THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG **CASE NO. 1225/12**
REPUBLIC OF SOUTH AFRICA

In the matter between:

SASOL POLYMERS, a division of SASOL CHEMICAL INDUSTRIES LIMITED Applicant

and

SOUTHERN AMBITION 990 CC t/a CHOICE PLASTICS
(Registration o.2006/037/462/23) First Respondent

HEMANTH RAJKUMAR SINGH
(Identity No. Second Respondent

JUDGMENT

Delivered on 26 September 2012

CHETTY AJ

[1] In this application, the applicant has requested judgment against the first and second respondents jointly and severally for the payment of the sum of R1 033 000.51, together with costs on an attorney and client scale.

[2] The respondents have opposed the application, raising various disputes, concluding that they are not liable to the applicant as claimed and

have requested that the application be dismissed.

[3] On 24 April 2008, and within the court's jurisdiction, the applicant concluded a written agreement (the Credit Application) with the first respondent. In terms of the Credit Application, first respondent applied for a credit facility with applicant for an amount R400 000. The Credit Application was signed by the second respondent who, at the material time, was the sole member of the first respondent. The first page of the Credit Application contains the details of the first respondent and at the bottom of the page the following description of the applicant appears:

"Sasol Polymers
A division of Sasol Chemical Industries Limited Registration No.1968/013914/06"

[4] The relevant provisions of the credit application are *inter alia* the following:

(i) Unless the buyer (the first respondent) objects in writing to the balance outstanding, the statement shall be *prima facie* proof of the amount – Para 5.3.

(ii) A certificate signed by a director or manager of the applicant, or any independent third party, whose office need not be proved, shall be *prima facie* proof of both the existence of the debt as well as the amount due by the buyer – para 5.13.

iii) If the buyer defaults in the due fulfilment of any obligation, applicant shall be entitled to recover costs from the buyer on a scale as between attorney and client – para 17.1.

[5] On 6 May 2008 the second respondent bound himself as surety for and co-principal debtor in *solidum* with the first respondent in favour of the applicant. The relevant provisions of the suretyship agreement are *inter alia* the following:

(i) No variation of the suretyship agreement was permissible unless reduced to writing and signed by the parties – para 3.
(ii) A certificate of indebtedness signed by one of the applicant's directors or manager shall constitute *prima facie* proof of the indebtedness – para 7.
(iii) The total amount recoverable from the second respondent shall not exceed R400 000 plus all legal costs on an attorney and client scale – para 17.

[6] At the time of the conclusion of the credit application and the suretyship agreement, the second respondent was the sole member of the first respondent. On 2 August 2010 Balan Naidoo (Naidoo) acquired a 90% member's interest in the first respondent, with 10% being allocated to Donovan Reginald Ranjith. Naidoo deposed to the main answering affidavit disputing liability.

[7] With the commencement of trading, the first respondent purchased chemical products (goods) from the applicant and as a result thereof became indebted to the applicant in the sum claimed. Zelda Steyn (Steyn), the credit manager of the applicant deposed to the affidavits in support of applicant's claim, duly authorised thereto in terms of a written resolution of the applicant.

[8] Having alluded to the disputes raised by the respondents, I deal now briefly with the legal position concerning disputes of fact.

[9] As stated by Van Wyk J in *Stellenbosch Farmers' Winery v Stellenvale Winery*[1]*:*

"It seems to me that where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justifies such an order."

In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[2] Corbett JA stated:

"In certain instances the denial by respondent of a fact alleged by applicant may not be such as to raise a real, genuine or bona fide dispute of fact. (See in this regard Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd[3]*, Da Mata v Otto NO*[4]*) ."*

[10] In *Peterson v Cuthbert & Co Ltd*[5] it was said that a bare denial of the applicant's allegations in his or her affidavits will not in general be sufficient to generate a genuine or real dispute of fact. In *Soffiantini v Mould*[6] Price JP stated:

"It is necessary to make a robust, commonsense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung

1 1957 (4) SA 234 at 235 (CPD) para E
2 1984 (3) SA 623 A at 634 I
3 1949 (3) SA 1155 (T) at 1163-5;
4 1972 (3) SA 858 (A) at 882 D-H
5 1945 AD 420 at 428-9
6 1956 (4) SA 150 E at 154 G-H

and circumvented by the most simple and blatant stratagem."

[11] In the case of *South Coast Furnishers v Secprop Investments*[7], Gorven J stated:

"I conceive that the test to be applied as to whether a genuine factual dispute has been raised on the papers is similar in nature to that of a trial at the point where the plaintiff's case has been closed and absolution is sought before the defence is embarked upon. Here, the test is whether there is evidence upon which a reasonable presiding officer might or could find for the plaintiff. If there is, absolution should be refused. The court does not enter into an evaluation of the credibility of witnesses unless there have 'palpably broken down, and where it is clear that they have stated what is not true'. Similarly, in motion proceedings, a robust approach can be taken, and the matter decided on the probabilities, if that clear falsity emerges from the papers."

[12] I turn to deal with the disputed issues in this application.

[13] The *locus standi* of the applicant has been disputed, with Naidoo contending that the applicant is not a creditor of the respondents. It is clear from both the credit application and the suretyship agreement who the applicant is. See in this regard *Mega Flex ('n Divisie van Sentrachem Bpk) en Andere v White River Motor Trading (Edms) Bpk*[8]. The various invoices produced by applicant, the certificate of balance and the correspondences bear testimony to the contractual *nexus*. It is clear from the credit

7 2012 (3) SA 431 at 439 E-F
8 1996 (1) SA 616.

application that the applicant was granting the first respondent credit facilities and the full citation of the applicant is mentioned. Counsel for the respondents, Mr Manikam, contended in argument before me that all the invoices and credit notes simply make reference to the trading name when reference is made to "Sasol Polymers trading as Sasol Polymer Distributors (SPD)". In particular he contended that the customer statement makes no reference to the applicant and therefore this, taken in conjunction with the fact that the corporate documentation of the applicant has not been placed before the court, the applicant has not established its *locus standi.* Apart from simply denying this, the respondents have placed no other information before the court and therefore I find that this amounts to a simple bare denial and there is no merit in this contention.

[14] Steyn's authority in deposing to the affidavits has been challenged without the respondents demonstrating on what basis this is done. No authority is required to depose to an affidavit. The deponent is simply a witness in the case. In any event, the *onus* is on the respondents to challenge any authority in clear and unambiguous terms. I am satisfied that despite the criticism by the respondents of the resolution (ZS1), the fact that Steyn is the credit manager of the applicant, and the circumstances surrounding this transaction warrant the conclusion that she is properly authorised.

[15] The respondents contend that the credit application was declined and that the agreements concluded are invalid. Naidoo, who was not a member of the first respondent at the time of the conclusion of the agreements is in no position to make this contention. It would appear from Mr Manikam's argument on behalf of the respondents that the lapse of time from the

conclusion of the credit application to the time when business was apparently done, must be interpreted to mean that the application for credit was declined. I cannot agree with this submission for on 19 June 2008 the applicant forwarded a letter to the first respondent confirming that the application was granted save that the limit was restricted to R100 000. Of importance is the fact that the letter stated that the account number 14022 would appear on all invoices and statements generated by the applicant. After the credit application was approved, the credit facility was increased on two occasions, that being in November 2010 to R900 000 and finally in May 2011 to R1 million. I place no reliance on the respondents' contention regarding the lapse of time for goods were purchased by the first respondent from the applicant giving rise to their indebtedness. Both the agreements are accordingly valid and binding on the respondents.

[16] The respondents deny that the applicant sold goods to the first respondent, but at the same time allege three payments were made to the applicant. The statements produced by the applicant refer to the first respondent, and all the invoices bear testimony to the receipt of the goods by the first respondent. Counsel for the applicant, Mr Pietersen, in my view, correctly pointed out that it was open to the respondents to demonstrate their payments rather than simply making the allegations. This having specific regard to the fact that a unique account number was allocated to the first respondent. The respondents have further failed to produce proof of such payment to the applicant and this therefore does not amount to a *bona fide* dispute and is untenable.

[17] The first respondent also contends that the provisions of the National

Credit Act 34 of 2005 are applicable to this transaction and that the applicant has not complied therewith. Section 4(a)(i) excludes compliance with the Act when the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the sum of R1 million as specified in section 7(1)(a). Although the first respondent has contended that the provisions of the National Credit Act are applicable they have set out no basis on which this contention is made. I find that the applicant has made the averment that the Act does not apply and that the *onus* is on the first respondent to set out the basis on which the Act is applicable.

[18] Most, if not all, of the contentions by the first respondent appear to have no substance when one has regard to the fact that Naidoo on behalf of the first respondent signed an acknowledgment of debt in favour of the applicant on 17 August 2011. It was contended on behalf of applicant that the provision of the acknowledgment of debt on behalf of first respondent corroborates the contention by applicant that the first and second respondents are indeed indebted to the applicant. Counsel for the respondents contended that the conclusion of the acknowledgment of debt amounts to a novation and therefore applicant can place no reliance thereon. He also argued that the identity of the applicant is not correctly illustrated on the acknowledgment, and therefore no reliance could be placed on this document. It is however also instructive that in the acknowledgment of debt the first respondent undertook to pay to the applicant the amount which is the subject of this application.

[19] Assessing the disputes raised by the first respondent and having regard to the legal position it is clear to me that most, if not all, of the first respondent's denials amount to a bare denial. Subject to the fact that the second respondent's liability is restricted to the sum of R400 000, I find that the applicant has made out a case. I am of the view that there are no real, genuine or *bona fide* disputes of fact on the papers and adopting a commonsense approach there is an overwhelming probability of the first and second respondents' indebtedness to the applicant. I find that the applicant has made out a case for the relief it seeks and that there is no doubt that the first and second respondents are indebted to the applicant in respect of goods that have been purchased, pursuant to the conclusion of the agreements in 2008.

[20] In the circumstances I grant the following order:

1. Judgment is granted against the first respondent in the sum of R1 033 000.51;
2. Judgment is granted against the second respondent in the sum of R400 000.00, such judgment to be joint and several with that granted against the first respondent, the one paying the other to be absolved;
3. First and second respondents are to pay the costs of the application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

DATE OF HEARING	17 September 2012
DATE OF JUDGMENT	26 September 2012
PLAINTIFF'S COUNSEL	Mr W.J Pietersen
PLAINTIFF'S ATTORNEYS	Messina Incorporated c/o Shepstone and Wylie
DEFENDANT'S COUNSEL	Mr M. Manikam
DEFENDANT'S ATTORNEYS	Asmal & Asmal c/o Essa & Associates