IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 73947/2010

DATE: 20/3/2014

In the matter between:

ANTALIS SOUTH AFRICA (PTY) LTD	Applicant
and	
D[…] C[…] C[…] N.O	First Respondent
D[…] C[…] C[…] N.O	Second Respondent
G[…] G[…] J[…] V[…] D[…]	
M[…] N.O	Third Respondent
D[…] J[…] P[…]	Fourth Respondent

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] In this application, and in terms of the Notice of Motion, applicant sought payment of an amount of R3 160 472.51 (three million hundred

and sixty thousand four hundred and seventy two rand and fifty one cents) against the respondents on the following basis:

(a) first respondent in her representative capacity as the executrix of the estate of late P[…] H[…] C[…] (the deceased) and as second respondent in her capacity as trustee of the J[…] Trust . I will refer to her as first respondent ; and

(b) Third and fourth respondents in their capacities as trustees of the J[…] Trust.

[2] The deceased, who was the husband of first respondent and a co-trustee of J[…] Trust with all the other respondents, bound himself and the J[…] Trust by resolution signed by the other trustees as sureties and co-principal debtors in *solidum* for all the debts and fulfillment of the obligations of J[…] Printers (Pty) Ltd ("Principal Debtor') in favour of the applicant for the due and punctual payment and performance on demand of all obligations and payment of all monies owed by the principal debtor to the applicant.

The debt against the Principal Debtor, that, according to applicant acknowledged, arises from credit facilities extended by applicant.

SECURITY FOR PAYMENT OF THE DEBT

[3] In paragraph 11 of the founding affidavit, applicant averred that it had, at the time this application was issued, instituted proceedings against Fastpulse Trading 368 (Pty) Ltd ('Fastpulse), a company that has also bound itself as surety and co-principal debtor in *solidum* with the Principal Debtor for due performance of the latter's obligations towards the applicant. As it turned out, Fastpulse had sold a game farm for R5 000 000.00 and was awaiting payment of an amount of R3 632 975.32 out of the proceeds of sale.

[4] It is common cause from subsequent pleadings[1] that:

(a) judgment was granted in favour of applicant,

(b) Fastpulse sought and was granted leave to appeal to the Supreme Court of Appeal on 14 June 2011, however, it failed to prosecute the appeal which subsequently lapsed,

(c) Applicant proceeded to execute against the judgment by serving a writ of execution on 15 November 2011 in the amount of R3 179 290.85 with interest and costs, (d) the sheriff received a

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cheque in the amount of R3 857 734. 84 from Fastpulse's co-respondent in the action on 25 November 2011,

(d) In the meantime, on 24 November 2011, Capital Acceptance, a creditor of Fastpulse obtained default judgment against it in the amount of R9 304 577.12

[5] Applicant entered into an arrangement with Capital Assurance with regard to sharing of the proceeds received from the execution of the judgment it obtained against Fastpulse . The cheque was deposited in the account of the sheriff, who only made a payment to applicant after it was cleared by the bank.. Applicant made a payment of R1 742 197 . 91 to Capital Assurance and retained R2 115 536.93, which was used to reduce the indebtedness of the respondents.
According to applicant, the balance due now is R1 044 935.58 together with interest and costs.[2].

OPPOSING AFFIDAVIT, SUPPLEMENTARY AFFIDAVIT AND DEFENCES THEREIN

[4] Respondents filed an opposing affidavit and raised the following initial defences:

[2] Replying affidavit dated 07 December 2012

(a) Non-joinder of two other trustees. The fourth respondent, who was still a trustee was subsequently joined in these proceedings,

(b) the deceased had no authority to bind the Trust. First respondent denied the authenticity of the resolution allegedly passed by the trustees to authorize the deceased to bind it as a surety and co-principal debtor; and

(c) J[…] Printers has since been liquidated.

(d) Applicant has instituted action against Fastpulse for the same amount.

[5] On 07 March 2013, respondents, without leave of the court, filed a subsequent affidavit in response to applicant's replying affidavit. The applicant raised no objection in court.

[6] According to the deponent (first respondent), applicant had raised new issues in paragraph 33[3] of its replying affidavit and as such, respondents were entitled to respond thereto.

[3] This paragraph deals with amongst other issues; execution of judgment against Fastpulse and the sharing of proceeds with Capital Assurance.

[7] In paragraph 11.2 thereof, respondents stated the following:

" 11.2 In this regard however, I would humbly submit the following:

11.2.1 Receipt by applicant of the sum of ***R3 857 734.84 (THREE MILLION EIGHT HUNDRED AND FIFTY SEVEN THOUSAND SEVEN HUNDRED AND THIRTY FOUR RAND AND EIGHTY FOUR CENTS)*** *pursuant to the writ issued by it, and executed served to extinguish the indebtedness of the Surety concerned (The Execution Debtor , Fastpulse Trading 368 (Pty) Ltd, and the Principal Debtor, J[…] Drukkers (Pty) Ltd.*

11.2.2 It is denied that the rationale underlying Applicant's payment to Capital Assurance Limited, of the sum of ***R1 742 197. 01 (ONE MILLION SEVEN HUNDRED AND FORTY TWO THOUSAND ONE HUNDRED AND NINETY SEVEN RAND AND NINETY ONE CENT)*** *is correct in Law. Applicant does not explain or substantiate its election so to do, other than stating generally, that it sought to avoid participation by Capital Assurance Limited in the proceeds, of the attachment;*

11.2.3 In any event , inasmuch as First and Second respondents herein are exposed to the liability of the Principal

Debtor, as Sureties, it is apparent that Applicant's action constituted conduct prejudicial to those Respondents as sureties;

11.2.4 Applicant had, without due consideration as to defences, and recourses First and Second Respondents might have, elected to remit payment to Capital Assurance Limited, of the sum in question

11.3 Accordingly, I would humbly submit that the sum of ***R1 742 197. 01 (ONE MILLION SEVEN HUNDRED AND FORTY TWO THOUSAND ONE HUNDRED AND NINETY SEVEN RAND AND NINETY ONE CENT*** *) paid by Applicant to Capital Assurance Limited, was incorrectly so pad. The amounts so paid was received by Applicant, pursuant to the Writ issued by it, and on receipt thereof effectively extinguished any and all claims as it may have had vis-a vis First and Second Respondents.*

11.4 It is my submission that Applicant has no claim for payment of the sum it claims, as reduced , or at all."

[8] The defences raised in the opposing affidavit were effectively abandoned and the only issue argued before me was whether the respondents were released from their obligations as sureties by virtue of

the fact that applicant received payment from another co-surety, FASTPULSE .

[9] Applicant filed a further replying affidavit[4] and argued that:

(a) payment to the sheriff does not automatically extinguish the indebtedness of the surety, neither does payment to Capital Assurance.

(b) Its actions are justified in terms of the suretyship agreement and are not prejudicial to the respondents. Reference was made to the following clauses in the suretyship agreements to justify its conduct :

" 1.12 : the Trust, by signature, intercedes and binds itself jointly and severally with J[…] Printers, as surety and co-principal debtor in solidum and in favour of client for the due and punctual performance on demand of all J[…] Printers obligations of whatsoever nature and howsoever arising…. Which J[…] Printers presently owes client or which J[…] Printers may in future owe client… arising from … any

[4] Filing of further affidavits without leave of the court is unprocedural. However, none of the parties took issue with this. It was necessary to explain by further affidavits the developments in view of the statement by applicant in the founding affidavit that it had instituted proceedings against a co-surety. As such, I do not have to disallow the affidavits, moreso because there was no objection.

obligation owed by J[…] Printers to any creditor or third party and howsoever arising acquired by the creditor.

2.3.3: The Creditor is at liberty , without affecting its rights, to release, abandon, realize or sell securities and to give time or compound or make any other arrangement with any other surety, guarantors or indemnitors for the debtor whether before or after any obligation has fallen due for performance.

2.6: The surety shall not be released from liability if the Creditor ….. in any manner prejudices the rights of the Surety, or the Debtor

(c) Applicant and the attorneys acting for Capital Assurance reached the agreement to share the proceeds because the latter would have been entitled to bring an application to participate in the proceeds. The attorneys acting for Capital Assurance had already issued a letter of demand at the time the sheriff received the cheque. The claim of Capital Assurance was much higher than the applicant's, and if no agreement had been reached, the latter would have received a far lesser amount if the matter had gone to court for adjudication. The sureties' indebtedness would not have been reduced to the extent it has. In effect, the applicant has acted to the benefit, not detriment of the respondents.

SUBMISSIONS ON BEHALF OF THE APPLICANT

[10] Mr. Carstensen , on behalf of the applicant filed comprehensive heads of argument and addressed all the defences raised by the respondents. However, as I have indicated above, the only issue in dispute before me was whether the payment to Capital Assurance had the effect of releasing the respondents from their obligations as sureties.

[11] Two arguments were made on behalf of the applicant, namely ;

(a) There was no release, and as such, applicant was entitled to claim the balance after the respondents' indebtedness was reduced by the proceeds realized by execution of the writ against Fastpulse and;

(b) the amount being claimed represented interest (This was apparently an alternative argument).

[12] I agree with counsel for the respondents that the second argument does not have merit because it was not raised in the papers. In any event, the issue of interest can properly be addressed in the order applicant may obtain. If applicant wanted to base its cause of action on it, it should have amended its prayers and filed further affidavits to

enable the respondents to deal with it. Therefore, I reject this argument and there is no need to go into its merit.

[13] On the issue of release, Mr. Carstensen made the following submissions:

(a) Prejudice in itself does not entitle a surety to be released from his/her obligations. Reference was made to the matter of **Absa Bank v Davidson 2000(1) SA 1117 (A)** at 1124I-J. He submitted further that there is no release even if the alleged prejudicial conduct is supported by the principal obligation, in this case being the application of credit and deed of suretyship. He referred to the matter of **Block & Others v Duburoro Investments (Pty) Ltd 2004 (2) SA 242 (SCA**) in this regard.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

[14] In his written and oral submissions, Mr Sullivan raised the following issues:

(a) Applicant is not correct in its submission that it was obliged to address the demands of Capital Assurance as a consequence of a judgment obtained by the latter against Fastpulse,

(b) Fastpulse did not proceed with its threat to approach the court for an order to participate in the proceeds. Applicant and the latter's attorneys took it upon themselves to pay monies to Capital Assurance,

(c) The suretyship obligations of the respondents were extinguished when applicant successfully executed its writ against the co-principal debtor and received the amount of R3 857 734, 34.

The suretyship then no longer had any force or effect. Reference was made to a quotation in the matter of **Eley v Lynn & Main Incorporated 2006 JDR 0770 (W**) in paragraph 5 where the following was said *"By our common law the surety undertakes to pay the debt of the principal debtor so long as the debt exists in law and has not in fact been paid by the debtor",*

(d) Capital Assurance should have utilized the provisions of rule 45(11)(a)(i).

(e) Each creditor is for himself.

RELEASE FROM SURETYSHIP OBLIGATIONS

[15] In the matter of **Bock and Others v Duburoro Investments (Pty) Ltd**[5], Harms JA[6], reiterated the principle that prejudicial conduct does not per se release a surety from his/her obligations. The appeal court also placed in perspective the views of the learned author C H Christie on the issue in question.

> *"[18] I then turn to the next issue, namely that of prejudice. In the 1992 edition of Caney's The Law of Suretyship,*[7] *there appeared a statement in these general terms:*
>
> > *'The creditor must do nothing in his dealings with the principal debtor and the other sureties which has the effect of prejudicing the surety; if he does the surety is released.'*
>
> *This and a similar statement from Wessels Law of Contract in South Africa*[8] *were quoted in some judgments.*[9] *The latter reads as follows:*
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> > *'In equity, upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his right, or if he omits*

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[5] (228/2002) [2003] ZASCA 94; [2003] 4 All SA 103 (SCA) (26 September 2003)

[6] ZULMAN, FARLAM, NAVSA JJA and VAN HEERDEN AJA concurring.

[7] 4 ed by Forsth & Pretorius

[8] 2 ed para 4346. The para and page references in Schwartzman J's judgment (at para 17.1) are wrong.

[9] E.g. Minister of Community Development v SA Mutual Fire & General Insurance Co Ltd **1978 (1) SA 1020 (W)** 1023H; **Fry and Another v First National Bank of SA Ltd 1996 (4) SA 924 (C)** 928C-D.

> *to do any act which his duty enjoins him to do and the omission proves injurious to the surety, the surety will be discharged.'*

These statements, it appears, became in the eyes of some a rule of general application and it is on this rule that the sureties in a sense rely. The problem, however, is that Wessels was not quoted fully and that he was quoted out of context. Wessels was dealing with the effect of the creditor's negligence on the surety (para 4338). He mentioned that it is difficult to lay down a general rule to determine when the personal negligence of the creditor would enable the surety to claim discharge (para 4342). He then hypothesized that the surety might be released

> *'if by contract there is a duty cast upon the creditor to preserve the surety's rights.'*
>
> *(Para 4343; my emphasis.)*

The next four paragraphs illustrate this proposition and the last of these deals with an 1861 case of Watts v Shuttleworth[10] *where, as Wessels (at para 4346) said,*

> *'a person became surety for the due performance of a work, on the understanding that the employer would insure against fire. The Court held that a failure to insure discharged the surety.'*
>
> *Only then the quoted text came. In Watts the building did burn*

[10] [**1861] EngR 800; 158 ER 510** (Ex Ch)

> *down. The Court there had to consider whether the failure to insure released the surety fully or only pro tanto and, applying the 'analogy' of the English rule of equity that if the creditor gives the debtor time to perform, the surety is released (which is not part of our law) the Court held that the surety had been released in toto.*

[19] Probably fearing that he might be misunderstood by future generations Wessels, after the quotation, referred by way of comparison to a judgment of his. That case, Nathanson and Another v Dennill ***1904 TH 289*** *292, makes his point in no uncertain terms. He held that if*

> *'a material alteration is made between the creditor and the principal debtor in an agreement to which there is a surety' the surety may be released if the surety is thereby prejudiced. The alteration he referred to was one that amounted to a novation of the principal debt.*

[20] This Court, in Absa Bank Ltd v Davidson ***2000 (1) SA 1117*** *(SCA), was confronted with the submission that:*

> *'there is a general so-called "prejudice principle" in our law to the effect that, if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is fully released.'*

It came, in the words of Olivier JA, without any mincing to the conclusion

that no such principle exists and held (at para 19):

> *'As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. Counsel who drafted the plea was therefore on the right track when he sought to base his case upon prejudice which flowed from the breach of an obligation, contractual in the present circumstances.'*

[21] This statement of the law was accepted as correct by Griesel J[11] *and by the Court a quo (at para 19) and somewhat grudgingly by the sureties during argument before us. The problem is that Van Zyl J*[12] *added an obiter gloss to it in these terms:*

> *'On the basis of these considerations I would then suggest that the prejudice required for a successful defence of prejudicial conduct justifying release from a suretyship agreement may be described in the following terms. With reference to all the relevant facts and circumstances, and with due regard to considerations of justice, fairness, reasonableness, good faith and public policy, the alleged prejudice must constitute real and substantial prejudice which has the effect of unduly increasing the*

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11 *Investec Bank Ltd v Lewis* **2002 (2) SA 111 (C)** 116H-117(C)

12 Hlophe JP concurring in *Di Giulio v First National Bank of SA Ltd* **2002 (6) SA 281 (C)** para 41

contractual burden of the surety.'

I have to admit that I do not understand how this test will work in practice or why the gloss was necessary. The considerations given may be appropriate where a judicial discretion is involved or a value judgment called for, such as in the case of sentencing or the determination of wrongfulness, but the release of a surety is not a matter of either. In a constitutional democracy the principle of legality applies and making all rules of law discretionary or subject to value judgments may be destructive of the principle. In any event, this gloss is irreconcilable with Brisley v Drosky ***[2002] ZASCA 35****;* ***2002 (4) SA 1*** *(SCA) para 11-24 dealing with the concept of bona fides in the law of contract. Lest there be any misunderstanding, this judgment subscribes to the law as set out in the judgment of Olivier JA*[13] *in spite of the criticism in the current edition of Caney.*[14]

[22] The argument of the sureties amounts to this: the banks were in possession of securities; these had to be realized in a lawful manner at the appropriate time and at a fair value; since this did not happen, they were released. The Court a quo (at para 19.1) saw the law in another way:

> *'I can see no reason in equity, morality, public policy, principle or law why minimal prejudice should automatically release a surety from all liability for the principal debt. In an appropriate case there is much to be said for limiting the surety's release to the extent that he or she has been*

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13 *Absa Bank Ltd v Davidson* **2000 (1) SA 1117 (SCA)** para 19.

14 Forsyth & Pretorius *Caney's Law of Suretyship* 5 ed 205-206

> *prejudiced by the conduct of the creditor that is in breach of some of some or other legal duty or obligation.'*

[23] One can approach the matter from a slightly different angle. The agreement between Nedcor and the principal debtor provided for the take-over of the pledges in a particular manner. Nedcor took them over in a manner contrary to that agreed upon. This breach did not release the principal debtor from its liability but the principal debtor was entitled to have been placed in the position as if the agreement had not been breached, which means in this case that the principal debtor was entitled to be credited with the 'true' value of the shares as at the date of take-over. Why should the position of the sureties, who are also co-principal debtors, be any different? There is no fiduciary relationship between them and the creditor.[15] *Their indebtedness will not have been increased or changed as a result of Nedcor's breach.*

[24] Wessels (para 4345) in the paragraph preceding his discussion of Watts, gave an example that fits this exposition of the law and is particularly apposite to the facts of this case:

> *'A obtained an advance of money from a loan society and B became his surety. There were certain goods pledged to the society by A. The society sold these goods and claimed on B for the balance. B pleaded as an equitable defence that but for the mismanagement of the agents of the society in selling A's goods they would have realized sufficient to satisfy*

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15 Cf the relationship between a bank and its client: *Absa Bank Bpk v Janse van Rensburg* **2002 (3) SA701 (SCA)** para 16

the whole debt. The Court held this to be a good plea.'

(Emphasis added.)

[25] It would thus appear as if the question of the release of a surety due to the prejudicial conduct of the creditor and the question of the quantum of the principal debt tend to be conflated. These are two distinct inquiries. Properly analyzed, the sureties' defence is about quantum, i.e., the extent of the principal debtor's liability for which they are in solidum liable."[16]

[26] Nestadt JA[17] *once referred to a general principle according to which a surety will be discharged if the creditor by his own act makes it impossible for himself to cede his security to the surety. This statement of his may appear to be in conflict with conclusions thus far. The learned Judge, it should be noted, did not deal with the question whether the release is in toto or pro tanto and, additionally, Wessels makes it clear that the release is dependent on the creditor's negligence (at para 4338-4339 and 4352) and is pro tanto (at para 4354). This principle can, in any event, not be applicable where the creditor utilized the securities in order to reduce the indebtedness of the principal debtor."*[18]

CONCLUSION AND FINDINGS

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16 Cf Wessels para 4363, *Gould v Ekermans* **1929 TPD 96**

17 *Barlows Tractor Co Ltd v Townsend* **[1996] ZASCA 3; 1996 (2) SA 869 (A)** 878D-E

18 Cf *South African Scottish Finance Corporation Ltd v Wassenaar* **1996 (2) SA 723 (A)** 731H-732A

[16] Respondents' indebtedness was not extinguished by execution of the writ against its co-principal debtor because in terms of the deed of suretyship, applicant was entitled to act in the manner it did. I have already referred to clauses in the suretyship agreement that justifies the conduct of applicant.

[17] I therefore reject the respondents' argument that payment to Capital Assurance was unlawful.

[18] There is no merit in the respondents' contention that "*Receipt by applicant of the sum of* ***R3 857 734.84 (THREE MILLION EIGHT HUNDRED AND FIFTY SEVEN THOUSAND SEVEN HUNDRED AND THIRTY FOUR RAND AND EIGHTY FOUR CENTS)*** *pursuant to the writ issued by it, and executed served to extinguish the indebtedness of the Surety concerned (The Execution Debtor , Fastpulse Trading 368 (Pty) Ltd, and the Principal Debtor, J[…] Drukkers (Pty) Ltd."*

[19] I thefore make a finding that the amount claimed by applicant against the respondents in the Notice of Motion was reduced by an amount of R2 115 536.93 and that the balance due is R1 044 935.58 together with interest and costs.

[20] In the result, I make the following order:

First, Second, Third and Four respondents are ordered , joint and severally, the one paying the other to be absolved;

[1] to pay applicant an amount of R1 044 935.58 (One Million forty four thousand nine hundred and thirty five and fifty eight cents) ; with

[2] interest at the rate of 15,5% a tempore morae to date of payment. The interest should be reckoned from the date of payment of the reducing amount by the sheriff to applicant's attorneys; and

[3] costs of suit on the scale as between attorney and client.

MAKHUBELE AJ

Acting Judge of the High Court.

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