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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 15035 / 2019

In the matter between:

ARVUM FINANCE (PTY) LTD

(Registration No. 2007/022356/07)

APPLICANT

and

ANDRÉ DANIËL SAAIMAN

(Identity No. [...])

FIRST RESPONDENT

CORNÉ ADRIAAN SAAIMAN

(Identity No. [...])

SECOND RESPONDENT

ADNRÉ DANIËL SAAIMAN N.O.

THIRD RESPONDENT

CORNÉ ADRIAAN SAAIMAN N.O.

FOURTH RESPONDENT

FREDERIK THOMAS SAAIMAN N.O.

FIFTH RESPONDENT

BESPOKE FIDUCIARY SERVICE (PTY) LTD N.O.

SIXTH RESPONDENT

(As trustees for the time being of the Corne Trust (IT391/1989))

Coram: Wille, J

Heard: 14th of October 2021

Delivered: 29th of October 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed motion for an order sounding in money based on the provisions of a suretyship document¹. The applicant is a finance company. Initially there were (6) respondents

¹ The 'suretyship'

cited in these application proceedings. The first and second respondents are natural persons and the remaining (4) respondents were cited in their capacities as the trustees of 'The Corné Saaiman Trust'². Counsel for the applicant wisely abandoned the seeking of any relief as against the trust. This, in reply and in response to the opposing affidavits filed by the respondents. The relief now sought is solely directed as against the first and second respondents³. The first and second respondents shall be referred to as the respondents, unless otherwise specifically indicated.

THE SURETYSHIP DOCUMENT

[2] The respondents signed the suretyship. The underlying reason for this security was because the applicant agreed to advance certain monies, from time to time, to Jongberg⁴, in the form of a loan. As a surety for the principal debtor's indebtedness to repay the loan advanced by the creditor, the respondents, jointly and severally bound themselves as sureties and co-principal debtors with Jongberg, in favour of the applicant.

RELEVANT 'DOCUMENTARY' DEFINITIONS

[3] The 'Capital Amount' is defined in the suretyship as follows:

² The 'trust'

³ The 'respondents'

⁴ The 'principal debtor'

‘...means the amount to be advanced by the creditor to Jongberg in instalments commencing on...and as more fully described in the Seasonal Advance Loan Agreement’⁵

[4] Further, the ‘Loan Amount’ is defined as follows:

‘...means the Capital Amount plus all accrued interest, fees, and costs to be repaid to the creditor, as more fully described in the Seasonal Advance Loan Agreement’

[5] The ‘Seasonal Advance Loan Agreement’ is described as:

‘...means the Seasonal Advance Loan Agreement entered into and between the Creditor, Jongberg, and Unlimited Fruit⁶ in terms of which the Creditor advanced the Capital Amount to Jongberg as production/working capital’⁷

[6] ‘Unlimited Fruits’ features as an entity on the suretyship document and is defined as:

‘...a private company incorporated in terms of the Laws of the Republic of South Africa...’

The reason why I mention Unlimited Fruits⁸, at this stage will become more apparent when the merits of this application as discussed. More about this later.

[7] Most importantly, the suretyship provides that the respondents bind themselves as sureties for all amounts due as a result of monies lent and advanced by the creditor to Jongberg

⁵ More about this agreement later.

⁶ More about this ‘entity’ later.

⁷ I say that this includes the payment of legitimate creditors of Jongberg.

⁸ ‘Fruits’

as a consequence and in terms of the Seasonal Advance Loan Agreement and ‘any further amounts paid on behalf of Jongberg.’⁹ Moreover, the sureties themselves warrant that they had a material interest in binding themselves in terms of the suretyship which was entered into for their benefit.¹⁰

THE PRODUCTION LOAN AGREEMENT

[8] One of the arguments piloted by the respondents is that the suretyship is not enforceable because it refers in terms to the ‘Seasonal Advance Loan Agreement’ and not the ‘Production Loan Agreement’, under and in terms of which the monies were loaned and advanced to Jongberg (the principal debtor).

[9] In my view there is no merit in this shield raised by the respondents. I say this because of the following, namely: that it is conceded that at least R402 180,33 was loaned and advanced by the creditor to the principal debtor: that the suretyship document includes a reference to all amounts due as a result of monies lent and advanced by the creditor to Jongberg: that the capital amount (as defined) includes a reference to all amounts advanced by the creditor to the principal debtor and most of all, the sureties warranted that they enjoy a material interest in the monies advanced by the creditor to the principal debtor.

[10] Notably, this agreement also includes the citation of ‘Fruits’ as a party to the Production Loan Agreement. This agreement in terms places upon ‘Fruits’ a repayment obligation to the

⁹ Clause 3.2 of the Suretyship

¹⁰ Clause 3.4 of the Suretyship

creditor subject to certain commissions and deductions¹¹. Put in another way, it is abundantly clear that ‘Fruits’ also directly benefited from the loan capital advanced by the creditor to the principal debtor.

[11] Finally, in terms of this agreement¹², the creditor enjoys the right to ‘prima facie’ prove the extent of the indebtedness to it by the principal debtor and the sureties by way of a certificate of balance signed by any director of the creditor. This certificate of balance has been annexed to the papers for the sum of R570 373,76 and is correctly signed by a director of the creditor.

THE APPLICANT’S CASE

[12] The applicant contends for the position that the alleged disputes of fact raised by the respondents are not *bona fide* and are raised in an attempt to avoid their obligations under and in terms of the suretyship.

[13] They say this, inter alia, because of the following, namely: that there was in existence only one single loan agreement between the creditor and the principal debtor, for which the sureties bound themselves in the suretyship: that the amount outstanding to the applicant by the principal debtor has been accepted by the BRP to be the correct amount due, owing and payable and that neither ‘public policy’ nor the common law, under this set of specific factual circumstances, should allow the sureties to escape their obligations under and in terms of their

¹¹ Clause 7.1.3 of the Production Loan Agreement

¹² The Production Loan Agreement

suretyship. In summary they say it matters not that the Production Loan Agreement was referred to as the Seasonal Advance Loan Agreement. There was after all, only one loan agreement.

THE RESPONDENTS' CASE

[14] The respondents deny that they are indebted to the creditor in the amount of R570 373,76 as reflected in the certificate of balance. They say at most (if at all), the debt due was the sum of R402 180,33. Further, they advance that after the principal debtor was placed into business rescue, Fruits and, not the applicant, filed a claim with the BRP in the amount of R570 373,76. The argument is that the certificate of balance is accordingly in direct contradiction with the terms and conditions of the claim formulated by Fruits against the principal debtor in business rescue.

THE RELEVANT FACTUAL MATRIX

[15] On the 12th of September 2018, the second respondent sent a representative of the applicant an email enclosing the last page of the signed suretyship agreement¹³. In this email, the second respondent requested that certain urgent payments be made by the applicant on the principal debtor's behalf. The subject line of this email reflected the label 'Seasonal Advance Loan Agreement'.

[16] On the same day the first respondent sent to the creditor a copy of the signed 'Production Loan Agreement'. The subject line of the covering email reflected the words 'Signed Seasonal

¹³ The second respondent was 'copied in' on this email.

Loan Agreement'. In essence, the agreement concluded between the parties made provision that amounts would be advanced by the creditor to the principal debtor directly, or to named third parties, limited to the sum of R1 668 193,43.

[17] Thereafter, on the 28th of May 2019, the directors of the principal debtor adopted a resolution and placed the principal debtor under business rescue. On the 30th of May 2019, the applicant informed the first respondent that the amount due owing and payable was the sum of R402 180,33.

[18] Subsequently, on the 10th of June 2019, a director of the applicant certified in a certificate of balance that the amount owed to the creditor was the sum of R570 373,76.

[19] The respondents attorneys, after the launch of the application, delivered a notice in terms of rule 35 of the rules of the court¹⁴, in which they requested more precise detail as to the accounting documentation between the creditor and the principal debtor. These documents were subsequently provided and no engagement is really had with this documentation in these papers before me,

DISCUSSION

[20] As an alternative, the applicant seeks a rectification of the suretyship document to include a reference to the 'Production Loan Agreement'. In my view this is totally unnecessary. It is common cause that the creditor loaned and advanced the sum of at least R402 180,33 to the

¹⁴ The Uniform Rules of Court

principal debtor, for which obligations the respondents signed as sureties. The suretyship references and includes a liability for ‘any further amounts paid on behalf of Jongberg’.

[21] A surety’s liability is solely for the very obligation for which he has undertaken the suretyship. This much is clear from what was held in *Trans-Drakensburg*.¹⁵ By contrast, in this case the respondents, were acutely aware of the principal obligation for which they gave their undertakings in terms of the suretyship. Their suretyship was for monies loaned and advanced to the principal debtor by the creditor. This loan was secured by the respondents as sureties to in the principal debtor in favour of the creditor.

[22] The applicant’s claim is for the sum of R570 373,76. A certificate of balance is annexed as ‘*prima facie*’ proof of this amount as due owing and payable. The manner in which the amount calculated has been set out in the claim documents submitted to the BRP of the principal debtor. This claim, together with the quantum thereof, albeit in the name of ‘Fruits’, has been accepted by the BRP, as the correct claim.

[23] The respondents say that the amount as claimed by the applicant is ‘unreliable’. I take it that this claim for ‘unreliability’ extends only to the difference between the claim of R402 180,33 and the claim of R570 373,76. The material before me exhibits further payments to certain third parties, namely: a payment to ‘Zaiger’ in the sum of R78 406,77 and a payment to ‘Custom Plum’ in the sum of R89 789,66. These payments, when added to the sum of

¹⁵ *Trans- Drakensberg Bank v Guy* 1964 (1) SA 790 (D) at 795 and 796

R402 180,33 make up the sum of R570 373,76. The Custom Plum amount is referred in some of the papers as the sum of R89 789,66 as opposed to R89 786,66.

[24] Accordingly, the issue is whether this forms the subject of a genuine dispute between the parties. In reply, the creditor advances that the initial amount claimed in the sum of R402 480,33 failed to take into account these (2) third party payments referred to in my previous paragraph. The respondents' argument on this is that these (2) payments had already been allocated to the ledgers of the creditor as early as the 31st of October 2018. Significantly, however the certificate of balance was only signed on the 10th of June 2019. This, for the sum of R570 373,76.

[25] Elaborating on this argument, the respondents advance their 'unreliable' theory carries weight because 'Fruits' and not the applicant creditor filed a claim of R570 373,76 with the BRP. The person who signed the certificate of balance was the very same director who signed the claim form on behalf of Fruits that was submitted to the BRP.

[26] In a further complication, the method of proof of the outstanding indebtedness, by way of a certificate of balance, is contained in the provisions of the 'Production Loan Agreement'. Moreover, in the list of creditors contained in the business plan of the BRP, the claims of 'Zaiger' and 'Custom Plum' are listed separately, from the claim of the creditor.

[27] The business rescue plan was published on the 19th of August 2019 and was adopted by the majority of creditors (including Fruits), on the 2nd of September 2019. The applicant

endeavours to explain this by contending that the creditor and Fruits 'are in the same group of companies'. This may be so, but both legally and factually they are discrete juristic entities.

[28] I am satisfied on the material before me that undoubtedly the sum of R402 180,33 is due owing and payable by the principal debtor to the creditor, for which the respondents are liable under their suretyship obligations. I remain unpersuaded and unsatisfied on the papers before me, as currently formulated, that the sum of R570 373,76 is due owing and payable by the principal debtor to the creditor and therefore by extension, due by the respondents.

COSTS AND ORDER

[29] The applicant seeks costs on an attorney and client scale against the first and the second respondents. The applicant also avers that it should be awarded costs of its 'abandoned' proceedings against the remaining trust respondents, alternatively, not be held liable for the costs of its 'abandoned' proceedings against the remaining trust respondents. The respondents suggest that the applicant and the trust respondents should each pay their own respective costs in connection with the 'abandoned' proceedings against the remaining trust respondents. On this, I agree.

[30] As far as the request for attorney and client costs is concerned, the attorney and client costs provision appears in the 'Production Loan Agreement' and not in the suretyship document. Accordingly, I am not inclined to entertain any costs award on the scale as between attorney and client.

[31] In the result, the following order is granted, namely:

1. That the first and second respondent, jointly and severally, the one paying the other to be absolved, are hereby ordered to pay to the applicant the sum of R402 180,33 within (10) days of date of this order.
2. That the first and second respondents, jointly and severally, the one paying the other to be absolved, shall be liable for *mora* interest at the legal rate (as determined from time to time), to the applicant on the sum of R402 180,33.
3. That each party shall bear their own respective costs in connection with the litigation between the applicant and the third, fourth, fifth and sixth respondents.
4. That the first and second respondents jointly and severally, the one paying the other to be absolved, shall be liable for the applicant's costs of and incidental to this application for the relief sought as against them (the first and second respondents), on the scale as between party and party, as taxed or agreed.

E. D. WILLE

**Judge of the High Court
Cape town**