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

CASE NO: 11850/20

In the matter between

MORGAN CARGO (PTY) LTD APPLICANT

AND

EVGUENI VICTOROVTICH ZAKHAROV RESPONDENT

Date of Hearing: 08 March 2022
Date of Judgment: 04 July 2022 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an opposed summary judgment application wherein the applicant sought payment in the sum of R644 193-63 and USD 245 648 pursuant a deed of suretyship. The respondent raised three defences to the application, to wit, the respondent denied signing the suretyship, alleged that the quantum of the debt was not correctly calculated and further denied that the debt was due and payable.

[2] The issue is whether the respondent raised *bona fide* defences.

[3] The applicant and Exotic Fruit Company (Pty) Ltd (Exotic) entered into a credit facility agreement. The applicant alleged that a deed of suretyship in its favour

wherein the respondent bound himself as surety and co-principal debtor with Exotic in respect of Exotic's liability was also signed. Exotic is allegedly indebted to the applicant in the amounts claimed. The action against the respondent is based on the disputed suretyship.

The signature

[4] In his plea, the respondent denied the allegation that he executed a deed of suretyship on or about 4 March 2019 at Cape Town in favour of the applicant and bound himself as surety and co-principal debtor with Exotic in respect of Exotic's liability. He admitted the conclusion of the credit agreement in which the deed of suretyship is incorporated. It was Exotic which applied for the applicant's credit facilities on the basis of which Exotic commenced export produce, to wit, fruits, through applicant's services. The acceptance of Exotic's application constituted the agreement between the parties, on the basis of which applicant advanced credit to Exotic and also rendered the required export services including transactions done on behalf of Exotic in South Africa and transactions done abroad with the receiving international agents in the countries to which the exports were effected at the specific request and instance of Exotic.

[5] In his affidavit opposing summary judgment, the respondent said the following at para 13 - 16:
"13. I know that Exotic Fruit applied for credit with plaintiff. I know that MC1 is the plaintiff's standard credit application document. I also know that application was made in about March 2019. The signature on page 4 of the document marked MC1 in the space labelled "Applicant" immediately underneath the date of 4 March 2019, could be my signature. It is unclear from the copy of the document attached to the particulars of claim and I would need to see an original of this document to know whether the signature is mine. Whether I in fact signed this particular document is not something I can remember.

14. But, had someone asked me at the time to sign this application for credit, I would certainly have done so and I may well have done so in fact. For those reasons I did not deny the conclusion of MC1. It seemed inappropriate to do so.

15. But the document has many pages and the fact that it may turn out to be my signature on page 4 does not mean that it is also my signature on the suretyship. I did not complete documents like these. The handwriting on the document is not mine. It would have been completed by someone in my office and given to me for signature. I would not have checked it and would have relied on the person giving it to me to explain to me what I was signing. I would then have signed in the place indicated by them.

16. The signatures on the suretyship do not look like mine. That they are probably not mine is reinforced for me by two facts:
16.1. First, I would not likely have signed as “Surety A” and “Surety C” as appears to have occurred on pages 6 and 7. Although I do not always check what I am signing, and would probably not have checked a document like this, I complete enough documentation in the course of business to have spotted the bold designations “Surety A” and “Surety C” immediately beneath the places where I was would have been asked to sign and to have immediately realized that only one signature was necessary, not two.
16.2. Second, in March 2019 there were two other directors in Exotic Fruit, in addition to me. I would have wanted, and it was my practice then, to have all 3 directors sign the suretyship because of the obvious prejudice that would accrue to me if I were the only surety. The fact that my co-directors signatures are absent from MC4 is a further indicator to me that the signature is probably not mine, and may have been appended by someone in Exotic Fruit’s office or even potentially in the plaintiff’s office. I do not know who signed the documents as surety – that is an issue to be explored at trial.”

[6] The joint liquidators of Exotic brought an application that the estate of the respondent be placed under provisional sequestration in the hands of the Master of this Court. The respondent opposed the application. The liquidators made the following allegations at para 24 to 26 of the founding affidavit in that application:
“24. His liabilities however by far exceeds his assets. He bound himself as surety and co-principal debtor with Exotci Fruit in favour of the following entities:
24.1. Corruseal Corrugated KZN (Pty) ltd (“Corruseal”)

24.2. Morgan Cargo (Pty) Ltd ("Morgan Cargo")
25. Exotic Fruit owes Corruseal approximately R18 million and Morgan Cargo R4 853 187.87. First Respondents exposure to these two companies alone is thus R22 853 187.87.
26. As shown below, both the companies have commenced with proceedings against First Respondent."

[7] The respondent's answer is in the following terms at para 37 in that application:
"37. AD PARAGRAPH 24 -26
37.1 It is correct that I signed suretyships for the debts of Exotic Fruit in favour of Corruseal and Morgan Cargo. However, this fact does not prove that I am liable to either of these entities or that if I am liable to them, my liabilities exceed my assets.
37.2. As far as I know, neither Corruseal Corrugated nor Morgan Cargo have proved claims against Exotic Fruit. When I was a director of Exotic Fruit it was defending the claims which had been instituted against it.
37.3. The applicants further do not say whether either of these entities has proved claims against Exotic Fruit and they do not say that Exotic Fruit is unable to settle these claims. If it is, I would not be liable under the suretyship, even if these entities had a valid claim under the suretyship (which I do not admit).
37.4. The applicants do not even put up the suretyship on which they rely for the benefit of the court.
37.5. At best for the applicant it has shown a potential liability of about R23 million."

[8] The respondent's debt is clear and distinct. It is clear that the respondent has no case in the action. The facts showed that the respondent did not raise a triable issue or a sustainable defence. The respondent has met the threshold of a sufficient disclosure of the nature, grounds as well as the facts upon which what he deemed to be a defence was founded. He did nothing more than preparing a fertile ground from which to plant vague suspicions, doubts and speculations. He failed on the second consideration, to wit, that the disclosed defence must be both *bona fide* and good in law [*Joob Joob Investments v Stocks Mavundla ZEK* 2009 (5) SA 1 (SCA) at para 30-32].

[9] Evidence as to the respondent's signature of the deed of suretyship, which was presented to the liquidation application, is admissible as it was relevant and material and could conduce to prove or disprove the fact at issue between the parties. In *Rex v Trupedo* 1920 AD 58 at p 62 it was said:
"The general rule is that all facts relevant to the issue in legal proceedings may be proved. Much of the law of evidence is concerned with exceptions to the operation of this general principle, as for example the exclusion of testimony on grounds of hearsay or remoteness. But where its operation is not so excluded it must remain as the fundamental test of admissibility. And a fact is relevant when inferences can be properly drawn from it as to the existence of a fact in issue"

[10] The rule is that evidence which is relevant is admissible unless there is some other rule of evidence which excludes it [*Principles of Evidence,* 3rd edition, Schwikkard, Van der Merwe, Chapter 5, p 45. In *R v Schaube- Kuffler* 1969 (2) SA 40 (RA) at 50B it was said:
"The general rule of evidence under common law is that any evidence which is relevant is admissible unless there is some other rule of evidence which excludes it: see Wigmore on *Evidence,* 3rd ed, vol I, pp 293 -295; Phipson on *Evidence,* pp 16-18. I know of no rule of evidence which can exclude such statements made by an accused once they have been proved to have been made voluntarily and what is proved is relevant to the enquiry."

[11]. The facts paint the respondent as a recalcitrant debtor who does not hesitate to state two mutually destructive versions under oath to the same court in two distinct applications, in order to avoid to pay what is due to his creditor. Summary Judgment proceedings constitutes a call for honesty from litigants [*Jacobsen vd Berg SA Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O) at 589C-D]. It should be a worrisome development that dishounourable conduct of this nature which in fact may amount to a crime of perjury or defeating the ends of justice should be advanced by Counsel in legal practice, with courts expected to live with, simply because "Counsel was acting on instructions" [*Du Preez v Du Preez* 2009 (6) SA 28 (T) at para 15]. The practice of law and our courts deserve better if they are to remain honourable professions and callings.

Computation of the debt

[12] The applicant's claim is specific to invoices that it alleged Exotic had not settled since 2019. The invoices are itemized in the statements presented. The respondent's answer was that Exotic made two payments for which it was not credited and therefore alleged that the computation of the quantum was incorrect. The respondent did not identify the invoices to which its payments were allocated. Furthermore, there are no facts set out which indicate that the applicant did not appropriate any payment made by Exotic to its debt in general, or its most onerous debt in particular [*Miloc Financial Solutions v Logistic Technologies* 2008 (4) SA 325 (SCA) at para 46]. It must be remembered that the deed of suretyship was a continuing covering liability to the value of R7 321 086, and that Exotic's indebtedness was based on a continued credit facility for rendered freight forwarded and logistical services to the sum of R6 million. An inductive but simple mathematical interrogation of the entries, reveal that the statements reflected the balance owing, and the amounts add up to the sums claimed.

[13] The respondent's excuse that Exotic has been liquidated and is under the control of the liquidators and that as a result he was unable to further interrogate the accuracy of the statements in recording the payments made to Exotic is simply opportunistic. He was a director and 100% shareholder of Exotic. He did not utter a single syllable in respect of the basis upon which his alleged inability to further interrogate the statements was founded. In my view this is not an oversight, but a deliberate design by the respondent to create a fertile environment for vague suspicions, doubt and speculation around the clear debt. It lacks facts to establish real doubt as to the liability of the respondent and cannot sustain an honest defence which if proved will constitute a defence valid in law to the applicant's claim.

Payment is not due

[14] The agreement between the applicant and Exotic provided as follows:
"PAYMENT TERMS
Payment to reflect in Morgan Cargo Bank account on or before last working day of payment period or when the credit limit is reached, whichever comes first."

Various options were given but the parties signed on the option:
“60 days from date of statement.”
In a contract where no time for payment was fixed, the debtor is not obliged to pay the debt until there was a legal demand. A demand is necessary to put the debtor in *mora.* Where a time for payment has been fixed the debtor is in *mora,* as a consequence, if he lets the due day pass [*Venter v Venter* 1949 (1) SA 768 (A) at 776-777]. At 778 it was said:
“I agree with the view expressed in those decisions. If a debtor undertakes to pay money on or before a particular date it follows from that undertaking that he must either tender or pay the money to his creditor in order to avoid a breach of contract and he can do so at any convenient place where he may lawfully perform his contract.”

[15] On 16 October 2019 the applicant served an application for the liquidation of Exoctic on Exotic. The applicant relied on the same amounts from the same statements for the debt owed. The applicant relied amongst others on a letter from Exotic, dated 25 September 2019. The letter, signed by the respondent, read as follows:
“RE: Payment

We would like to apologise for the delay in payments from ourselves this season.

We had a difficult Citrus farming season in 2019. This was unexpected and it was attributed to several unforeseeable circumstances. We experienced granulation on our Novas and Navels which resulted in arrival claims. We also had very high temperatures which resulted in less export fruit. Our exports for 2019 were less than half of the 2018 Citrus season.

This resulted in some financial constraints that were beyond our control.

We have a production loan which will be released at the end of October 2019 and we also have our Macadamia sales which will also come through the end of October 2019. Therefore, we will make all payments to our creditors in November 2019.

All accounts will be settled by the end of November 2019."

[16] The applicant relied on that letter to show that Exotic could not pay its debts as and when they fell due, and as such stood to be wound-up. I am unable to conclude that there was never a good demand, or such a demand was never known to Exotic or that such demand did not find the respondent on or before 25 September 2019, or at least the latest by 16 October 2019. A suggestion that the applicant did not call upon Exotic to pay the debt in order to complete the applicant's cause of action is not supported by the papers. The respondent is simply a dishonest businessman who is engaged in dishonourable conduct of peddling untruths, including in court papers. The demand was clearly established on the papers.

Striking out

[17]. In its application for summary judgment, the applicant introduced facts which are not set out in its particulars of claim. These included amongst others the choice of currency by the applicant's client in the position of Exotic, and that the statement together with the invoices for each account will be sent to client and that payment is eventually paid at the exchange rate applicable to the transaction at the time the consignment was sent. The new facts also include a certificate of indebtedness and that the liquidators had accepted the applicant's claims against Exotic. The respondent argued that that the new facts are inadmissible for the purposes of summary judgment and fell to be disregarded and or struck out.

[18] Rule 32(2)(b) of the Uniform Rules of Court read as follows:
"32 Summary judgment
(2)(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial."

[19] The Rule requires identification of the facts upon which the plaintiff's claim is based. The *Concise Oxford English Dictionary,* 10th edition, revised, Edited by J Pearsall, Oxford University Press, 2002 (the dictionary) defines "identify" amongst

others as “select by analysis”. Rule 18(4), which required the pleadings to “contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto”. In my view, the selection can only be from the facts already set out as envisaged in Rule 18(4). In my view, the “identification” in Rule 32(2)(b) is not intended for the applicant to add further details to his statement of the facts. The dictionary gives addition of further details to a statement as the definition of “amplify”. It is distinct from “ identify”.

[20] If one has regard to the definition of “analysis” in the dictionary, the picture that emerges is that an applicant may present a detailed and methodical examination of the elements or structure of the facts relied upon for the claim, but is not allowed to add new facts in the application for summary judgment. A careful consideration of what the applicant added in the detail, amounts to new facts in my view. It is in that sense that I also understood the court in *Absa Bank v Mphahlele* [2020] ZAGPJHC 257 at para 22 when it was said:
“In terms of the subrule the plaintiff is entitled to attach documents in support of facts upon which it relies in support of that plaintiff’s cause of action …”
And at para 32:
“… as a general proposition, a plaintiff should not be entitled to introduce evidence or facts which do not appear in a plaintiff’s particulars of claim or declaration.”
It follows that the new evidence introduced by the applicant in the summary judgment application stood to be ignored.

[21] For these reasons I make the following order:
1. The application for summary judgment is granted.
2. 1. The respondent is to pay to the plaintiff an amount of R644 193-63 plus interest at 7.75% *a tempore morae* until date of final payment and costs on attorney and client scale.
2.2. The respondent is to pay the plaintiff an amount of USD 254 648 plus interest at 7.75% *a tempore morae* until date of final payment and costs on attorney and client scale.

DM THULARE

JUDGE OF THE HIGH COURT