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

Reportable
CASE NO: 11435/2012

In the matter between:

FIRSTRAND BANK LIMITED	Applicant
And	
JOHANNES BENJAMIN VAN DER WESTHUIZEN	First Respondent
JEREMIA JESAJA BOSHOFF	Second Respondent
KHAMA INVESTMENTS (PTY) LIMITED	Third Respondent
KURIAKOS DESIGN AND MANAGEMENT (PTY) LTD	Fourth Respondent

CORAM	:	**D M DAVIS J**
JUDGMENT BY	:	**D M DAVIS J**
FOR THE APPLICANT	:	**ADV G WOODLAND SC**
INSTRUCTED BY	:	**EDWARD NATHAN SONNENBERGS**
FOR THE RESPONDENTS	:	**ADV F JOUBERT SC, ADV M GARCES**
INSTRUCTED BY	:	**DAVIDSON ENGLAND ATTORNEYS**
DATE OF HEARINGS	:	**05 SEPTEMBER 2012**
DATE OF JUDGMENT	:	**08 OCTOBER 2012**

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

CASE NO: 11432/2011

In the matter between:

FIRSTRAND BANK LIMITED	Applicant
And	
JOHANNES BENJAMIN VAN DER WESTHUIZEN	First Respondent
JEREMIA JESAJA BOSHOFF	Second Respondent
KHAMA INVESTMENTS (PTY) LIMITED	Third Respondent
KURIAKOS DESIGN AND MANAGEMENT (PTY) LTD	Fourth Respondent

JUDGMENT: 08 October 2012

DAVIS J

Introduction

[1] The applicant a financial institution through a division thereof, Rand Merchant Bank, lent and advanced the sum of R 832 639 979 to a company called Monteriva Investments 17 (Pty) Ltd ('Monteriva'). The purpose of the loan was to fund a large housing and commercial development near George known as Destiny Africa. It appears that the property, on which this development was to take place, is bare land and is completely underdeveloped. The applicants claim against Monteriva was secured by a mortgage bond.

[2] Monteriva was obliged to repay the loan amount by no later than 31 August 2010. It failed to so pay and a winding up application was launched against it on 13 May 2011. Monteriva has now been liquidated on the basis that it is unable to pay its debts and hence its affairs have been wound up. A provisional order was granted on 6 September 2011 and a final order on 9 November 2011. The applicant lodged a claim against Monteriva in the amount of R 83 146 246, 45 which has been duly admitted to proof. No dividend has been paid to the applicant. According to the joint provisional liquidators, Monteriva is 'hopelessly insolvent' and there is no prospect of it being rescued.

[3] The claim against the respondents is in respect of the surety obligations towards the applicant on behalf of Monteriva. According to the applicant, between 1 April 2011 and 7 April 2011 attorneys for applicant made due demand on respondent's sureties for the requisite payment. Notwithstanding their demands, the sureties failed to pay. The present action follows from this refusal. Given the nature of the dispute between first respondent and applicant (it having been established at the hearing that there was no appearance from second respondent and, further, third respondent is in the process of being liquidated), it is necessary to sketch the background facts to the principal debt.

The principal debt

[4] On 11 April 2006 applicant and Monteriva concluded a loan agreement for the sum of R 40 million. The loan had to be repaid within twelve months but was apparently extended by agreement.

[5] On 30 September 2009, applicant and Monteriva concluded a loan facility agreement which replaced the 2006 agreement. This loan facility amount was not to exceed R 80 million and had to be repaid by 31 August 2010. It was in respect of this loan obligation that the suretyships, to which I have made reference, and which are critical to this dispute, were concluded.

[6] On 27 September 2010, an addendum to the 2009 loan facility agreement was concluded. In terms of this addendum the loan was stipulated to be repayable on 31 August 2010. It appeared from first respondent's answering affidavit that he had signed a 'new deed of suretyship' on 27 September 2010, that is on the same day as that upon which the addendum was concluded.

[7] On 3 December 2010 applicant addressed a letter to Monteriva in which it noted that the loan term had expired on 31 August 2010. It offered to extend the facility subject to certain conditions which proved to be unacceptable to Monteriva.

[8] Notwithstanding the second suretyship agreement, it was common case that on 30 September 2009 the suretyship agreement was concluded. From Clause 1.2.7 of that agreement which constitutes a definition of loan agreement, it is clear that the suretyship agreement was concluded in contemplation of the loan facility agreement which was concluded on 30 September 2009 for an amount not exceeding R 80 million.

First respondent's defence

[9] First respondent's defence is based upon the second suretyship which was concluded on 27 September 2010. Its significance needs to be examined within the context of the addendum. Although the applicant claimed that it could not locate a signed copy of the addendum, its terms were accepted by the parties and implemented. This was confirmed in the founding affidavit deposed to by Mr Du Preez on behalf of applicant. It appears that this agreement was signed by first applicant as chairman of Monteriva. In terms of the addendum, a new clause 1.2.61 A was inserted into the 2009 agreement and it read thus:

> "*'van der Westhuizen Limited Suretyship' means the suretyship agreement entered into or to be entered into between van der Westhuizen and the Lender, in terms of which van der Westhuizen binds himself as surety and co-principle debtor in solidum with the Borrower (subject to a limit of R10,000,000.00 (ten million rand) exclusive of interest and costs)- for the due, proper and punctual performance by the Borrower of its obligations to the Lender under and in terms of this Agreement, all on the terms and conditions contained therein*".

[10] As noted in the addendum, a second suretyship was concluded on 27 September 2010. The only copy made available to the court was provided by first respondent. This version of the agreement was only signed by first respondent. In this case, there has been no acknowledgement by the applicant that it signed this suretyship agreement. In terms of this second agreement, the first respondent bound himself to a suretyship to be limited in the amount of R 10 million. By contrast, in terms of Clause 4 of the first suretyship agreement, the first respondent had agreed to a suretyship to a maximum of R 19.2 million. First respondent contends that it is clear from the wording of the second suretyship agreement, in particular paragraph 24.1.2 thereof, that this agreement cancelled the first suretyship agreement. By virtue of the applicant having chosen not to rely on the second suretyship agreement for the purposes of the present dispute, respondent contends that this application, based as it is on the first suretyship agreement stands to be dismissed.

The issues

[11] Mr Woodland, who appeared on behalf of the applicant, correctly characterised the dispute between applicant and first respondent thus:

1. In terms of clause 22.2 of the first suretyship agreement, a standard provision was included, namely that "no addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the parties." In Mr Woodland's view therefore, the question arose as to whether the first suretyship had been

cancelled by way of an agreement signed in writing by both parties, including the applicant.

2. On the basis that there had been a variation of the first suretyship agreement in writing, the question arose as to the meaning of the second suretyship agreement and, in particular, whether it replaced the first suretyship agreement or whether it needed to be read together with its predecessor, in effect increasing the liability of first respondent's surety obligations to R 29 million.

[12] Mr Joubert, who appeared together with Mr Garces on behalf of first respondent, noted that the first time that the applicant had raised the issue of the second suretyship was in its replying affidavit after the first respondent had averred in its answering affidavit that his suretyship liability was limited to R10 million. At no point in the papers, had the applicant claimed that the second suretyship not been signed by the applicant, even in its replying affidavit. In the reply to first respondent's averment that the second suretyship had limited its liability to R 10 million, first respondent noted that second suretyship provided that it was in addition to any other suretyships which had been concluded and further that "*this means that the first respondent is in fact indebted to the Applicant in an additional amount of R 10 million (over and above the amount of R 19,200,000 claimed.*"

[13] Mr Joubert submitted that it had been the applicant which had prepared the second suretyship agreement and, further, that in terms of Clause 22 of the addendum, to which reference has already been made, the probabilities were that both agreements was signed at the same time as they had formed part of the same contractual scheme. To the extent that the applicant averred that the two agreements had to be read together, he questioned as to why the applicant had not proceeded against first respondent in the amount of R 29 million, that is the R 19 million guaranteed in terms of the first suretyship agreement together with R10 million in terms of the second such agreement. Furthermore, there was never a suggestion that the second agreement was in any way invalid, a point that could arguably have been taken by the applicant in its replying affidavit but which was not. Relying on the General Law Amendment Act of 1956, Mr Joubert noted that the contract of a suretyship was valid once it had been entered into in writing and had been signed by or on behalf of the surety.

[14] This dispute turned, not on whether the second suretyship was valid, but rather whether it had been signed by applicant so that the variation, or, in this case, cancellation of the first suretyship had been affected '*in writing and signed by the parties*'. In my view, given that it is admitted by the applicant that the addendum agreement was signed, it is likely that the second suretyship, which formed an integral part of this suit of agreements would also have been so signed by the applicant, notwithstanding that the only copy which was provided to the court was only signed by first respondent. The point about signature has never been taken by applicant. In its reply Mr Du Preez states:

"I deny that Clause 24.1.2 of J1.2 limits the first respondent's liability to R10 million. If one has regard to Clause 9 it states that the suretyship attached as J1.2 is in addition to and without prejudice to any other suretyship and securities granted.

This means that the first respondent is in fact indebted to the applicant in an additional amount of R10 million (over and above the amount of R19, 200, 000 claimed)."

It could be argued that his only intention in this passage was to a point to the validity of the second suretyship by relying upon Clause 9 thereof. Having been so specific about Clause 9, it is surprising that he did not refer to Clause 22.2 of the first suretyship to contend that no cancellation could ever have taken place as applicant had not signed the document. Further, it was the applicant who prepared this agreement. In my view, I consider that, on the probabilities, there has been compliance with the provision of Clause 22.2 to the first suretyship agreement. Much was made by Mr Woodland of the fact that the second suretyship was not signed by applicant. In his view, it followed that the absence of a signature by a duly appointed representative of applicant would trigger the application of the anti-variation, Clause 22. See **SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en Andere** 1964 (4) SA 760 (A). Thus, the second suretyship had not varied or extinguished the binding effect of the first suretyship agreement.

[15] It is significant that neither the addendum attached to papers nor the connected suretyship agreement was signed by the applicant. The applicant however claims that an original of the addendum cannot be located but confirms it was so signed. As the two agreements were part of one contractual structure and prepared by applicant, absent some evidence and the agreed confirmation of the lost file, it can be assumed, on the probabilities that the second suretyship was also so signed. Indeed, in his further affidavit , Mr Du Preez refers to the second suretyship as being in addition to the first suretyship, which appears to constitute a further recognition of the inapplicability of Clause 22 to the present dispute.

[16] I therefore turn to the second argument, namely the relationship between the first and second suretyship agreements.

The first and second suretyship agreements

[17] There are two clauses which were the subject of dispute. Clause 9 of the second suretyship agreement reads thus:

> "***9. Continuing Covering Security***
>
> *The Surety agrees and declares that the suretyship herein granted is to be in addition to and without prejudice to any other suretyship/s and security/ies now held or hereafter to be held by the Lender, and that it shall remain in force as a continuing covering security for the past, present and future obligations of the Principle Debtor in terms*

of the Secured Obligations notwithstanding any partial or intermediate settlement of the Principle Debtor's indebtedness."

Clause 24.1.2 of the same agreement reads as follows:

"*This Agreement supersedes and replaces any and all agreements between the parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof.*"

[18] Mr Joubert submitted that it was clear from the express wording of Clause 24.1.2 of this agreement that it cancelled the first agreement and thus complied fully with the provisions of Clause 22.2 of the first agreement. In his view, to the extent that the applicant could rely on the provisions of Clause 9 of the second suretyship agreement the *contra proferentem* rule stood to be applied against the applicant. In this connection he relied on the decision in **Patel v Patel and another** 1968 (4) SA 51 (D) at 56 B:

"*If there is ambiguity and interpretation leaves it in doubt whether the surety's obligation extends as far as the creditor would have it, it is the creditor's fault that he has not made express provision for this in the contract, to which (in the absence of admissible extrinsic evidence) must be applied the maxim* <u>*verba contra stipulatorem interpretanda sunt*</u>."

[19] Unsurprisingly Mr Woodland relied heavily on Clause 9 of the second suretyship agreement which, in his view, made it clear that first respondent had bound himself as surety over and above the obligations which were created by the first suretyship agreement. This clause was couched in express terms:

> "*The surety agrees and declares as the suretyship herein granted is to be in addition to and without prejudice to any other suretyship/s and security/ies. now held and hereafter to be held by the Lender.*"

[20] Mr Woodland contended that the meaning of this particular clause was clear from a reading of the addendum. A further suretyship was required by the applicant in connection with the conclusion of the addendum to the loan agreement. In terms of clause 5.1.5 of the addendum, first respondent was required to execute a suretyship subject to the limit of R 10 million. The clear intention was therefore to provide the applicant with an additional suretyship in return for its consent to the agreement encapsulated in the 2010 addendum."
In Mr Woodland's view, it was simply unthinkable that the applicant would have agreed to reduce its suretyship against the first respondent when 'the writing was already on the wall' for Monteriva, the principal debtor.

[21] Mr Woodland also referred to an explanation provided by first respondent in a further affidavit as to why applicant would have taken a highly unusual step of reducing its protection by agreeing to a suretyship in the amount of R 10 million as opposed to R 19 million. First respondent avers that a fellow shareholder in Monteriva, being fourth respondent, had transferred 10% of its shares to the

applicant for the sum of R 50 million which shares had been retained by applicant if fourth respondent had not repaid the amount of R 22 million on or before 29 November 2010. When negotiations began in September 2010 to extend the loan agreement, applicant insisted that fourth respondent waive its rights to exercise its option to reacquire the 10%. By contrast, applicants insisted on retaining the 10% shareholding on Monteriva and '*forego payment to R 22 million*' by the respondent. First respondent then stated in his affidavit:

> "*Since the repayment date had already passed (namely the 31st of August 2010) when negotiations to extend it commenced and the Applicant was desperate to obtain a variation to the Agreement together with an undertaking that the 10% (ten percent) shareholding of KDMC be retained by it, it offered certain inducements to the parties in order to conclude the agreement. One of the inducements was given to me in terms whereof the suretyship held by them would be reduced in value and limited to an amount of R10 000 000.00 (Ten Million Rand). This was communicated to me verbally and was my understanding of the agreement.*"

[22] Mr Woodland submitted that an explanation which amounted to a version that applicant sought to hold on to a 10% share in Monteriva at a time when this company was in serious financial difficulty and therefore, in effect, had waived its rights to R 22 million but somehow further agreed to a reduction in the suretyship of first respondent made absolutely no commercial sense and should be rejected as completely untenable.

[23] Furthermore, Mr Woodland submitted that the purpose of Clause 9 of the second suretyship agreement was absolutely clear. When first respondent signed its agreement, he must have known that the suretyship which he now granted was *'in addition to and without prejudice to any other suretyships... now held or hereafter to be held by the lender'*. In this connection, Mr Woodland referred to the judgment of Scott JA in **HNR Properties CC and another v Standard Bank of SA Limited** 2004 (4) SA 471 (SCA), in support for his argument that a commercial approach should be taken to resolving the difficulty.

[24] In that case, a bank had instituted an action against two sureties. They had bound themselves in two separate deeds of suretyship to the bank for the due and proper payment of a principal debt. The liability of the first surety was limited to a maximum of R 1 million while that of the second surety was unlimited. The two deeds of suretyship were otherwise couched in identical terms. Clause 15 of both agreements provided '*the surety shall not be released from any liability of the surety hereunder or from any of the debtors obligations unless such release be in writing, signed on behalf of the bank by a duly authorised signatory.*' The sureties defence was that they were released by the bank from their obligations in terms of their respective suretyship agreements. In this connection, they referred to a letter signed on behalf of the bank which was described as '*a facilities letter*' and which constituted in their view a written release from the sureties within the meaning of Clause 15. In approaching this argument, Scott JA held that:

"*Being a provision in a suretyship agreement (Clause 15) must be construed restrictively and in favour of the suretyship. But that does not mean that it must be construed in a manner other than sensibly. If the language is clear effect must be given to it.*" para 14

[25] The question in this case is what constitutes a sensible approach to the clauses prepared by applicant. I must also take account of Scott JA's observation said in **HNR Properties,**

"*Institutions such as banks do not likely release sureties while the debt of the principal debtor remains extent. If there is release it is in the interest of both parties that it be readily capable of proof.*"

[26] The problem in this case is that Clause 24.1.2 is phrased in very wide terms. A similar clause does not appear in the first suretyship agreement. Clause 24.12 provides that 'this agreement supersedes and replaces any and all agreements between the parties... in relation to the subject matter hereof.' Its meaning is clear and it is manifestly at war with Clause 9.

[27] It may well be that the explanation provided by the first respondent as to why the applicant would have agreed to a reduction of suretyship admits of no credence. Furthermore, when he signed the second suretyship agreement, he must have known by way of Clause 9 that there was a specific provision that this

suretyship was in addition to the first suretyship that he had concluded. However the same argument can be employed when Clause 24.12 is examined. This clause also admits of no ambiguity. It clearly evinces a purpose: it replaces all agreements between the parties in relation to the subject matter of the second agreement. That means in plain English that, once concluded, the entire earlier suretyship agreement is replaced.

[28] It may be that the background circumstances powerfully dictate for a difference interpretation. In making this observation, it is important to recall the *dictum* of Scott JA in **HNR**, *supra* at para 16:

> "*Nonetheless, in every case the intention to release must appear from the writing itself. It may be explicit or implicit. But if the latter; the intention to release must be apparent from the writing on an ordinary grammatical construction of the words used or, stated differently, the release of the surety must be a necessary implication of the words used. It is therefore not permissible to import into the writing, whether by reference to background or surrounding circumstances or any other source, an intention to release which is otherwise not ascertainable from the actual language of the document relied upon.*"

In this case, there are two clear provisions, neither of which admit of any ambiguity. This contract was prepared by applicant, which, in any event, for unexplained reasons, chose to omit it from its founding affidavit. In this case, where a court is compelled to choose one clause over the other, it must surely follow an interpretation that favours the party which was not responsible for the preparation of the contract. In the result, I cannot, on the express wording of the

contract read as a whole and which was prepared by applicant, hold that the former agreement was replaced by the latter.

[29] For these reasons, the following order is made:

First Respondent

1. The application against first respondent to make payment of R 19 200 000 is dismissed with costs.

The Second Respondent

2. The second respondent is directed to pay the applicant the sum of R19 200 000.

3. Interest is to be paid on the above sum at 2% above the applicant's prevailing prime overdraft rate, from time to time, such interest to be calculated daily and compounded monthly, from 31 August 2010 until date of payment.

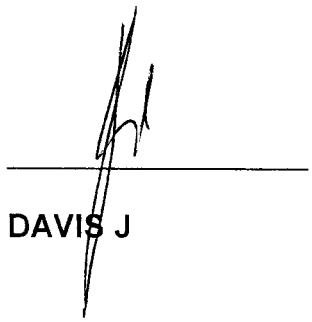
4. The second respondent is directed to pay the applicant's costs on an attorney and client scale.

The Fourth Respondent

5. The fourth respondent is directed to pay the applicant the sum of R32 000 000.

6. Interest is to be paid on the above sum at 2% above the applicant's prevailing prime overdraft rate, from time to time, such interest to be calculated daily and compounded monthly, from 31 August 2010 until date of payment.

7. The fourth respondent is directed to pay the applicant's costs on an attorney and client scale.



DAVIS J