager of Sasfin. The context is that the business of Sasfin and Sunlyn is to provide financing. Bula needed the finance because it could not pay cash for its switchboard apparatus. DW wanted its cash up front, rather than wait each month for its rental.

16 Gray gave evidence that the amounts in question were indeed paid into DW's bank account. This evidence was not attacked or even addressed in cross-examination. Vorster identified Sasfin's payment requisitions and explained that Sasfin paid the cession considerations to DW on Sunlyn's behalf. Although this evidence of Vorster was touched upon in cross-examination, it was not contradicted.

17 Vorster explained that it was of the essence of the transactions that DW should be paid for the cessions. It could hardly be otherwise. DW had bought the goods, needed to pay for them and otherwise needed cash for its business. That was why it offered the cessions to Sunlyn. Vorster said, and the probabilities overwhelmingly support him, that if payment to DW had not been made, his telephone would never have stopped ringing as DW tried to find out what was holding up its money. But this never happened, Vorster said. So the documents, the uncontradicted testimony and the probabilities all favour the plaintiff.

I hold that Sasfin indeed paid DW the agreed considerations for the cessions on behalf of Sunlyn.

18 The second ground upon which the cession away from DW to Sunlyn was attacked was on a reading of clause 8 of the main cession agreement between DW and Sunlyn. This main cession agreement created a framework under which cessions from DW to Sunlyn would take place. It is to that extent an obligationary agreement, preceding potential transfer agreements between DW and Sunlyn under which rights would actually pass from the one to the other.

19 Two types of cessions are provided for in the main cession agreement: out and out cessions pursuant to clauses 1 to 4 and a security cession pursuant to clause 8.

20 But the plaintiffs do not rely on clause 8. They rely on clauses 1 to 4. So the argument is stillborn. But the content of the argument is in my view also quite without substance. The argument is that there is no evidence of any endorsements in relation to either of the two credit agreements. Clause 8 reads:

> As security for the discharge of [DW]'s obligations hereunder as well as all other obligations which it may now or in the future incur to Sunlyn from whatsoever cause and howsoever arising [DW] hereby irrevocably cedes to Sunlyn all claims, rights of action and receivables which are now and which may hereafter become due to it by all person/s ("the debtors") from any cause of indebtedness whatsoever and/or any money standing to its account with any bank, hereby undertaking on demand by Sunlyn to take all such steps as may be necessary to enable Sunlyn to enforce the rights granted to Sunlyn herein and to deliver to Sunlyn on demand all documents (duly endorsed and/or completed where appropriate) evidencing and/or embodying and/or relating to any such claims, rights of action and receivables.

21 It is perfectly clear that while the provisions of clauses 1 to 4 are merely obligationary, clause 8 constitutes a transfer agreement. The security cessions took place on signature of the main cession agreement. The obligation to endorse arises only after the security cession takes place. So a failure to endorse, whatever that may mean, cannot affect the validity of the security cession. Moreover, the obligation to endorse only arises "where appropriate". It was never pleaded that an endorsement was appropriate. Counsel for the third defendant could not tell me what should have been endorsed, what the content of the endorsement should have been or why endorsements were appropriate in the present case.

22 The cession away from DW to Sunlyn has thus been proved.

23 The final argument advanced by counsel for the third defendant was based on the fact that the third defendant had been in the employ of Bula when he stood surety under the deed of suretyship but that he had left Bula's employ before the conclusion of the second credit agreement. Although it was never pleaded or even put to any of the witnesses called by the plaintiff, the argument was that it would be contrary to the interests of justice to hold the third defendant liable on a suretyship signed when he was an employee of the principal debtor in relation to debts which arose after he had left the principal debtor's employ. The third defendant testified that he had never intended that the deed of suretyship would be used to hold the third defendant liable for debts of Bula arising after the third defendant left Bula's employ.

24 This argument is entirely without merit. The language of the suretyship does not restrict its ambit to debts arising while the third defendant was in the employ of Bula. It is not suggested that DW, let alone Sunlyn, knew, when the suretyship was signed, that the third defendant did not intend it to cover debts of Bula arising after he left Bula's employ. It is not suggested that any other contextual material is relevant to the interpretation of the suretyship.

25 A contention similar to that advanced on behalf of the third defendant found favour in *Rand Bank v Rubenstein.*[3] But the proposition was firmly rejected by the Appellate Division in *Bank of Lisbon and South Africa Ltd v de Ornelas and Another.*[4] And in *Rubenstein*, the defence was pleaded, so giving the plaintiff a chance to deal with it.

26 The first plaintiff is therefore entitled to judgment. As I have said, quantum was conceded by counsel for the third defendant. Quantum was however proved through certificates of a manager of Sunlyn under clause 9 of the terms of business which governed the dealings between Bula and DW and clause 11 of the deed of suretyship.

27 Costs on the scale as between attorney and own client are provided for in clause 10 of the deed of suretyship.

28 I make the following order:

1 There will be judgment for the first plaintiff against the third defendant for:

1.1 payment of the sum of R282 217,25;

1.2 payment of the sum of R138 888,58;

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3 1981 2 SA 207 W 215B-D

4 1988 3 SA 580 A 607B

1.3 interest on both judgment debts at the rate of 15% per annum calculated from day to day from 26 July 2011 to date of payment.

2 The third defendant must pay the plaintiffs' costs on the scale as between attorney and own client.

3 This judgment will be joint and several with any judgment which may in due course be granted against the first or second defendants arising from the claims in the plaintiffs' particulars of claim as amended.

NB Tuchten
Judge of the High Court
27 February 2014

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