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

Case Number: 885/2019

In the matter between:

NEDBANK LIMITED **Plaintiff**
(Registration number:1951/000009/06)

And

XANITA (PTY) LIMITED **Defendant**
(Previously Great Ideas Production Company (Pty) Limited)
(Registration number: 2005/000642/07)

JUDGMENT ELECTRONICALLY DELIVERED
12 JUNE 2023

Baartman, J

[1] Nedbank **(the plaintiff)** paid a demand guarantee whereafter it claimed the amount paid, R4 935 000 plus interest, from the principal debtor **(the defendant).** It is in issue whether 'the defendant is by operation of law, indebted to the plaintiff' for the amounts paid in terms of the guarantee. In the alternative, the plaintiff based its claim on enrichment. Papier J presided over the trial but has since become indisposed. The parties agreed that I should finalise the matter. Although, I have not had the benefit of observing the witness led at the trial, I have had regard to the transcript and the parties

presented oral argument before me.

[2] The plaintiff submitted that in its position as guarantor, 'like a surety, [it] has a right of recourse against the defendant as principal debtor'. It is common cause that the plaintiff issued two guarantees in favour of Absa. The following appears from the first guarantee:

> '26 January 2006
>
> Letter of guarantee NO... for R3 435.000.00 on behalf of James Beattie ID No ...We ... in our capacities as senior credit managers….hereby undertake to pay [Absa] on first written demand an amount up to the maximum...
>
> R3 435.000.00..
>
> Any claim hereunder must be received in writing... accompanied by your signed statement that Great Ideas has failed to make payment.'

[3] At the time, Mr Beattie, the defendant's sole director, signed a counter guarantee from which the following appears:

> 'NEDBANK COUNTER GUARANTEE
>
> 31/01/2006
>
> Nedbank….has at my/our request undertaken liability to or in favour of
>
> ASSA BANK….R3 435 000.00
>
> I/we JAMES WILLIAM BEATTIE
>
> Irrevocably authorise the bank without further reference to me/us

a) pay or comply with any claim against the bank by the guarantee party which may be made under the said instrument irrespective of

i) the correctness of the amount claimed;

ii) the terms and conditions of the underlying contract;

iii) the validity of the grounds on which it is based; and

iv) any other cause and

b) recover from me/us, by charging against my/our account and against any separate cover held for my/our account or otherwise, any sum or sums it may pay in terms of this authority...'

[4] The second guarantee was issued on 16 January 2008. It differed from the first in that the guarantee amount was R1 500 000 and 'in respect of payment due by Great Ideas Production Company... ' instead of payment due by Mr Beattie, who again gave a counter guarantee binding himself personally as before.

[5] The defendant denied liability and alleged that Mr Beattie had undertaken to repay the plaintiff if the guarantees were called up. The plaintiff called its manager 'legal advice division', Mr van Zyl, as its only witness. The defendant called no witnesses. I deal with the evidence led to the extent necessary for this judgment.

Mr van Zyl

[6] Mr van Zyl joined the plaintiff in September 2007 as a senior legal

advisor. At the time, Mr Beattie had been a long-standing client of the plaintiff. His home loan had been restructured to include an additional bond. Ultimately, 5 bonds were registered over Mr Beattie's Bishopscourt property. The defendant was registered in 2005 as Great Ideas Production Company and 2007 changed its name to Xanita (Pty) Ltd. Mr Beattie became the defendant's director in 2005 and resigned on 1 February 2007. When the first guarantee was issued, Mr Beattie was the plaintiff's sole director. Mr van Zyl confirmed that Mr Beattie had provided the counter guarantee on 30 January 2006, which was 'an authorisation by Mr Beattie to [the plaintiff] to issue the guarantee and to claim from [him] repayment in the event that their bank is called on to make payment under the guarantee to Absa'.

[7] Mr Beattie's account was restructured again in 2006. Mr van Zyl said the following about the restructuring:

> '... the banking system Nedbank uses, a note will be placed that the client will be unable to draw the R3. 435 million of the facility that has been granted to him, as that has been earmarked to stand as a potential liability under the guarantee...'

[8] He confirmed that the amount, R3. 435 million, 'is the amount of the guarantee, the Absa guarantee and the amount of the cross-guarantee and that is a reduction in the limit available to Mr Beattie on his home loan', which would serve as security for the guarantees. In September 2007, another restructuring occurred. Thereafter, the second guarantee and counter guarantee were issued for R1.5 million. Although, Mr Beattie was no longer the defendant's sole director, he granted the counter guarantee in similar terms to the first one.

[9] Mr Beattie was also the sole director of Brown Gold Factory (Pty) Limited **(Brown Pty),** a company that purchased 'vacant land in an industrial

development called Firgrove Estate'. The applicant lent Brown Pty R19 865 000 and Mr Beattie secured the loan with a R24 million covering mortgage bond over his Bishopscourt property, the same property referred to in respect of the counter guarantees. There were also other loan agreements between the plaintiff and Brown Pty.

[10] In August 2011, Mr Beattie had fallen into arrears with his home loan instalments. In November 2011, Mr Beattie and the plaintiff entered into an agreement that allowed him to sell the Bishopscourt property. The property sold for R70 million from which Mr Beattie managed to settle some of his debt including reducing some of Brown Pty's debt. The plaintiff's position in respect of the guarantees was as follows:

> '[The plaintiff] was of course concerned that whereas at the point in time that the two guarantees were issued in favour of Absa for Xanita's indebtedness to Absa. [The plaintiff] was of the view that there was enough equity in the Bishops' Court property to recover the debt on the home loan as well as possibly recovering in the event that it pays Absa under the guarantees, that it would also have enough equity in the Bishopscourt property to recover the full indebtedness. Of course, the Bishopscourt property subsequently sold but this contingent liability remained and therefore [the plaintiff] standing unsecured for the possibility of paying under the guarantee was a great cause of concern and we addressed it with Mr Beattie from time to time.'

[11] Mr van Zyl said the plaintiff had issued 'evergreen guarantees in the sense that they don't have an expiry date'. However, the plaintiff had issued a guarantee for another client that did expire; therefore, the plaintiff engaged Mr Beattie in an attempt to bring these guarantees into that category. Absa, however, corrected any misunderstanding and asserted that the guarantees were 'evergreen.' Mr Beattie was still attempting to resolve the

situation when Absa called up the guarantees. The plaintiff paid R1.5 and R3.435 million to Absa in settlement of the debt in terms of the guarantees. In March 2016, Mr Beattie was provisionally sequestrated; on 16 May 2016, that order was made final. The plaintiff lodged a claim against the sequestrated estate.

[12] On 17 January 2017, Mr van Zyl signed the standard form in which he confirmed that 'no other person besides [Mr Beattie's' sequestrated estate] is liable otherwise than as surety for the said debt or any part thereof'. He said, at the time, that he did not contemplate the possibility that the plaintiff may have had recourse against any other party. The plaintiff sought legal advice after the trustee of Mr Beattie·s sequestrated estate indicated how bleak the plaintiff's prospects of recovering a dividend were. Following legal advice, the plaintiff demanded payment from the defendant 'because of [the plaintiff] having paid the guarantees. This action was instituted when payment was not forthcoming. The plaintiff has not received any repayment in respect of the guarantees to Absa. The defendant's financial statement, as at June 2016, reflected under liabilities 'Nedbank R4.935 million'.

[13] In cross-examination, the witness conceded that he was not involved in the generation of the guarantees or counter guarantees. He only became involved with the matter in 2013 as 'a distressed financial exposure'. He confirmed that the plaintiff had suggested that Mr Beattie and the defendant's board should secure the Absa overdraft through suretyship or other means that would satisfy Absa. The defendant's board was not prepared to co-operate.

The guarantee versus surety

[14] The plaintiff alleged that as guarantor, it has a right of recourse against

the defendant as principal debtor. The plaintiff contends that its right of recourse is akin to that of a surety. A guarantee is entered into when a party gives an original and unqualified undertaking to pay a definite sum as principal debtor and not as surety[1]. Caney[2] distinguishes a guarantee from a surety as follows:

> **'3. Suretyship and the contract of guarantee**
>
> ...It is clear that the word "guarantee" in common parlance and in many contractual contexts means (and is intended by the parties to mean) simply to undertake the obligations of a surety. This is not what is meant by guarantee in this context, for the contract of guarantee is distinct from suretyship....
>
> With a contract of guarantee, on the other hand, the guarantor undertakes a principal obligation to indemnify the promisee on the happening of certain events. The well-worn example is a guarantee that "the price of cement will not rise this year"....
>
> Difficulties begin to arise, however, when the event on which the guarantor becomes bound to indemnify the promisee is in fact the performance by a third party of some obligation which that third party owes to the promisee....
>
> What then is the difference between a guarantee that a debtor will perform and suretyship? Lubbe makes one point of distinction clear: the guarantor's obligation, as an obligation independent of that of the debtor, is to indemnify the creditor in respect of losses suffered through the debtor's non- performance, whereas the surety, as we have seen, is only liable for losses resulting from the debtor's breach of contract. Thus if the creditor

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[1] *List v Jungers* 1979 (3) SA 106 **(A).**
[2] *The Law of Suretyship in South Africa.*

> suffers grave losses when it turns out that debtor's contract is invalid, the guarantor's obligation remains in force and he will have to pay those losses but the surety's obligation falls away and he w!II not have to pay a penny A second point of distinction is this: as we ha1e seen, a surety undertakes that the debtor himself will perform, and only ttihat if he fails to perform that the surety will do so. With guarantee, on the ot er hand, the guarantor undertakes to pay on the happening of a certain eve t but does not promise that that event will happen '

[15] It is common cause that the plaintiff issued 2 guarantees in favour of Absa and was obliged to pay once the guarantees were called up. That obligation is independent of the defendant's liability to Absa. Therefore, I support the defendant's reliance on the *Edward Owen*[3] matter in which the court held as follows:

> 'A bank which gives a performance must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is where there is a clear fraud of which the bank has notice.'

[16] The plaintiff pleaded as follows:

> '...the Defendant is, by operation of law, indebted to the Plaintiff in the sum of R4 935 000 (R3 435 000 plus R1 500 000), together with interest thereon at

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[3] *Edward Owen Engineering Ltd v Barclays Bank International Ltd* (1978] All ER 976 (CA) ((1977) 3 WLR 764) AT 983B.

the prescribed rate a tempore morae from 21 May 2016 to date of payment in full.'

[17] The guarantees were issued to protect Absa in the event of default by creating an independent obligation on the plaintiff to pay on the occurrence of specified events. It is common cause that the specified events occurred and that the plaintiff was obliged to honour the guarantee when it was called up. In doing so, the plaintiff honoured its obligation and settled its own debt. Therein lies the essential distinction between the guarantee and a surety.

[18] The plaintiff, as a commercial bank, aware of the pitfalls in issuing a guarantee, sought to protect itself through the counter guarantees that Mr Beattie issued. It follows, as a matter of law, that the plaintiff had to look to Mr Beattie to indemnify it as provided for in the counter guarantees[4]. It is clear from Mr van Zyl's evidence that the plaintiff was aware of its dilemma once Mr Beattie became a man of straw. Therefore, the plaintiff attempted to minimise its exposure by entreating Mr Beattie to persuade the defendant's directors to take over the counter guarantees. The plaintiff was unsuccessful in its attempts to obtain alternate security for its debt.

[19] The guarantees required a statement from Absa that Xanita had defaulted on its obligations, not proof of the default. Both parties referred me to the *Kelly-Louw thesis*[5] from which the following appears:

'The fundamental difference between a true guarantee (suretyship guarantee) and a demand guarantee is that the liability of a surety...is secondary, whereas the liability of the guarantor (issuer) of a demand guarantee is primary....The principle that underlies demand guarantees is

[4] *Lombard Insurance v Landmark Holdings* 2010 (2) SA 86 paras 19 and 20.
[5] *Michelle Kelly-Lauw, Selective aspects of bank demands Guarantees,* 2008 Doctoral Thesis Unisa.

> that each contract is autonomous. More specifically, the obligations of the guarantor of a demand guarantee are not affected by the disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it does not matter whether between himself and the principal he is entitled to payment. The guarantor must honour such a demand. ... Therefore, if actual proof of breach or non-performance is required under the guarantee, the facility is not a demand guarantee, but a true guarantee in the strict sense....
>
> The independence of the demand guarantee from the underlying contract is enshrined in the cardinal principle of autonomy of the guarantee.'

[20] Kelly-Louw also asserts that the 'principal must reimburse the guarantor or the counter-guarantor (instructing party)'. There is no authority for this proposition and it is contrary to our law. The plaintiff, in its position as a commercial bank, was at liberty to demand the security it deemed necessary; it did. In the circumstances of this matter, the plaintiff was satisfied that Mr Beattie's Bishopscourt property would yield sufficient to satisfy the bonds registered over the property and the guarantees. It did not. It does not follow that the plaintiff is entitled to compensation from a party not involved in the independent contract between it and Absa.

[21] I accept that the defendant benefited from the contract in that its indebtedness to Absa was reduced. The plaintiff was aware of the position before entering into the guarantee and did not seek to bind the defendant; instead, it was satisfied with Mr Beattie as its security in circumstances where nothing prevented it from also obtaining security from the defendant. The guarantee has advantages distinct from the surety and the plaintiff chose the instrument best suited to its needs. It proved insufficient. The court cannot come to the plaintiff's aid because it made a bad business decision. Therefore, I am

not surprised that the plaintiff admits that 'we have not been able to find any case law that has held that a guarantor, like surety, has an automatic right of recourse in the event of being required to pay under the guarantee'.

[22] Mr Muller SC, the plaintiff's counsel, submitted that Mr Beattie acted 'for and on behalf of [the defendant]'. He relied on the *Rossouw*[6] decision as authority for the proposition that '[the defendant] gave a mandate to [the plaintiff] to bind itself as guarantor to Absa, a mandate which implies a liability on the party [the plaintiff].' In *Rossouw,* the court was dealing with a surety and held as follows;

> 'An examination of the basis of the claim indicates the original suretyship as the true cause. Where the guarantee has been entered into at the instance of the debtor - as happens in the vast majority of cases - the latter in effect gives a mandate to the surety to bind himself, and that implies a liability to make good any expenditure or loss to which he may be put in consequence of the execution of the mandate. Should the surety give his guarantee without the knowledge of the debtor, his claim to be reimbursed for loss incurred for the benefit of the latter would be that of a *negotiorum gestor…'*

[23] The plaintiff led no evidence to support the proposition that Mr Beattie had acted on mandate. I fact, the first guarantee was issued 'on behalf of James William Beattie, [ID number]'. Nevertheless, I am prepared to accept that he did. That does not assist the plaintiff, as indicated above; the difference between the guarantee and surety has crystallised. The plaintiff exercised an informed choice. Mr van Zyl testified that the plaintiff felt exposed when the proceeds of the sale of Mr Beattie's house only yielded R70 million. It is curious that the plaintiff would look only to Mr Beattie's home as its security if it believed that he had acted on a

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[6] *Rossouw and Rossouw v Hodgson & Others* 1925 AD 97.

mandate from the defendant.

[24] In Zanbuild[7], the court held as follows:.

> '[19] Construing the Absa guarantees as a whole, I agree with the view of the High Court that they support the interpretation contended for by Zanbuild. In other words, that they do not constitute "on demand" bonds, but that they give rise to liability on the part of Absa akin to suretyship. The first indicator in that direction is the assertion at the outset that the guarantees provide "security for the compliance of the contractor's performance of obligations in accordance with the contract". And in the body of the document the bank guarantees "the due and faithful performance by the contractor". This accords with language associated with suretyships.'

[25] The court did not look at the clause in isolation; instead, it considered the document as a whole. Therefore, the mere similarity of a clause typically found in suretyships does not lead to the conclusion that a suretyship is at hand. As indicated above, the guarantees at issue in this judgment, afford the plaintiff the opportunity 'to withdraw this guarantee after you have been given 3 (three) months' written notice of the bank's intention to do so; provided that [Absa] shall have the right to recover from [the·plaintiff] the amount owing and due to [Absa] in respect of payment by [the defendant] on the date on which the period of notice expires, subject to the total amount mentioned above.' I am persuaded that the guarantees as a whole constitute demand guarantees. Therefore, the plaintiff correctly pleaded as follows:

> '3 On or about 26 January 2006 and at Cape Town the Plaintiff... furnished to and in favour of ASSA Bank...a written guarantee,...in terms of which, *inter alia,* the Plaintiff undertook to pay Absa... in the event that the Defendant

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[7] *Minister of Transport & Public Works, Western Cape and Another v Zanbuild Construction (Pty) Ltd* 2011 (5) SA 528 (SCA).

defaulted... **("the first guarantee")**

…

5. On or about 17 January 2008 the Plaintiff... furnished to and in favour of Absa a further written guarantee... '

[26] The plaintiff's position as a commercial bank permitted it to demand securities to its satisfaction. The plaintiff only sought to involve the defendant once it was clear that its chances of receiving a dividend from Mr Beattie's sequestrated estate were slim. In the circumstances of this matter, the parties intended to and concluded guarantees as distinct from a suretyship. Therefore, as a matter of law, the plaintiff does not have a right of recourse against the defendant pursuant to paying the guarantees.

[27] The defendant had in its annual financial statements recorded a liability to the plaintiff in the amount of the guarantees. I take it to mean that at that point, the defendant's auditors considered the guarantees to be the defendant's debt. It is apparent from Mr van Zyl's evidence, that the defendant changed its opinion when Mr Beattie approached the defendant on the plaintiff's behalf. Therefore, the defendant is defending this action. The defendant's opinion in respect of status of the guarantees does not create a legal obligation.

The enrichment claim

[28] The plaintiff has in the alternative based its claim on enrichment as follows:

'In the alternative...

12. The payments by the Plaintiff to Absa referred to in paragraph 10 above had the effect of reducing. the Defendant's indebtedness to Absa by the amount of R4 935 000 (R3 435 000 + R1 500_000).

13 The making by the Plaintiff of the said payments to Absa accordingly:

13.1 Enriched the Defendant in the sum of R4 935 000; and

13.2 Impoverished the Plaintiff in the amount of R4 935 000.

14. The aforesaid enrichment-of the Defendant (and impoverishment of the plaintiff) was unjustified.'

[29] The requirements for an enrichment action are as follows[8]:

(a) The defendant must be enriched;

(b) The plaintiff must be impoverished;

(c) The defendant's enrichment must be at the expense of the plaintiff;

(d) The enrichment must be unjustified *(sine causa).*

[30] Mr Muller relied on the *Odendaal*[9] matter as authority for proposition that 'when one person (A) pays the debt of another (8), even acting in his own interest, A has an action against B to the extent of B's enrichment, provided that A has acted reasonably in the circumstances, so that B's enrichment can be regarded as unjustified.' Subsequently, the principle has been approved in

[8] *McCarthy Retail Ltd v Short Distance Carriers* CC 2001 (3) SA 482 (SCA).
[9] *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 {T).·

Standard Bank Services Ltd v Taylam (Pty) Ltd 1979 (2) SA 383 (C).

[31] In *Odendaal,* the plaintiff paid the debt of another for its own benefit. In this matter, the plaintiff paid its own debt in terms of a contract between it and Absa, a third party independent of the defendant. I have accepted that the defendant benefited from the agreement between the plaintiff and Absa without any demur from the defendant. However, that does not transform the plaintiff's debt into the defendant's debt. The plaintiff is unable to show that it has paid the debt of another because when it paid the guarantees, the plaintiff settled its own debt. Therefore, the payment was not *sine causa.* Evidently, the plaintiff has not met one of the requirements for a claim based on enrichment.

[32] In the circumstances of this matter, the plaintiff cannot complain that it has been impoverished. The plaintiff voluntarily entered into a contract with Absa in terms whereof it undertook a substantial liability. However, the plaintiff secured its exposure through the counter guarantees. The plaintiff is not impoverished when its security proves insufficient. The defendant would have benefitted if Mr Beattie had met the counter guarantee and Mr Beattie, if without a counter guarantee from the defendant, would not have been able to complain.

Conclusion

[33] I, for the reasons stated above, am persuaded that the plaintiff, as guarantor, does not have a claim as a matter of law against the principal debtor after it had paid in terms of a guarantee. In the circumstances of this matter, the plaintiff, in paying in terms of the guarantee, settled its own debt and does not meet the requirements for an enrichment claim. Therefore, I make the following order:

(a) The plaintiff's main and alternative claims are dismissed;

(b) The plaintiff is directed to pay the costs of the action, including the costs of 2 counsel.

Baartman, J