IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
13/05/2014
DATE SIGNATURE

Case No: 17195/2010
Last date heard: 17 September 2013
Date of judgment: 13 May 2014

In the matter between:

SCI ESSEL OFFSHORE SERVICES LTD	Plaintiff
and	
FANTASY CONSTRUCTION CENTRAL (PTY) LTD	First Defendant
DAVID HENRY SMITH	Second Defendant
KENNETH BERNARD STRICKER	Third Defendant
ADAM JOHANNES SHEPHERD	Fourth Defendant

JUDGMENT

PHATUDI J:

[1] The plaintiff instituted this action against the defendants by way of provisional sentence summons. The plaintiff claims an amount of R130 million against the first defendant, allegedly represented by the

second, third and fourth defendants, who unconditionally acknowledged the first defendant's indebtedness to the plaintiff. [1]

[2] The plaintiff further claims the aforesaid sum against the second, third and fourth defendants personally, who allegedly bound themselves as sureties and co-principal debtors with the first defendant in favour of the plaintiff for the repayment on demand of any sum or sums of money the first defendant owed or owe the plaintiff from whatever cause arsing.[2]

[3] It is important to note that prior to the commencement of the trial, the fourth defendant applied for the postponement of the hearing on the basis that the plaintiff undertook not to pursue the claim against fourth defendant. It is further submitted that the plaintiff failed to substitute the fourth defendant with the trustees by virtue of the fourth defendant being sequestrated. It was lastly submitted that if the plaintiff does not pursue the claim against the fourth defendant, then the plaintiff must withdraw against the fourth defendant.

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[1] Particulars of claim – Pleadings bundle – Vol 1 page 4 para 1.1
[2] Particulars of claim – Pleadings bundle – Vol 1 page 6 - 9

[4] The plaintiff, pursuant to the submissions made by counsel representing the defendants, unconditionally withdrew the action against the fourth defendant. I then made an order to that effect. I further ordered the plaintiff to pay the fourth defendant's costs including the costs reserved on the 8 December 2012 on an attorney and client scale.

[5] The plaintiff's counsel[3] places on record in his opening statement that the plaintiff obtained judgment in this division before Kollapen (AJ) as he then was, on 08 December 2010 against the first defendant in the amount of R130 million. He submits that the plaintiff now proceeds against the second and third defendants as sureties to the first defendant. He further submits that the issues to be determined by this court are

5.1 the second and third defendants' acknowledgment of debt and or undertaking to pay R130 million in respect of the cause of action thereto and the counter claim by the third defendant.

5.2 the issue of settlement agreement concluded by the parties of which the plaintiff is not a party thereto, which is raised by the third

[3] Adv. M. Van Der Merwe SC assisted by Adv. B. Blom

defendant by way of special plea, that they are thus not liable to pay the sum of money the plaintiff claims.

5.3 Whether the plaintiff and RRI have ceded its claim to Keiskamma and back from Keiskamma to the plaintiff.

[6] I find it prudent to mention at this stage that after a week of the trial proceedings, the plaintiff's counsel placed on record the plaintiff's withdrawal of the action against the third defendant. He submitted that this court is not required to make any order arising out of the plaintiff and third defendant out of court settlement. Counsel submitted that he places the withdrawal on record only for this court to take note thereof. He lastly submitted that the evidence the plaintiff alluded stands as against the second defendant. The plaintiff is thus proceeding only against the second defendant.

Facts

[7] The factual synopsis of the matter is set out by Andrè Badenhorst (Badenhorst), Peter Charles Spies (Spies) and Johan Christiaan Coetzee (Coetzee) who testified for and on behalf of the

plaintiff and Kenneth Bernard Stricker (Stricker), the only witnesses who testified for and on behalf of the defendant in his capacity as trustee of Zandele Trust.

[8] David Henry Smith (Smith), Kenneth Bernard Stricker (Stricker) in his capacity of trustee of KyleCourt Trust and Adam Johannes Shepherd (Shepherd) became shareholders of Fantasy Construction Central (Pty) Ltd (Fantasy).

[9] Fantasy concluded a deed of sale over the property owned by Tara Sugar Estate subject to a successful adjudication of a DFA document. The property is situated between Ballito and Salt Rock and located between the N2 Highway and the ocean on the North Coast of Kwa-Zulu Natal. Fantasy intended to develop the area by establishing a township by the name of Mount Richmere Village Estate.

[10] Fantasy had applied for financial assistance from Landbank of South Africa. It is apparent from the Landbank document that guarantees for the value of R225 million rand would be issued in

favour of Mavava Trading 137 (Pty) Ltd in respect of a development of Mount Richmere Village Estate at Salt Rock Kwa-Zulu.[4] The guarantees were subject to certain conditions. The guarantees could not be issued on the due date as per deed of sale.

[11] DFA was approved. The suspensive condition in the deed of sale between Fantasy and Tara became fulfilled. Fantasy encountered challenges with the payment of the purchase price. Solutions to the challenges were required. Badenhorst advised Smith of a financer, one Mr Frikkie Lutzkie (Lutzkie).

[12] Lutzkie was contacted, informed of the project and what was needed to secure at least the land. R80 million was required to pay Tara Estate. Badenhorst stood to gain R10 million for facilitating the finance. Lutzkie became interested. Fantasy, through Smith, undertook to pay back the financier the loaned amount within seven (7) days.

[4] Letter addressed to Mr A. Shepherd – Vol 2 of 7 page 97

[13] Lutzkie undertook to provide R80 million to fulfil the requirements of Fantasy to Tara Estates for the purchase of the land. Lutzkie would be paid back an amount of R120 million for making funds available and R10 million would be paid to Badenhorst by Fantasy as a facilitation fee. The total to be repaid by Fantasy is R130 million. This led to the signing of the "acknowledgment of debt" referred to throughout in this trial as "annexure A". This is the first issue that requires determination.

Acknowledgment of debt

[14] The acknowledgment of debt is worded:

'WE, the undersigned

Fantasy Construction (central) Proprietary Limited (the debtor) ...

(herein represented by Kenneth Bernard Stricker, David Henry Smith and Adam Johannes Shepherd in their capacities as Directors and duly authorised thereto by virtue of a resolution)... do hereby acknowledge Fantasy Construction (Central)(Proprietary) Limited to be indebted to

SCI Essel offshore Services Limited (herein represented by ICF Ho Fong and duly authorised thereto) (the creditor) ...

And its heirs, Executors, Administrators or Assigns, in the sum of R130, 000,000-00 (ONE HUNDRED AND THIRTY MILLION ADVANCED payable within 6 (six) months from date of signature hereof ...'[5]

[15] Smith pleaded that

'2.2.1. Annexure "A" specifically provides that the acknowledgment of debt is given on the basis that an amount of R130 million was lent and advanced by the plaintiff to the first defendant (Fantasy). The second defendant denies that such a loan took place as alleged or at all.

2.2.2. The plaintiff is aware that it did not advance such amount or any amount at all to the first defendant therefore pleads that the claim by the plaintiff has no basis in law.

2.2.3. The second defendant further pleads that Annexure "A" does not have a *causa* and is therefore void and unenforceable, alternatively voidable.'

[16] It is trite law that an acknowledgement of debt (AOD) is a document which contains an unequivocal admission of liability by a debtor. The debtor must acknowledge that he or she owes a particular sum of money occasioned by a certain *causa* to the creditor. The debtor undertakes to pay what is owed. The AOD can

[5] Pleadings Bundle A – Vol 1 pages 15 and 16

also be referred to as a "liquid document", which, in simpler terms proves a debt without any extraneous evidence.

[17] It is clear from the reading of **Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another**[6] that the plaintiff is obliged to establish on a balance of probabilities that the defendant unconditionally acknowledges liability for the amount claimed. Equally, the court states that 'where the outcome is dependent on resolving a dispute of fact, the defendants in provisional sentence proceedings will often through documentary evidence be able to prove a balance of eventual success in their favour.'[7]

[18] In simpler terms, the onus rest on the defendant to prove on the balance of probabilities that they are not liable for the debt once they acknowledge having signed the acknowledgment of debt.[8]

[19] The evidence of both Badenhorst and Stricker is that Lutzkie mentioned at the meeting that R80 million, for which a guarantee was

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[6] 2011 (3) SA 1 (CC)
[7] Twee Jonge Gezellen v Land Bank and Another 2011 (3) SA (1) CC at headnote.
[8] See: Inglestone v Pereira 1939 WLD 55 at 71; De Klerk and Assosiates v Eggerschwiler and Another. Case Number 2674/2011 – Namibian High Court (unreported)

issued, would be made available by the plaintiff via Risk Reduction International (RRI). It is further common cause that R40 million was never lent and or advanced to Fantasy. It is further common cause that R10million was as well never lent or advanced to Fantasy or anyone else on behalf of Fantasy.

[20] Badenhorst testified that he never received R10 million facilitation fee he was promised. He further testified that as at the date of trial, no such money has been advanced to him.

[21] In my view, the *causa* set out in the AOD is incorrect as R130 million was never lent and advanced as alleged. There is no merit in the plaintiff's submission that the evidence that led to the signing of AOD is admissible to identify the *causa* is clear. It stipulates that Fantasy acknowledge to be indebted to SCI in respect of R130, 000,000-00 (ONE HUNDRED AND THIRTY MILLION RAND) in respect of MONIES LENT AND ADVANCED.

[22] On the evidence led, the plaintiff failed to prove that it lent and advanced R130 million rand to Smith and or Fantasy. Spies, as

consultant and former attorney, testified that he is the drafter of the AOD and suretyship Smith signed. He testified that the drafted documents were signed prior to Monday the 09 October 2006. Stricker testified that no documents were signed prior to the meeting in Ballito on the 09 October 2006. At the time of the drawing of AOD, no such monies were lent and or advanced. The parties were still in negotiation of the transactions.

Consent to judgment

[23] The plaintiff authorised Lutzkie to be its representative in its dealings. Lutzkie instructed an attorney to issue summons against Fantasy. Lutzkie was a major shareholder of Fantasy when such summons was issued. He instructed the same attorneys to represent Fantasy. The same firm of attorney placed the matter on the roll for Fantasy to consent to judgment in the amount of R130, 000,000-00.

[24] What surprises me is that the said attorneys did not bring to the court's attention that he represents both parties. The plaintiff now

relies on the said judgment to claim against Smith as surety to the judgment debt against Fantasy.

[25] Stricker, the only witness who testified for the defence, testified that there was a settlement agreement that was made an order of court in Durban on the 17 July 2007. Fantasy was a party to the agreement. Neither the plaintiff nor Smith was cited as a party thereto. He, however, contends that the settlement was in full and final on all and any claims that may exist between the parties including Fantasy and RRI to the settlement agreement. The evidence remained uncontested.

[26] A surety cannot be held liable if the principal debt is extinct. The debt against the principle debtor was settled as between the parties relating to the same debt. It follows that Smith's obligation as surety ceased to exist as at the date of settlement of the debt in full and finally.[9]

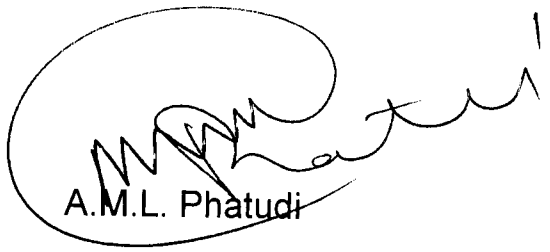
[9] See: Moti and CO v Cassim's Trustee – 1924 AD 720

[27] In my view, costs follow the event. Smith succeeds with his defence and is thus entitled to his costs.

I in the result, make the following order:

Order:

The plaintiff's claim is dismissed with costs.



A.M.L. Phatudi

Judge of the High Court

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