IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 6314/19P

In the matter between:

HEI WAY SUPPLY (PTY) LTD **PLAINTIFF**

and

SIMONS, EDWIN ARNOLD PATRICK **DEFENDANT**

ORDER

Summary judgment is granted against the defendant for:

(a) Payment of the sum of R762,446.62;

(b) Payment of interest on the aforesaid amount at the prescribed rate of 10.25 percent per annum from 1 November 2017 until date of final payment; and

(c) Costs of suit.

JUDGMENT

MOSSOP AJ:

[1] This is an opposed application for summary judgement. When the matter was argued this morning, Ms Palmer appeared for the plaintiff and Mr Blomkamp SC appeared for the defendant. Both counsel are sincerely thanked for their helpful submissions.

[2] The plaintiff's action against the defendant is based on a deed of suretyship ('the suretyship'). The suretyship was attached to, and formed part of, a credit application document ('the credit application'). The credit application, which was directed to the plaintiff, was that of an entity known as Brissimons Steel Enterprises CC completed. The plaintiff alleges that this entity trades under the name of 'BS Steel'. I shall refer to this entity as 'the principal debtor.'

[3] The credit application has two parts to it, a Part A in which the particulars of the credit seeker are recorded and a Part B, which comprises a suretyship. Part A of the credit application was completed by the principal debtor and signed by the defendant. It was completed in full, save for the amount of the credit that the principal debtor required. That was left blank. Part B was also completed and bore a signature. Despite the denial recorded in the defendant's plea that he signed the suretyship, in his affidavit resisting summary judgement the defendant admits that the signature that appears on Part B of the credit application is his.

[4] Prior to any transactions occurring, and by way of a separate instrument, the plaintiff advised the principal debtor in writing that the credit facility it would provide it with was the amount of R400,000. There was no indication that the credit facility was restricted to that amount or that it could not be increased or reduced.

[5] Thereafter, the principal debtor placed orders for goods on the plaintiff, which supplied the ordered goods to the principal debtor and invoiced it. The invoices are attached to the particulars of claim. Over the period 6 April 2017 to 10 July 2017, according to the plaintiff, the principal debtor placed orders on it for the supply of goods to the value of R2,548,589.64, which orders were fulfilled. The invoices record these transactions and come to the total referred to above. Over the period 5 June 2017 to

15 August 2017, again according to the plaintiff, the principal debtor made payments to it in the total amount of R1,787,143.02, leaving a balance due to the plaintiff in the amount of R761,446.62.

[6] The amount of R761,446.62 is the amount in which the plaintiff seeks summary judgement against the defendant. The defendant disputes this amount but there is no basis suggested by him as to why the invoices and the payments made as narrated by the plaintiff are incorrect.

[7] The defendant has raised three defences to the plaintiff's claim. I shall deal with each of those defences.

[8] The first defence relates to the fact that the limit of the credit facility identified in Part A of the credit application was not completed when the suretyship was signed. The defendant appears to suggest that the suretyship fell to be amended once the limit of the credit facility was determined, but was not, and that his liability is accordingly limited to the amount of the credit facility.

[9] This is not a particularly stout defence. The wording of the suretyship permits of no equivocation: the suretyship was

'. . . for the due performance by the customer of all its obligations existing and arising in terms of this application.'

There was no need therefore to insert the credit limit. The liability of the defendant existed in respect of all the obligations flowing from the credit application, whatever the amount. That the principal debtor placed orders in an amount that exceeded the facility offered does not permit the defendant to limit his liability, as he contends, to the amount initially fixed by the plaintiff, namely R400 000. Whatever remained unpaid by the principal debtor on its account was covered by the suretyship as it had arisen from the provisions of the credit agreement.

[10] The same defence was raised in the matter of *Flotek Piping & Irrigation (Pty)*

Ltd v Grace and Another.[1] The defendant pleaded that his liability was restricted to the amount of the credit limit. The credit limit in the credit application, to which the deed of suretyship was attached, was left blank. Unlike in this matter, the credit limit was never determined. The court found that the deed of suretyship was of an unlimited nature by virtue of the following wording

'. . . for all amounts which may at any time be payable by the debtor to the creditor from any cause of action whatsoever . . .'[2]

The wording is not that dissimilar to the wording in the deed of suretyship in this matter. The court found that it was an unlimited undertaking not connected to the credit limit and the defence failed. The same must occur in this matter in respect of this defence.

[11] The second defence relates to whether part B of the credit application is, in fact, a suretyship. The defendant asserts that there has been non-compliance with the provisions of the General Law Amendment Act 50 of 1956. What that non-compliance amounts to is by no means certain. In the defendant's plea, he states that the suretyship must fail because

'[t]he written document relied upon fails to identify the principal debtor by name.'

However, in paragraph 14 of the defendant's affidavit resisting summary judgment it is clearly stated that

'. . . it cannot be a valid deed of suretyship because it does not state expressly who the creditor is.'

These are two conflicting assertions. Both will need to be considered.

[12] 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 shall affect the liability of the signer of an aval under the laws relating to negotiable instruments.

[13] The proviso to the section has no relevance in this matter.

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[1] *Flotek Piping & Irrigation (Pty) Ltd v Grace and Another* (12260/2021) [2021] ZAGPPHC 739 (3 November 2021).

[2] *Flotek Piping & Irrigation (Pty) Ltd v Grace and Another*, supra, para 12.

[14] A reading of the suretyship reveals that the obligation was incurred in respect of 'BS Steel'. In his affidavit resisting summary judgment, the defendant admits that goods were supplied by the plaintiff to Brissimons Steel Enterprises CC and that he represented the principal debtor in securing the credit facility with the plaintiff. Part A of the credit application identifies the applicant seeking credit facilities as being Brissimons Steel Enterprises CC.

[15] Dealing with the allegation that the name of the principal debtor is not specified, this allegation is incorrect. There is a name mentioned in the suretyship. The name referred to is sufficiently similar to the name mentioned in Part A of the credit application. If I am incorrect in this conclusion, then the matter of *Industrial Development Corporation of SA (Pty) Ltd v Silver*[3] is of assistance. In that matter, the issue was the same: the name of the principal debtor was omitted from the deed of suretyship. A loan agreement was attached to the particulars of claim and the principal debtor was identified in that document. The court held that the terms of a suretyship may be supplemented to identify the principal debtor by incorporation by reference. name omitted is the name of the creditor and not the name of the principal debtor.

[16] In my view, the credit application, which is comprised of Part A and Part B is a single document. The defendant himself acknowledges that Part A and Part B of the credit application must be read together and the document construed as a whole. I agree with this. If that is done, it is obvious who the principal debtor is: it is the entity seeking credit from the plaintiff, namely Brissimons Steel Enterprises CC.

[17] Considering the allegation that what is missing is the name of the creditor, it appears to me that this is what was intended to constitute non-compliance with the General Law Amendment Act. The name of the creditor is not mentioned in the suretyship. However, common sense dictates that the creditor is the entity affording credit to the principal debtor. The entire credit application, comprising Part A and Part B, is a document prepared by Hei Way Supply (Pty) Ltd, the plaintiff. This appears in

[3] [2002] 4 All SA 316 (SCA).

Part A on the face of the first page of the credit application. There can therefore be no uncertainty when reading part B as to who the creditor is.

[18] The third defence is that there has been prejudicial conduct by the plaintiff in its dealings with the principal debtor. As a consequence, so the defendant contends, he has been discharged from his obligations as a surety. This defence is a two legged defence. The first leg of the defence is the complaint that the plaintiff extended credit to the principal debtor in excess of the disclosed credit facility of R400,000. The second leg of the defence is that the plaintiff has been dilatory in pursuing payment from the principal debtor.

[19] As a general principle, the South African law of suretyship does not recognise a so-called 'prejudice principle', 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.[4]

[20] The relevant legal principle on the question whether or not a surety has been released as a result of prejudice caused by the applicant to him was formulated by Olivier JA in *Davidson*[5] as follows:

‘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.‘

[21] I turn now to consider the specifics of the two legs of the third defence. The first is that the defendant was prejudiced by credit in excess of R400,000 being granted to the principal debtor. In my view, there is no merit in this contention. A similar argument

[4] *ABSA Bank Ltd v Davidson* 2000 (1) SA 1117, para 14.
[5] *ABSA Bank Ltd v Davidson* 2000 (1) SA 1117, para 19.

was raised and rejected in *Stiff v Q Data.*[6] At paragraph 17 of the judgment, Mthiyane JA said:

'The suggestion that because credit was given in excess of R100 000, other than on a COD basis, the plaintiff was precluded from claiming the full amount, is misconceived ... The plaintiff is not compelled to grant an increase in credit by way of written consent only. If he chooses to allow the defendant to exceed the initial limit without paying cash on delivery, it is entitled to do so.'

[22] In any event, as I have already found, the liability of the defendant was an unlimited one. Moreover, the principal debtor, represented by the defendant, in writing acknowledged the debt in the exact amount claimed by the plaintiff in these summary judgment proceedings on 21 January 2018 in the following terms:

'We acknowledge our debt of R762,446.62 (seven hundred and sixty two thousand four hundred forty six rand and sixty two cents only), and hereby arrange to pay at least R20,000 (twenty thousand rands) a month starting from the month of May 2018 until the debt is settled.'

[23] The use of the words 'we'[7] and 'our'[8] may refer only to the principal debtor's admission of the quantum of the indebtedness but it could also refer to both the principal debtor and the defendant's admission of that amount. The effect is the same, however, irrespective of what the intention was. If it was intended to include both the principal debtor and the defendant then he has admitted the extent of the indebtedness. If it was only intended to refer to the principal debtor, then the defendant is still bound by the admission as in terms of the suretyship the defendant agreed that '. . . all acknowledgements and admissions by the customer shall be binding upon me/us . . .'

[24] The second leg of the defence is that the plaintiff has delayed in pursuing the principal debtor for payment. As previously stated, the invoices that were issued by the plaintiff cover the period April to July 2017. What was not disclosed by the defendant at any stage, and he must have had personal knowledge thereof, alternatively derived knowledge from his son who took over the principal debtor's

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[6] *Stiff v* Q *Data Distribution (Ply) Ltd* 2003 (2) SA 336 (SCA).

[7] 'We' is the nominative plural of 'I' and is used to denote oneself and another or others.

[8] 'Our' is a form of the possessive case of 'we' used as an attributive adjective.

business from him, was that the principal debtor went into business rescue in March 2018. That state of affairs prevailed, according to a Windeed report put up, until 20 November 2019 when those proceedings became a nullity. Section 133 of the Companies Act 71 of 2008 imposes a moratorium on legal proceedings against entities in business rescue proceedings. The plaintiff did not delay in proceeding against the principal debtor: it was precluded from doing so. Summons was issued against the defendant on 23 August 2019.

[25] Before the moratorium against the institution of legal proceedings against the principal debtor ended, the plaintiff commenced proceedings against the defendant. The claim against the principal debtor has not prescribed and there is no evidence that the plaintiff has breached any of the terms of the credit application or the terms of the suretyship.

[26] The defendant agreed to stand as surety and co-principal debtor. He signed the suretyship and Part A of the credit application. Having agreed to the terms in that document, it does not lie in the defendant's mouth to plead prejudice in respect of something that the plaintiff could legally do.

[24] I am accordingly unable to find any vestiges of prejudice in the defendant's version that constitute real and substantial prejudice which has the effect of unduly increasing his contractual burden.

[27] In the circumstances, I am satisfied that the defendant has not established that he has a bona fide defence to the plaintiff's action and summary judgment must consequently follow.

[28] I accordingly grant summary judgment against the defendant for:

(a) Payment of the sum of R762,446.62;

(b) Interest on the aforesaid amount at the prescribed rate of 10.25 percent per annum from 1 November 2017 until date of final payment; and

(c) Costs of suit.

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MOSSOP AJ

APPEARANCES

Counsel for the applicant	:	Ms T. Palmer Instructed by: Allan Levin and Associates Care of Viv Greene Attorneys 132 Roberts Road Pietermaritzburg
Counsel for the respondent	:	Mr P. J. Blomkamp SC Instructed by: WHA Compton Attorneys 176 Boom Street Pietermaritzburg
Date of Hearing	:	16 November 2021
Date of Judgment	:	16 November 2021