THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 2263/2007

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

BEULAH EVELYN BONUGLI First Defendant

CHRISTOPHER STEPHEN BONUGLI N.O. Second Defendant

JUDGMENT : 10 JANUARY 2011

VELDHUIZEN J:

[1] On 22 April 1998 the plaintiff concluded a written instalment sale agreement with the Union Charter Trust ("UCT"), a trust formed to purchase and charter aircraft, in terms of which it sold a Pilatus aircraft to UCT. The agreement was signed by the first defendant on behalf of UCT and me Gwynneth Leukis signed on behalf of the plaintiff. It is common cause that UCT fulfilled its obligations in terms of this agreement with the result that this

agreement is no longer contentious. At the time when entering into this agreement, however, the Rivonia Close Trust ("RCT"), a trust established in terms of section 6 of the trust Property Act, No 57 of 1988, and the first defendant also entered into a written agreement, headed 'General Guarantee', with the plaintiff. In terms of this agreement RCT and the first defendant is, jointly and severally, bound to the plaintiff as sureties for and co-principal debtors of UCT (described in the agreement as the Debtor) for:

> '. . . for the due and faithful payment by the Debtor to you of all such sum or sums of money as now are and as may hereafter become due, owing or payable to you by the Debtor in respect of any obligation, present or future, by the Debtor in favour of you, arising out of or in relation to any cause of indebtedness whatsoever . . . and whether such indebtedness arises from money already advanced or hereafter to be advanced . . . '

[2] On 3 March 1999 and at Johannesburg the plaintiff and UCT concluded three written leases in terms of which the plaintiff leased to UCT three Pilatus PC12 aircraft with serial numbers 242, 245 and 202 respectively. On 7 December 1999 also at Johannesburg the plaintiff and UCT concluded a further written lease agreement. In terms of this agreement the plaintiff leased to UCT a Pilatus PC12 aircraft with serial number 252. The plaintiff alleges that UCT breached these agreements by failing to make timeous payments of the amounts due. UCT was in fact sequestrated on 6 November 2006.

[3] The plaintiff, relying on the above suretyship, now sues the first defendant in her personal capacity and the first and second defendants as representatives of RCT for the performance of UCT's obligations in terms of the four leases. Initially the plaintiff claimed payment of the sum of R16 958 968. This was later amended and during the trial the parties reached an agreement regarding the amount of the plaintiff's claim. I will later refer to this agreement.

Jurisdiction

[4] In a special plea the defendants raised the question of jurisdiction and this is the first issue with which I have to deal. It is common cause that the whole of the cause of action on which the plaintiff relies arose outside this court's area of jurisdiction.

[5] It is trite law that a trust, like a partnership and unlike a company, is not a separate legal entity. To proceed against a trust a party must proceed against the trust's trustees in their representative capacity. Jurisdiction is determined at the time when the action is instituted. *Pollak on* Jurisdiction, 2nd ed states on p12 'The time at which jurisdiction must exist is the time of the commencement of the action.' See also: *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969(2) SA 295(A)

at 301. An action is, of course commenced or instituted, when the summons is issued and served.

[6] It is clear that a court can only exercise jurisdiction if it has the power not only to take 'cognisance of the suit, but also of giving effect to its judgment.'[1] The requirement of effectiveness was also stressed in *Veneta Mineraria SPA v Carolina Collieries(Pty) Limited (In Liquidation)* 1987(4) SA 883(A) at 893E – F and was fully discussed in *Thermo Radiant Oven Sales(Pty) Limited v Nelspruit Bakeries (Pty) Ltd* 1969(2) SA 295(A). In *Veneta* Viljoen JA referred with approval to *Einwald v The German West African Company* 5 SC 86 where De Villiers CJ held that jurisdiction in respect of a contract can be exercised on three grounds:

> 'viz by virtue of the defendants' domicile being here, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject-matter in an action in rem being situated in this Colony.'

The learned judge went on to state later in the *Veneta* judgment:

> 'A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment. (See Steytler NO v Fitzgerald 1911 AD 295 346/7). By virtue of the provisions of s 28(1) of the Act (and, of course, its predecessor, s 5 of Act 27 of 1912, which was worded very similarly) the procedural impediment in so far as effectiveness in respect of any person resident in the Republic is concerned has been eliminated <u>but it still has to be established in every case that, in</u>

[1] Steytler NO v Fitzgerald 1911 AD 295 at 346

terms of s 19(1) of the Act, a court has the power of taking cognisance of the suit.' (Own underlining).

In *Estate Agents Board v Lek* 1979 (3) SA 1048(AD) it was also state by Trollip JA at 1069F 'any process, judgment, or order of the Court *a quo* would run throughout the Republic and, if necessary, could be served and have legal effect on the Board in Johannesburg under s 26(1) of the SC Act of 1959,. . .'

[7] It is common cause or at least not disputed that at the time when this action commenced the first defendant had her residence at 1 Victoria Road, Clifton within this court's area of jurisdiction. I pause to mention that the plaintiff submitted that 'The registered address of RCT in terms of the provisions of section 5 of the Act (ie the Trust Property Control Act 57 of 1988) is Victoria Road, Clifton, Cape Town.' It is, however, clear that the section refers to the address for service of notices and process upon a trustee and not the trust. The second defendant, at the relevant time, resided in Sydney, Australia. This judgment, therefore, need not decide whether the first defendant's residence constitutes 'residing' within the meaning of s19(1)(a) of the Supreme Court Act 59 of 1959 ('the Act') as discussed in *Mayne v Main* 2001 (2) SA 1239 (SCA). The issue is rather whether the second defendant's absence of residence within this court's jurisdiction non suits the plaintiff.

[8] Reference to the requirements for actions against partnerships is insightful. *Pollak* states on p 67:

> 'Under the common law, in an action against a partnership it is usually necessary that all the partners be joined in the proceedings but if some partners are outside the Republic it has been held that they need not be joined.'

And on p 69:

> 'The procedural right to sue a partnership in its own name does not make the partnership a legal persona. Rule 14 of the Uniform Rules of Court deals with the method of citation and service and does not purport to alter the terms of the common law according to which the proceedings against a partnership are proceedings against the individual partners thereof. It would therefore seem to follow that despite the provisions of rule 14(2) a court cannot exercise jurisdiction against a partner unless, as an individual, he is subject to the jurisdiction of the court.'

I do not perceive there to be any reason why in this regard the requirements for jurisdiction in an action against a trust should be any different from an action against a partnership. There is, of course, fundamental differences between a trust and a partnership. The most important, for purposes of this judgment, is the fact that partnership assets are owned by the partners whilst trust assets must be kept strictly separate from the assets of the trustees. A judgment against a trust can only be executed against trust assets but one against a partnership can be executed

against the partners if the partnership assets are insufficient to satisfy the judgment.

[9] In the *Estate Agents Board v Lek* case Trollip JA stated on p 1067E:

> 'In the present context of our unitary judicial system of having one Supreme Court with different Divisions, as set out earlier in this judgment, convenience and common sense, are, *inter alia*, valid considerations in determining whether a particular Division has jurisdiction to hear and determine the particular cause.'

It is important to realize that the above passage does not hold that a court can solely on the ground of convenience and common sense exercise jurisdiction to hear a matter. With regard to the above quoted passage *Pollak* writes on pp 24 and 25:

> 'Despite the emphasis on convenience, it is submitted that the court did not hold that convenience is per se a ground for jurisdiction; it is a proper consideration in determining whether a court has jurisdiction.'

And

> 'Convenience is a factor to be weighed, with other factors, and is not a connecting factor which will actually establish jurisdiction.'

I agree with these statements.

[10] The following facts and circumstances are, in my opinion, pertinent:

(a) In terms of s 19(1)(a) of the Act this court has jurisdiction over the first defendant in her personal capacity as well as in her representative capacity.

(b) The second defendant is not resident in the Republic.

(c) All the defendants entered an appearance to defend and this court's judgment will, therefore, bind them.

(d) Any warrant for execution issued pursuant to this court's judgment will be valid throughout the Republic.

(e) The first defendant was the driving force behind the RCT.

(f) None of the defendant's will suffer any inconvenience or prejudice if this court was to adjudicate the issues.

(g) Every consideration of convenience and common sense require that this court should adjudicate the issues between the plaintiff and all the defendants.

[11] In the circumstances the second defendant's special plea to jurisdiction falls to be dismissed.

The suretyship agreement

[12] The defendants, having admitted that the first defendant signed the suretyship agreement, pleaded the defence of

rectification and, in the alternative, lack of authority. Their plea reads:

"10.1 The defendants admit that the first defendant signed the original of annexure "PC9" ("the suretyship") in her personal capacity and in a representative capacity.

10.2 The defendants deny that, consequent upon the first defendant signing the suretyship, the defendants bound themselves as sureties and co-principal debtors *in solidum* with UCT for the due and faithful payment by UCT to the plaintiff of all sums of money then owing or which may thereafter become owing by UCT to the plaintiff in relation to any cause of indebtedness whatsoever.

10.3 In amplification of the aforesaid denial, and without limiting the generality thereof, the defendants aver that:

10.3.1 The suretyship does not reflect the common intention of the plaintiff and the defendants correctly in that it purports to be a "General Guarantee" in terms whereof the defendants bound themselves as sureties and co-principal debtors with UCT for all sums of money then owing or which would thereafter become owing by UCT to the plaintiff in relation to any cause of indebtedness whatsoever.

10.3.2 Prior to, and as at 22 April 1998, the common intention of the plaintiff and the defendants was that the suretyship which the defendants would sign would be

limited to and only secure UCT's obligations in terms of an instalment sale agreement which UCT was going to conclude and did conclude with the plaintiff on 22 April 1998 in respect of an aircraft with registration number BEB ("the BEB agreement"). A copy of the BEB agreement is annexed, marked "DP1".

10.3.3. The provisions in clause 2 of the suretyship which provide that the defendants bind themselves as sureties for the payment of all monies "as now are and as may hereinafter become due owing or payable to you by the debtor in respect of any obligation, present of future, by the debtor in favour of you, and arising out of or in relation to any cause of indebtedness whatsoever" and the recitals thereafter in clause 2 of the suretyship were occasioned by a common error of the plaintiff and the defendants and the suretyship was signed by the first defendant in the bona fide but mistaken belief that it recorded the true agreement between the parties, viz, that the defendants bound themselves as sureties in respect of UCT's indebtedness to the plaintiff arising from the BEB agreement.

10.3.4 The defendants accordingly aver that the suretyship falls to be rectified by the deletion of the words which appear after the phrase "in respect of" in the seventh line of clause 2 thereof and the replacement thereof with the words "the Instalment Sale Agreement concluded by you

and the Debtor in respect of a Pilatus PC-12/45 concluded on 22/04/1998 with agreement no: 28936728/0001".

11.2.4 In addition, the defendants, in their representative capacity, aver that the first defendant was only authorised to conclude a limited suretyship, as pleaded in paragraph 10 above. In the event that it may be held that the suretyship is not so limited but is an unlimited suretyship, as alleged by the plaintiff, the defendants, in their representative capacity, aver that the first defendant was not authorised to conclude such a suretyship and the defendants, in their representative capacity, are not bound by the terms thereof."

[13] I deal with the alternative defence first. Much was made of the trustees' resolution of 20 April 1998. It reads:

'Meeting of the trustees of Rivionia Close Trust on 20 April 1998 at 322 Rivonia Boulevard, Rivonia, Sandton resolved that:

Rivonia Close Trust be bound as guarantor for the obligations of the Union Charter Trust resulting from a finance agreement with Stannic to finance the purchase of a Pilatus PC-12 aircraft. BE Bonugli in her capacity as trustee be authorised to sign, endorse and execute all documentation to give effect to the above.'

This resolution makes reference to one aircraft namely 'a Pilatus PC-12' and also refers to an agreement of purchase. It was submitted that this is a clear indication that RCT's trustees did not authorise any other transactions and that the first defendant did not have the authority to bind RCT outside of the resolution.

[14] The test whether the first defendant had the necessary authority to bind RCT is an objective one. Section 2.3 of RCT's trust deed reads:

> 'Subject to the provisions of Clause 7.1 all matters to be decided in terms of this deed of trust shall be by the Donor BEULAH EVELYN BONUGLI, according to her sole and absolute discretion. In the event of her death, decisions shall be made by the remaining trustees by majority decision.'

This section of the trust deed makes it clear that nothing turns on the wording of the above resolution. The first defendant was, in my view, at all times authorised to bind RCT without the co-operation of the other trustee(s).

[15] I now treat the main defence, namely that of rectification. It is settled law that the party relying on rectification bears the onus of proving it. Farlam AJA (as he then was) stated in *Tesven CC and Another v South African Bank of* Athens 2000 1 SA 268 SCA at 274I-J:

'To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed and so overthrow the basis on which contracts rest in our law ....'

Having admitted signing the suretyship agreement, the defendants, to be successful, must also prove:

(a) That the contract, because of a common error in good faith, does not reflect the true intention of the parties; and

(b) What the real intention of the parties was at the time of signing the contract.

[16] The defendants' main defence requires me to inquire into the subjective intention of the parties at the time they entered into the suretyship agreement. This, of necessity, involves an evaluation of the evidence. In *SFW Group Ltd & Another v Martel et cie & Others* 2003 1 SA 11 SCA it was stated at 14I-15E:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was leaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his

version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it.'

[17] The first defendant's evidence, even allowing for the long lapse in time from the signing of the suretyship agreement to the time she was asked to recall the events, can be described in one word: bad. She was verbose, evasive and argumentative. It is also clear that the first defendant was not averse to fabricating evidence. I have already referred to RCT's resolution of 20 April 1998. When the first defendant faced the summary judgment application she attached a resolution of 22 April 1998 in support of her opposition to the application. In her affidavit she stated 'It will be noted that this resolution refers to a guarantee solely in respect of UCT's obligations in terms of the BEB agreement.' The first defendant admitted that this resolution was back dated. Of even greater significance is the fact that this resolution was signed by ms Cynthia Greaves as one of the trustees. Ms Greaves was, however, not a trustee as at

22 April 1998. This resolution must have been manufactured much later and it is clear it was done for a dishonest purpose. Also in her affidavit opposing summary judgment the first defendant testified that she had torn up the original guarantee. Her affidavit reads:

> 'Once the debt in terms of the BEB agreement had been discharged, UCT and I were released from any obligations under the guarantee, and the original guarantee was returned to me by the Plaintiff. As the guarantee has been terminated, and it was no longer of any force or effect, I tore it up at the time.'

The first defendant clearly intended to convey that she was no longer in possession of the guarantee. But, as it turned out, she did have the guarantee in her possession. It was torn into four pieces, but perfectly legible. The first defendant's evidence of how the guarantee came to be torn is highly suspect and unbelievable.

[18] Although the defence that the trust had been released from the guarantee by one Costa Diamantacos was abandoned it is significant that the first defendant admitted that she knew all along that he did not have the authority to release the trust of its obligations.

[19] It is clear to me that the first defendant, although not legally trained, was a skilled business woman. This was not the first time that she had signed a guarantee on behalf of RCT and she had experience of signing unlimited guarantees. She admitted that she knew the implications of such an agreement. Although the resolution of 20 April 1998 makes mention of one aircraft the evidence clearly shows that the first defendant, whether through UCT or some other entity, intended acquiring more aircraft for charter purposes. She mentioned to ms G Leukis, the plaintiff's representative, that there was potential of R47 million of aircraft financing to be done.

[20] The first defendant testified that the plaintiff was prepared to grant the finance for the further transactions on the strength of what was referred to as the 'Pilatus underpin.' This was an agreement between the supplier and UCT to the effect that they would make up any shortfall in charter income to cover the monthly payments due on the finance agreements. In my view it is highly unlikely that the plaintiff would have advance such sums of money solely on the strength of this agreement.

[21] All in all I am not satisfied that the first defendant's evidence is preferable to that of ms G Leukis who testified that she had spent some time with the first defendant going through the

suretyship agreement and that she fully understood that she was signing an unlimited guarantee.

Damages

[22] The plaintiff, in terms of its amended particulars of claim, claims an amount of R16 958 969. In order to prove its claim the plaintiff tendered the certificates of a manager of the plaintiff, one Callinicos, in terms of section 14 of the deed of suretyship which reads:

> 'A certificate signed by any of your managers, whose appointment need not be proved, as to the amount owing to you by the Debtor and/or me/us at any time, the fact that such amount is due and payable, the rate of interest payable thereon and the date from which such interest is reckoned shall be binding on me/us and shall be prima facie proof of the facts stated therein.'

[23] In terms of the parties' agreement regarding quantum I have to decide whether:

(a) the defendants are liable: for interest from 6 November 2006 (the date of UCT sequestration) to 1 March 2007 (the date on which the plaintiff instituted its action);

(b) UCT was liable for 'aircraft repair charges'; and

(c) UCT was liable for 'other charges' levied under the fourth lease agreement.

[24] In *Barclays National Bank Ltd v Von Varendorff and Others* 1985 2 SA 544 D&CLD Booysen J stated at 549B-D:

> 'It is clear that our law distinguishes between defences *in rem* and defences *in personam* and that the former and not the latter are available to a surety. (*Ideal Finance Corporation v Coetzer* 1970 3 SA 1 A at 8 and 9; *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another* 1984 2 SA 693 C at 695E-G.)

It is equally clear that insolvency and liquidation are defences *in personam* (*Proksch v Die Meester en Andere* 1969 4 SA 567; *Jayber (Pty) Ltd v Miller and Others* 1981 2 SA 403 W.)

In my view the fact that UCT was sequestrated does, accordingly, not relieve the defendants of their obligation to pay interest.

[25] It is common cause that the 'aircraft repair charges' and 'other charges' were paid and levied by the plaintiff under the fourth lease agreement. The defendants bore the evidentiary onus of rebutting the prima facie proof that the amount stated in Callinicos' certificate is due and payable. This they failed to do. I, therefore, conclude that the defendants are liable to pay these charges to the plaintiff.

CONCLUSION

[26] In the result judgment is given in favour of the plaintiff against the first defendant in her personal capacity and against the first and second defendants in their representative capacities, jointly and severally for:

(a) payment of the sum of R16 958 969;

(b) interest on the sum of R16 958 969 *a tempore morae*; and

(c) costs, which costs shall include the costs for the employment of two counsel.

A.H. VELDHUIZEN, J
JUDGE OF THE HIGH COURT