IN THE GAUTENG HIGH COURT. PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No.: 45993/13

Date: 16 May 2014

Not Reportable

Not of interest to other judges

In the matter between:

DESTINATION CAPITAL (PTY) LTD Applicant

(Registration number 2009/024384/07)

and

MICHALIS XEKALOS First Respondent

(Identity Number 7[…])

AND EIGHT OTHERS JUDGMENT

KEIGHTLEY AJ

[1] This is an application for judgment to be entered against the third and fifth respondents for payment of the balance outstanding on a loan in the amount of R6 361 519. 00 together with interest and costs. In addition, the applicant seeks to declare fifth respondent's immovable properties executable.

[2] Applicant's cause of action is a suretyship agreement that third and fifth respondent, together with seven other respondents, signed in favour of the applicant for the debts of an entity called Flavours of Life Fanchising CC t/a Rhapsodies Franchising.

[3] It is common cause that the principal debtor has failed to pay the amount owing under the loan agreement to which the suretyship agreement is linked.

[4] It is also common cause that judgment has been entered against all but the third to fifth respondents. Both of these latter respondents filed notices of opposition in response to the application for judgment against them. In addition they filed answering affidavits, to which the applicant replied.

[5] By the time this matte came before the court for hearing only the third respondent appeared at court to advance argument in support of his opposition; there was no appearance by the fifth respondent. In the circumstances the applicant seeks judgment by default in respect of the fifth respondent. I deal first with the defences raised by the third respondent, before considering the question of judgment by default against the fifth respondent.

THIRD RESPONDENT

[6] The third respondent initially raised three defences. At the hearing of the matter third respondent confirmed that he was abandoning his defence based on the National Credit Act. [1] The third respondent's remaining defences were the following:

[24.1] First, he contended that there was no resolution from the applicant authorising the deponent, Mr Lebos, to depose to the founding affidavit. I refer to this as "the authority" defence.

[24.2] In the second place, the third respondent averred that he had signed the suretyship

[1] Act 34 of 2005

agreement as a witness and that he had no idea that he had signed as a surety. I refer to this as "the signature" defence.

[7] Dealing with the authority defence, in his answering affidavit, the third respondent states this defence in the following terms:

> *"Nowhere in the applicant's papers is there any resolution by the applicant that authorise (sic) the deponent to depose to the applicant's founding affidavit on behalf of the applicant. The deponent's : uthority to depose to the Founding Affidavit is therefore not established and thus denied."*

[8] At the hearing of the matter counsel for the third respondent sought to argue that this passage from the answering affidavit did not amount to a challenge to the authority of the deponent to depose to the affidavit on behalf of the applicant. He submitted that it in fact amounted to a challenge to the authority to institute the application itself.

[9] It seems clear to me from the extract from the answering affidavit reproduced above that the attack was directed squarely at the alleged lack of authority on the part of Mr Lebos to depose to the founding affidavit on behalf of the applicant. In this regard the Supreme Court of Appeal has held that:

> *"The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit."*[2]

[10] On the basis of this authority there is no merit in the challenge to Mr Lebos's authority to depose to the founding affidavit. If the third respondent wished to dispute that the applicant had authorised the institution of the application, then this should have been stated clearly in his answering affidavit. He did not do so.

[11] In any event, and even assuming that the answering affidavit can be read so as to give rise the to the challenge now made by the third respondent, the applicant attached to its replying affidavit an extract from a resolution of the directors of the applicant adopted on 25 September 2013. The resolution, *inter alia,* confirmed Mr Lebos's authorisation to sign all documentation and do all things necessary to pursue

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[2] Ganes v Telecom Namib'- Ltd 2004 (3) SA 615 (SCA) at [19]

the application against, among others, the third respondent. Counsel for the third respondent pointed out that the resolution was only adopted after the application had been instituted. On this basis he submitted that there was no authority to institute the proceedings at the time that the application was launched. This submission overlooks the fact that in paragraph 4 of the resolution it is expressly recorded that the applicant ratifies the ac;.ons already taken by Mr Lebos and the attorneys of record. In the circumstances, the fact that the resolution was adopted after the application was instituted is of no material consequence.

[12] Counsel for the third respondent also sought to argue that the attached resolution was only signed by one director, Mr Lebos, whereas the applicant has three directors. This, he said, indicated that the resolution had not been properly adopted and did not constitute competent authorisation for the institution of the proceedings by the applicant.

[13] This submission does rot hold water. It is correct that the signature of one director, Mr Lebos, appears on the extract attached to the applicant's replying affidavit. However, the signature appears to have been appended for purposes of certifying that the resolution set out in the annexure is a true extract in respect of the original resolution. In other words, the original resolution is not before court. In addition, there is no evidence indicating how many directors adopted the resolution, nor how many directors were required by the company to adopt a resolution of this nature. In the circumstances, there is no basis on which the competence of the resolution can properly be challenged on the grounds suggested by the third respondent.

[14] For all of these reasons I find that there is no merit in the authority defence raised by the third respondent.

[15] Turning to this signature defence, the third respondent contends that he was misled by the first respondent into signing the document as a surety and coprincipal debtor. He avers that the first respondent told him that he would be signing the document as a witness. He avers in his answering affidavit that he was no more than an employee of Flavours of Life Franchising CC at the time and that he did nc[1] have sufficient capital to stand as surety. He says that he did not read the body of the agreement before appending his signature to it as both the first respondent and a woman who was representing the applicant at the time of signature assured him that he was required only to witness the document. According to the third respondent he would never have signed the document had he known

that he was binding himself thereby as a surety and co-principal debtor.

[16] If one has regard to the suretyship agreement itself it is clear that the third respondent's name is inserted in the very second line of the first paragraph under the heading, "SURETYSHIP". His name is printed in capital letters and in bold type. The third respondent's initials appear on this first page. They also appear on each page thereafter. Even if the third respondent was oblivious to his name appearing under this heading on the first page of the agreement, his signature at the end of the agreement is placed above his name printed in capital letters and in bold type and, critically, alongside his name, the words "the surety", appear in bold type. In addition, the third respondent placed his signature on another page which is attached to the agreement. By his signature on this additional page the third respondent certified that his attention had been drawn to and that he had read clause 27 of the agreement, which he understood and accepted. Once again his signature is placed above his name in capital letters and bold type, and above the words "the surety" in bold type. Clause 27 of the agreement deals with the requisite formalities of the suretyship agreement and in clause 27 the sureties acknowledge that the listed formalities were complied with.

[17] The third respondent fails to explain how he missed the fact that he was described as "the surety" directly below the spot where he appended his signature, not once, but twice. In addition, in the applicant's replying affidavit both Mr Lebos and the applicant's attorney, Ms Watson, who were present when the surety should agreement was signed, deny that Ms Watson advised the third respondent that he was signing as a witness.

[18] Counsel for the third respondent submitted to the court that the third respondent's signature defence created a material dispute of fact that warranted a referral to oral evidence. The principles governing the power of the court to refer a matter to oral evidence are well established in our law.

The court has a wide discretion in this regard.[3] It is required in each case to examine the alleged dispute of fact and to determine whether in truth there is a real dispute of fact that cannot be satisfactorily determined without the aid of oral evidence.[4] If this is not done a respondent might be able to raise a fictitious dispute of fact and thus to delay the hearing of the matter to the prejudice of the applicant.[5] Insubstantial allegations are insufficient to raise the kind of dispute that should be

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3 *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at 10A-D

4 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634/

5 *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428

referred to oral evidence.[6] If the court is satisfied that there is no genuine of fact or that a respondent's allegations are so far-fetched or so clearly untenable or palpably implausible as to warrant their rejection on the papers, the court will be justified in deciding the dispute on the papers without a referral to oral evidence.[7]

[19] I am satisfied that on the facts arising in this case the third respondent's version that he was misled by, *inter alia*, the applicant's attorney, into unwittingly signing the suretyship agreement as a surety may properly be rejected on the papers. The facts set out above demonstrate the inherent implausibility of the third respondent's version in this regard. Accordingly, I am satisfied that no genuine dispute of fact exists in respect of this issue to warrant a referral to oral evidence. In my view the papers before court indicate that the third respondent knew or, at the very least, ought reasonably to have known that he was appending his signature as "the surety". In the circumstances he is bound by his signature, and the applicant is entitled to enforce the terms of the suretyship agreement against him. For these reasons I conclude that there is no merit in the third respondent's signature defence.

[20] Accordingly I find that the applicant is entitled to judgment against the third respondent.

FIFTH RESPONDENT

[21] As far as the fifth respondent is concerned, I am likewise satisfied that the applicant is entitled to judgment against him. There is no merit in his defence that he did not read th^ terms of the suretyship agreement before signing them and, for this reason, that he mistakenly believed that the terms were different. I am satisfied that the applicant has demonstrated that there is no factual or legal merit in this defence.

[22] Furthermore, his defence that he was placed in an unfair position because his home language is not English also falls to be rejected. Although the fifth respondent asserts rather vaguely that he is "of Austrian descent", the facts show that he has been active as a businessman in South Africa for at least seventeen years. His answering affidavit was written in English and he appears to have deposed to it without the necessity of translation. This defence is patently unmeritorious. In my view, the fifth respondent has no defence to the applicant's claim against him.

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6 *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E) at 157/-J

7 *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 197*A-B*

[23] The applicant seeks to have two immovable properties owned by the fifth respondent declared to be specially executable. In addition to fifth respondent signing as a surety under the suretyship agreement, he agreed to the registration of a surety bond in favour of the applicant against each of these properties. It is common cause that neither of these properties is the fifth respondent's primary residence. They appear to have been bought by him as investment prop rties. In the circumstances, there is no reason why the applicant should not be entitled to exercise its rights under the surety bonds in respect of these properties.

[24] In the circumstances I make the following order:

[24.1] Third and fifth respondents are liable, jointly and severally with the remaining respondents, any one or more paying the others to be absolved, to pay to the applicant:

[24.1.1] The sum of R 6 361 519. 00;

[24.1.2] Interest thereon at the rate of 8% per month, compounded monthly from 31st of May 2013 to date of payment, both days inclusive;

[24.1.3] Costs of suit on the scale as between attorney and client.

[24.2] The following property is declared specially executable:

[24.2.1] Section No. 25 as shown and more fully described on sectional plan No SS 346/91 in the scheme known as The Courtyard in respect of the land and building or buildings situate at Sandown Township, Local Authority: City of Johannesburg of which section the floor area, according to the said sectional plan is 37 (Thirty Seven) square metres in extent: and

[24.2.2] An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the sectional plan: and

[24.2.3] An exclusive use area described as parking bay P13 measuring 10 (ten) square metres being as such part of the common property comprising the land and the scheme known as the courtyard in respect of the land and building or

buildings situated at Sandown Township, Local Authority: City of Johannesburg as shown and more fully described on sectional plan No SS 346/91.

[24.3] The following property is declared specially executable:

[24.3.1] Section No. 62 as shown and more fully described on sectional plan No SS 346/91 in the scheme known as The Courtyard in respect of the land and building or buildings situate at Sandown Township, Local Authority: City of Johannesburg of which section the floor area, according to the said sectional plan is 37 (Thirty Seven) square metres in extent: and

[24.3.2] An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the s ctional plan: and

[24.3.3] An exclusive use area described as parking bay P27 measuring 13 (thirteen) square metres being as such part of the common property comprising the land and the scheme known as the courtyard in respect of the land and building or buildings situated at Sandown Township, Local Authority: City of Johannesburg as shown and more fully described on sectional plan No SS 346/91.

R M KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING	8 MAY 2014
DATE OF JUDGMENT	16 MAY 2014
APPLICANT'S COUNSEL	MS R STEVENSON
INSTRUCTED BY	MARTINI-PATLANSKY ATTORNEYS
3RD RESPONDENT'S COUNSEL:	A J SWANEPOEL
INSTRUCTED BY	JAY INCORPORATED

5TH RESPONDENT'S COUNSEL: NO APPEARANCE