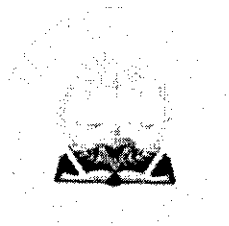
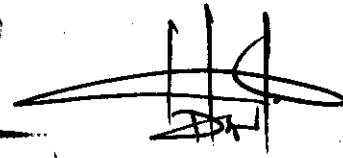


REPUBLIC OF SOUTH AFRICA



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IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT DIVISION)

CASE NO: 64166/ 2015

29/1/16

In the matter between:-

STAN RIO PIPE AND STEEL (PTY) LIMITED

APPLICANT/ PLAINTIFF

and

ANDRIES J H ESTERHUIZEN

RESPONDENT/ DEFENDANT

JUDGMENT DELIVERED ON 29 JANUARY 2016

VILAKAZI AJ:

[1] This is an application for summary judgment at the instance of the Applicant. The Plaintiff has instituted action against the

Defendant based on an application for credit facilities including a deed of suretyship.

[2] The plaintiff sued the defendant for payment of an amount of R503 393. 68 said to be due and payable to it by the defendant as surety and co- principal debtor in terms of the Application for credit facilities including a deed of suretyship concluded on 6 May 2014, attached herewith and marked as Annexure "A". Annexed to the summons is the detailed ledger account of the principal debtor marked as Annexure "B", which shows the claimed amount plus interest at 9% per annum tempora morae and costs on the scale of attorney and own client scale.

[3] In its founding affidavit, plaintiff alleges that the principal debtor is Sansu Steel and that the defendant stood surety for the due and punctual performance of the principal debtor towards the plaintiff.

[4] The defendant resists the plaintiff application for summary judgment on the basis that the contract of suretyship was invalid for want of compliance with the provisions of section 6 of the General Laws Amendment Act 50 of 1956 in that the name of the principal debtor is not recorded in Annexure "A"

- [5] The defendant avers that the plaintiffs' action is mala fide and premature due to the fact that the plaintiff has accepted the business rescue plan in terms of which the plaintiff will be paid in full over time. In the alternative he avers that he is excused from his suretyship obligation should the court find that a deed of suretyship is valid, until such time that it has been determined that the principal debtor cannot meet its obligations to the plaintiff. He submits that this would occur if the principal debtor does not meet the terms of the business rescue plan or termination of same.
- [6] The defendant in the Answering affidavit admit that it signed an application for credit on behalf of Nansu Steel (" the principal debtor") on 6 May 2014 in terms of which it applied for trade credit facilities with the plaintiff.
- [7] Section 6 of Act 50 of 1956 provides:
- "No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety; Provided that nothing in this section contained therein shall affect the liability of the signer of an aval und the laws relating to negotiable instruments".

What the section requires is that the terms of the contract of suretyship are to be embodied in a written document. Terms which are essential for the material validity of a contract of suretyship are the identity of the creditor, the surety and the principal debtor and the identification of the principal debt. The requirement that the contract must be embodied in a written document does not however mean that every particular must be meticulously spelled out in the document. Although it may appear not to be the case, the identity of the principal debtor is undoubtedly a material term of a contract of suretyship (*Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 344 H-345 E. Unless, therefore the identity of the principal debtor is embodied in the written document, the contract of suretyship will be invalid.

[8] It was contended on behalf of the plaintiff that Annexure 'A' which is part and parcel of the application form, page 2 thereof which reflects the terms and conditions of agreement of sale and the deed of suretyship should be evaluated in its entirety and therefore constitutes one document. The principal debt is identifiable, it mentions the credit limit required is R 500 000.00. It was plaintiff's submission that accordingly there was compliance with section 6 despite the blank space where the name of the

principal debtor ought to have been inserted. In my view there is merit in this submission.

8.1 In deciding this matter, I am relying in the Supreme Court of Appeal decision in **Industrial Development Corporation of SA (Pty) Limited** and **Dale Clifford Silver case No 419/ 2001**. The facts were remarkably similar to the present. The space left for the insertion of the name of the principal debtor in the deed of suretyship had likewise been left blank. In the loan agreement, the respondent signed both on his own behalf and on behalf of Engineplan and on the same day as the deed of suretyship was signed. The loan agreement further provides that any advance in pursuance of its terms was conditional upon the respondent first guaranteeing the obligations of Engineplan under the loan agreement in the form and subject to such terms as the appellant reasonably required. The document specified the amount of the principal debtor's indebtedness, that such indebtedness was in respect of money to be lent and advanced **by Industrial Development Corporation of South Africa LTD**, the appellant, to the principal debtor in terms of an agreement (defined as the loan agreement) and the loan agreement was to be entered simultaneously with the deed of suretyship. It did not reflect the name of the principal debtor, a space left for the insertion of the latter's name was left blank. **IDC** relied on the

reference in the deed of suretyship to the loan agreement which in turn discloses the identity of the principal debtor. It was contended on behalf of **IDC** that the loan agreement was incorporated by such reference into the deed of suretyship and that there was accordingly compliance with section 6 despite the blank space where the name of the principal debtor ought to have been inserted. The court said the deed of surety makes it clear that the debt secured is the loan in terms of the loan agreement sought to be incorporated. The court held that extrinsic evidence identifying the loan agreement as the one to be all that would be required and is therefore admissible".

- [8] Turning to the facts of this matter before me, Annexure A, indicates Stan Rio Pipe and Steel (Pty) Ltd, as the seller and Sansu Steel as the purchaser. The defendant signed on this Annexure, and reflects his capacity as "suretyship and principal debtor." Clause 6 provides that a party that has appended his signature on behalf of the purchaser binds himself as surety and co-principal debtor in solidum unto and in favour of the seller in respect of all the obligations of the purchaser, past, present and future and furthermore hereby agree and undertake to be bound by the terms and conditions of this agreement mutatis mutandis. Thereafter it makes provision for the name of the Seller and Purchaser. The defendant in compliance with clause 6 of the agreement has appended his signature binding himself as

co- principal debtor and surety and has inserted his identity number. His capacity is disclosed as director. I am satisfied that the suretyship and the agreement comply with section 6 of the General Laws Amendment Act.

- [9] In respect of the second ground of contention it is common cause that the principal debtor is under business rescue and the principal debt is the subject of a business rescue plan. In the Heads of Argument on behalf of the defendant alluded to the fact that the business rescue plan does not secure the plaintiff's rights against sureties. Counsel on behalf of the Defendant submits that once the business rescue plan has been approved it provides a defence in rem by the surety. He fortified these contention by reference to the judgment of Rogers J in ***Tuning Fork (Pty) Ltd t/a Balance Audio v Greeff and Another 2014 (4) SA 521 (WCC)***. The defendant admits that this amount claimed by the plaintiff in this court proceeding will be paid in full.
- [10] It was submitted by counsel for the plaintiff that the liability of the surety is unaffected by the business rescue plan. For this **submission he relied in the case of *New Port Finance Company Pty Ltd v Nedbank Ltd [2015] 2 ALL SA 1 SCA***. Wallis J mentioned that Rogers J in *Tuning Fork* based his reasoning on his reading of **the decision in *Moti and Co v Cassims Trustees 1924 AD 720*** and disagrees with his reasoning . He further explained that" Moti's

case supra was decided on the basis of the court's interpretation of section 126 (2) (b) of the Insolvency Act 32 of 1916 that has no direct counterpart in the Companies Act 71 of 2008. The key provision in that regard is section 154, which in subsection 2 says the company may enforce a debt in accordance with and to the extent permitted by the terms of the business rescue plan. That section is capable of the construction that it deals only with the ability to sue the principal debtor and not the existence of the debt itself. If that is the case then the liability of the surety would be unaffected by the business rescue plan unless the plan itself made specific provision for the situation of sureties. **[Para 14**

E- G]

[11] I am of the view that reliance on the Tuning Fork's case is misplaced. **The New Port Finance** case is a case on point. In this matter before me, the plaintiff's right to sue the surety under the deed of suretyship remains unaffected by the business rescue plan. Section 133 of the Companies Act, No. 71 of 2008 as amended (the "Act") places a general moratorium on legal proceedings against a company in business rescue. The moratorium granted by this section is designed to provide the company with a breathing space while the business rescue practitioner attempts to rescue the company by designing and implementing a business rescue plan. The general rule relating to sureties is that a surety may rely on any defence which is

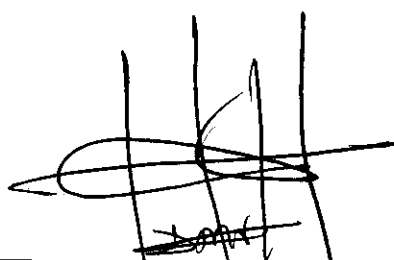
open to the principal debtor, provided such defence arises upon the obligation (one in rem) and not from some personal privilege granted to the debtor (a defence in personam) (***Ideal Finance Corporation v Coetzee* 1970 (3) SA 1 (A) at 11G-12F**). It was held in ***Standard Bank v SA Fire Equipment (Pty) Ltd* 1984 (2) SA 693 (C)** that a statutory moratorium being a purely personal defence would not be an impediment to the creditor proceeding against the surety. Equally so, this case was referred to with approval in ***Cape Produce Company (PE) (Pty) Ltd v Dal Maso and Another* 2002 (3) SA 752 (SCA)**.

- [12] The defendant in his opposing affidavit avers that it was never the intention of the parties that he would be personally liable for the principal debtor's liabilities until such time that it had become due and payable. This argument is entirely without merit. The language of the sale agreement and the deed of suretyship is very clear. I could not find any contextual material relevant to the interpretation of the suretyship.
- [13] I am of the view that the critical consideration is whether the defendant has raised a bona fide defence to frustrate the plaintiff's application for summary judgment.
- [14] The defendant admits that it has signed an application for a credit on behalf of the principal debtor on 6 May 2014 in terms of which it applied for trade credit facilities with the plaintiff. The

defendant has renounced a defence of excussion. It follows that the defendant has failed to set up a bona fide defence to the plaintiff's claim so as to avoid summary judgment.

[15] In the result the following order is made:

1. Summary judgment is granted in favour of the plaintiff in the amount of R 503 393.68
2. Interest at 9% per annum tempore morae on R 503 393.68 until the full debt is extinguished.
3. Costs on the scale of attorney and own client



T D VILAKAZI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

FOR PLAINTIFF	:	STOOP SC
INSTRUCTED BY	:	COETZER & PARTNERS
FOR DEFENDANT	:	ADV R RAUBENHAUMER
INSTRUCTED BY	:	HACK STUPEL & ROSS
DATE HEARD	:	2 NOVEMBER 2015