

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

22/7/16
CASE NO: 64166/ 2015

In the matter between:-

ANDRIES J H ESTERHUIZEN

APPLICANT

and

STAN RIO PIPE AND STEEL (PTY) LIMITED

RESPONDENT

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL DELIVERED ON 22 JULY 2016

VILAKAZI AJ:

- [1] In a judgment delivered on 29 January 2016, I granted summary judgment in favour of the Respondent in the amount of R503 393.68 , interest at 9% per annum tempore morae on R503 393.68 until the full debt is extinguished and costs on the scale of attorney and own client.
- [2] The Applicant has applied for leave to appeal against the whole of that judgment.

- [3] The test in respect of applications for leave to appeal is well established. I am to consider, in determining this application, is there a reasonable prospect that another court would on appeal come to a different conclusion than that reached by this court.
- [4] The position with regard to the assessment and determination of summary judgment application is well established. The test is whether the Defendant has set out in its opposing affidavit what is referred to as a bona fide defence. A bona fide defence entails more than the allegation of matter, which on its face would amount to a defence. It requires, in order for the bona fides requirement to be satisfied, the setting out of sufficient factual allegations to persuade the court that the defence raised, is raised not only in name, but in substance.
- [5] The claim of the respondent against the applicant arises from a deed of suretyship in terms of which the applicant bound himself as surety and co- principal debtor in favour of the Respondent in respect of all the obligations of Nansu Staal (Pty) Ltd, the principal debtor, with registration number 1996/05360/07 with a credit limit of R500 000.00 arising from an agreement of sale and deed of suretyship entered into with the Respondent. The application for leave to appeal was premised upon 2 grounds, firstly;
- [6] The applicant challenges the validity of the deed of suretyship and consequently the debt relied on by the respondent. Page 1 of the application for credit facilities and suretyship makes mention of Nansu Staal (Pty) Ltd and its registration number. The details of the principal debtor on page 2 are not inserted. On the very same page the terms and conditions of the agreement of

sale and deed of suretyship was signed by a Mr AJ Esterhuizen in his capacity as director, surety and co-principal debtor on 6 May 2014. Clause 12 of the terms and conditions provides that the party who has appended their signature hereto on behalf of the purchaser binds himself as surety and co- principal debtor in solidum and in favour of the Respondent, the seller, in favour of all the obligations of the purchaser, past, present and future. The signatories hereto renounce the benefits of excussion and cession of action.

- [7] The critical question here is whether the deed of surety is invalid in terms of section 6 of the General Law Amendment Act 50 of 1956 as the applicant seems to suggest.
- [8] On the face of this document I am satisfied that it appears to be a valid deed of suretyship. The identity of the principal debtor is easily ascertainable and identifiable on page 1 of this agreement.
- [9] The next determination is what capacity the Applicant signed in. Page 2 clearly illustrates that he signed in two capacities on behalf of the company, Nansu Staal, being the principal debtor and also as surety. Consequently his defence that the deed of suretyship is invalid is without merit and falls to be dismissed.
- [10] The second ground of appeal is that the respondent has approved a business rescue plan of Nansu Staal (Pty) Limited, the principal debtor and consequently the obligations of the applicant in his capacity as surety is suspended.
- [11] The applicant's assertion is incorrect. The business rescue plan establishes an agreement between the creditor and the principal debtor not to sue until the happening of a future event. There is no reference or stipulation of the obligations of the

applicant in his capacity as surety of Nansu Staal in the business rescue plan (see **New Port Finance Company (Pty) Ltd v Nedbank Ltd [2015] 2 ALL SA 1 SCA**). There is nothing that prevents the respondent from proceeding against the surety. The fact that the respondent has approved the business rescue plan does not mean the respondent has renounced its rights against the surety. The compromise arrangement by the creditors, if any, does not affect the rights of creditors against a third party.

[12] I conclude that the applicant failed to show that there is reasonable prospect of success on appeal and another court would come to a different determination. Viewed holistically there are no other reasons an appeal should be heard.

[13] In the result the appeal is dismissed with costs


J.D. VILAKAZI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG, PRETORIA

APPEARANCES:

FOR APPLICANT	:	ADV R RAUBENHEIMER
INSTRUCTED BY	:	HACK STUPPEL & ROSS
FOR RESPONDENT	:	STOOP SC
INSTRUCTED BY	:	COETZER & PARTNERS
DATE HEARD	:	20 JULY 2016