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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 3999/2020p

In the matter between:

GRINDROD BANK LIMITED
(Registration Number: 1994/007994/06)

APPLICANT

And

CRAIG SUTHERLAND STEEL
(Identity Number: 720128 5240 08 8)

RESPONDENT

JUDGMENT

Delivered on. 09/07/2021

CHILI. J

[1] The applicant approached the court for entry of judgment in its favour, as against the respondent[1], in the amount of R20,000,000.00 plus interest thereon together with

[1] Mr Craig Sutherland Steel, in his personal capacity.

costs on attorney and client scale. It is common cause that the respondent is indebted to the applicant. The amount claimed had been loaned to Willmeg Investments (Pty) Limited (hereinafter "Willmeg"), a company of which the respondent is the sole director. When the loan agreement was concluded, Willmeg was represented by the respondent and the employees of Willmeg[2]. On the same day (the 23rd of August 2018), the respondent, acting in his personal capacity, concluded a guarantee with the applicant in terms of which he undertook to settle Willmeg's indebtedness to the applicant to the limited amount of R20,000,000.00[3]. In reply to the applicant's claim, the respondent lodged a counter application seeking an order for a stay of proceedings pending institution of an action for rectification of the terms of the guarantee. At the hearing of the opposed application it was agreed that the main issue for determination is the question whether disputes of fact exist that warrant referral of the matter either for the hearing of oral evidence or for trial.

[3] It is not in dispute that the respondent placed his signature on both documents relied upon by the applicant, namely, the loan agreement and the guarantee. The purported dispute is narrowed to two issues only, namely, the amount claimed and the question whether the contents of the guarantee reflect the true intention of the parties.

[4] The well-known test in relation to disputes of fact was laid down by the Appellate Division in *Plascon-Evans*[4] as follows:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which had been admitted by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may

[2] See "Term Loan Agreement," annexure FA2 at pages 22 thorough 29 of the indexed papers.
[3] See para 1 of the guarantee, annexure FA1 at pages 16 through 20 of the indexed papers.
[4] *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 at 634 H to 365.

not be such as to raise a real, genuine bona fide dispute of facts[5]. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court[6], and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks[7]. Moreover, there may be exceptions to this general rule, as, for example, where the allegations of denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

In *Whiteman*[8] the SCA remarked as follows:

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purported to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

[5] In his answer the respondent placed into dispute the amount reflected in the statement of balance presented by the applicant, without providing even a single shred

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[5] See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882 D – H.

[6] See *Petersen v Cuthbery & Co Ltd* 1945 AD 420 at 428.

[7] See *Rikhoto v East Rand Administration Board & Another* 1983 (4) SA 278 (W) at 283 E-H.

[8] *Whiteman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375 para 13.

of evidence in support of his denial. A certificate of balance presented by the applicant, reflects the amount owed by the respondent to the applicant as at 1 June 2020, to be R20,426,326.35 together with interest thereon[9]. On the 31st of March 2020, Willmeg, represented by Mr Paul Mc Cabe, forwarded an email to the applicant stating: 'with regards to the above-mentioned loan, kindly grant us relief of interest payments for the months of April 2020 to June 2020, to be capitalized with the original loan capital of R20,000,000.00'. Considering financial constraints caused by the prevailing covid-19 pandemic, the applicant allowed Willmeg's request and on the 3rd April 2020, forwarded a letter to Willmeg, amending payment terms as follows:

> "Where the bank has agreed to deferred payments under the facility, the interest and fees accrued over this period (1 April 2020 to 30 June 2020) will be capitalized on the facility. To allow for any interest capitalization resulting from this amendment, the facility limit shall be increased to R20,500,000.00. From 1 July 2020 the existing repayment terms will resume[10]."

This letter which reflects the amount owed to the applicant as at the 1st of July 2020 to be R20,500,000.00, was duly signed by the respondent on the 3rd of April 2020. It is worthy to be noted that the said letter, together with signatures thereon, comprises only two pages. For the respondent to now allege that the amount reflected in the certificate of balance is in dispute, is in my view farfetched and unworthy to be believed. I might just add that when responding specifically to an allegation pertaining to the amount contained in the certificate of balance together with the interest thereon, the respondent stated in para 67 of his answering affidavit:

> "AD PARA 28 THEREOF
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> 67. The allegations are accepted".

In light of the above, I am not persuaded that a dispute exists with regards to the amount reflected in the applicant's certificate of balance. In any event, the only sum claimed by

[9] See annexure FA9 at page 65 of the indexed papers.
[10] See para 1.5 of annexure FA4 at pages 31 and 31A.

the applicant is the amount of R20,000,000.00 as reflected in the guarantee; not the entire amount reflected in the certificate of balance.

[6] I now turn to deal with the argument that the guarantee does not reflect the true intention of the parties. The defence raised by the respondent is that he did not read the guarantee prior to placing his signature thereon. In amplification he states that had he read the guarantee, he would have either refrained from signing it or insisted on the amendments to reflect the true intention of the parties. His version is that it was agreed that the guarantee would only be applicable in the event of Willmeg being wound up. The key question is whether the allegation by the respondent, that he did not read the contents of a guarantee before placing his signature thereon, qualifies as a dispute of fact warranting referral of this application either for hearing of oral evidence or for trial. It is apposite to deal first with the events that preceded the conclusion of a guarantee.

[7] It is common cause that the conclusion of the guarantee was precipitated by discussions between representatives from both sides. The respondent himself was party to those discussions. On the day that followed the discussions (the 2nd August 2018) Mr Simon Weare (the applicant's representative) forwarded an email to the respondent and certain of Willmeg's employees, setting out the terms of lending and the proposed security described as "personal guarantee from Craig Steel (the respondent) for R20,000,000.00". The said funding proposal was accepted by the respondent himself and Mr Paul Mc Cabe. On 20 August 2018 Mr Weare and Mr Grant Gibson (representing the applicant) hand delivered a letter described as an "offer letter", containing the terms of lending and the security required (an amount of R20,000,000.00). At that meeting (of which the respondent was party) the precise terms of the guarantee were again discussed. On 22 August 2018 Mr Weare subsequently sent all the documents which required signatures, including the loan agreement and the guarantee, to the respondent and other employees of Wilmeg. When the documents were returned to the applicant, it transpired that they had not been correctly signed. On 23 August 2018 the said documents were again

forwarded to the respondent and Mr Bremner (Willmeg's employee), pointing to the errors that required rectification by the respondent. The respondent subsequently attended to the said errors and returned the correctly signed documents.

[8] No mention is made in any of the above documents, including correspondences, of the guarantee being enforceable only in the event of Willmeg being wound up. If such a conversation did occur as alleged by the respondent, the respondent would have brought that to the attention of the applicant's representative before placing his signature on the loan agreement and the guarantee. I reject the respondent's defence that he did not read the guarantee before placing his signature thereon as false. Given the circumstances surrounding the conclusion of both the loan agreement and the guarantee, coupled with the respondent's experience in businesses, his defence that he simply placed his signature on the guarantee without reading it, is so untenable that it can safely be rejected on the papers. It is raised in the tersest of terms and with no evidence, whatsoever, to support it. From the above it is clear, that when negotiating the terms of both the loan agreement and the guarantee, the respondent was in the company of Willmeg's employees. Nevertheless, he made no attempt at all, to file confirmatory affidavits of his companions.

Request for a stay of proceedings

[9] The respondent requested a stay of proceedings on the basis that he intends bringing an action for rectification. It is worth mentioning that the issue before me is not a request for rectification *per se*, but a stay pending an action for rectification. The question for determination therefore is whether there are any prospects of success in the proposed rectification action or application, that justify a stay of the present application. The five factors the applicant has to prove in a rectification application are:

(a) that an agreement *inter parties* had been reduced to writing;

(b) that the written document does not reflect the true intention of the parties – this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established;

(c) an intention by both parties to reduce the agreement to writing;

(d) a mistake in drafting the document which mistake could have been the result of an intentional act of the other party or a bona fide common error; and

(e) the actual wording of the true agreement[11]."

The respondent's case rests on the averment that the contents of the guarantee do not reflect the true intention of the parties. If it did, so the argument goes, it would contain a clause stipulating that the guarantee would only be applicable in the event of Willmeg being wound up; hence a request for the inclusion of clauses of 27 and 28 to read:

"27. The guarantee will only be applicable in the event of Willmeg being wound up.

28. The applicant will not otherwise then in the event of Willmeg being placed under winding up, be entitled to invoke a guarantee."

[10] Except for his say so, the respondent advanced no evidence whatsoever in support of an averment that it was agreed during the course of discussions, that the guarantee would only be applicable in the event of Willmeg being placed in liquidation. It was sufficiently established that the respondent was at all times in the company of Willmeg's employees when the terms of both the loan agreement and the guarantee were discussed. If there was a semblance of truth in his version he would have been expected to identify the individuals who participated in the discussions as Ms Mthethwa did, and the roles they played. A mere averment that "it was agreed that the guarantee would only come into force if Willmeg is liquidated" and without more, is nothing but a bald averment

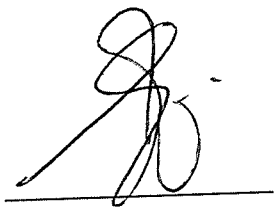
[11] See LTC Harms *Amler's Precedents of Pleadings 6 ed* (2003) p 298-299 and the cases there cited.

without supporting facts. In light of the above I am not persuaded that a case has been made out for a stay of proceedings pending institution of an action for rectification.

[11] I am satisfied that the applicant succeeded in proving its claim against the respondent and for that reason I make the following order.

Order.

1. Judgment is entered for the applicant against the respondent, in the amount of R20,000,000.00 plus interest thereon at the prime interest rate of (currently 7.25%) plus 5%, calculated daily and compounded monthly, from 1 June 2020 to date of payment, both days inclusive.
2. The respondent is to pay the costs of the application on attorney and client scale.
3. The respondent's counter application is dismissed with costs.



Chili J

Appearances

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Ref: Mr Sewgoolam/pd/S621L

Date of hearing: 02 February 2021

Date of judgment: 09 July 2021