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

Case Number: 885/2019

In the matter between:

NEDBANK LIMITED

Plaintiff/Applicant

(Registration number:1951[...])

And

XANITA (PTY) LIMITED

Defendant/Respondent

(Previously Great Ideas Production Company (Pty)
Limited) (Registration number: 2005[...])

**JUDGMENT ELECTRONICALLY DELIVERED
1 SEPTEMBER 2023**

Baartman, J

[1] On 12 June 2023, in the June judgment, I dismissed, the plaintiff's (the applicant) claim for payment of R4 935 000 plus interest from the defendant (the respondent). The alternative claim based on enrichment suffered the same fate. This is an application for leave to appeal that finding.

[2] In dismissing the applicant's claim, I found that the applicant had issued demand guarantees in favour of Absa, which it duly paid when Absa

called up the guarantees. I further held that the applicant had paid its own debt when it paid the Absa guarantees. The applicant held counter guarantees as security for its Absa obligation from Mr Beattie, the respondent's former director. It was common cause that Mr Beattie had been sequestered and was therefore unable to satisfy the applicant's claim when it called up the counter guarantees he had given in respect of the Absa guarantees. I held that the applicant's failure to have secured sufficient security for the Absa guarantees did not entitle it to call on the respondent. The following appears from the guarantees: (paras 3 and 5 of the June judgment)

'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 [the respondent] ... 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
ABSA BANK R3 435 000.00

I/we JAMES WILLIAM BEATTIE

Irrevocably authorise the bank without further reference to me/us

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

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 applicant pleaded as follows:

'3. On or about 26 January 2006 and at Cape Town the Plaintiff, duly represented...., furnished to and in favour of ABSA Bank Limited ("**Absa**") a

written guarantee, in terms of which, inter alia, the Plaintiff undertook to pay ABSA on written demand an amount up to a maximum aggregate amount of R3 435 000 in the event that the Defendant defaulted on loan facilities granted by Absa to the Defendant ("**the first guarantee**")"

[6] The applicant made similar allegations in respect of the second guarantee and annexed both guarantees referred to above. The respondent, in its plea, denied that it was liable as claimed and stressed that:

'2.3.4.2. Mr Beattie authorised the plaintiff to pay or comply with any claim against it by ABSA which may be made under the first guarantee.

2.3.4.3. Beattie agreed that any sum or sums that the plaintiff paid to ABSA by reason of the first guarantee would be recovered from him including interest.
..'

[7] The respondent made similar allegations in respect of the second guarantee. In correspondence, dated 26 August 2013, the applicant said the following to Mr Beattie:

'...From our point of view we cannot cancel the guarantee on our system until Absa returns the guarantees to us or they formally release us from all obligations under the guarantees. The exposure of R1.Sm + R3.435 therefore remains against your name.'

[8] It is apparent from the guarantees that Absa was entitled to payment on demand accompanied by 'a signed statement' alleging that the respondent had failed to make payment on its facility with Absa.¹ I held that the guarantees constituted demand guarantees and that they were different from those

¹ Paras 15-17 of the June judgment.

discussed in *Zanbuild*² where the court held that the bonds in issue gave '... rise to liability... 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 "due and faithful performance by the contractor". This accords with the language associated with suretyships.'

[9] I further held that the applicant had undertaken an obligation to Absa independent of the respondent's obligation; therefore, it had paid its own debt for which it had counter security. In its application for leave to appeal, the applicant relied on sections 17(1)(a)(i) and 17(1)(a)(ii).³

Section 17(1)(a)(i) ground

[10] The applicant alleged that the guarantees were conditional guarantees 'where similar principles of rights of recourse to those applicable to suretyships would apply'. I have dealt with the issue in the June judgment, paragraphs 14-17 and above.

[11] I have found that the applicant led no evidence that Mr Beattie acted on a mandate from the respondent.⁴ That is factually correct. However, I was prepared to accept that he did but held that it did not assist. In the circumstances of this matter, the guarantees at issue are not conditional guarantees akin to a surety. I am persuaded that the guarantees in issue are demand guarantees.

[12] In the June judgment, I also dismissed the applicant's alternative claim based on enrichment. I held that the applicant had settled its own debt in terms of

² *Minister of Transport & Public Works, Western Cape and Another v Zanbuild Construction (Pty) Ltd* 2011 (5) SA 528 (SCA).

³ *Superior Courts Act* No.10 of 2013.

⁴ Para 23 of the June judgment.

its obligation to ⁵Absa. The respondent benefitted from the payment although that does not detract from the fact that the applicant settled its own debt. Therefore, the claim based on enrichment was dismissed.

Section 17(1)(a)(ii) ground

[13] The applicant further submitted that leave should be granted as follows:

'19.1 As noted earlier, there is a dearth of case law directly on point. It manifestly involves important questions of law;

19.2 The issue in question concerns a matter of commercial significance, generally, and in the banking world, in particular. It is clearly of public importance, in addition to being of great importance to one of South Africa's well-known banks.'

[14] There is no merit in the above ground. It is apparent from the evidence that both banks, significant role players in the South African banking world, held similar views in respect of the import of security Absa held and the obligation the applicant had incurred. That is apparent from the correspondence referred to above. In addition, the evidence showed that the applicant had enlisted Mr Beattie to persuade the respondent's directors to provide additional security through suretyship or other means when it became clear that Mr Beattie was a man of straw.⁶ The distinction between suretyship and guarantees has crystallised, as indicated in paragraphs 14-20 of the June judgment.

[15] I, for the reasons stated above am persuaded that the applicant has not met the test for leave to appeal. Therefore, I make the following order:

⁵ Paras 28-32 of the June judgment.

⁶ Paras 6- 13 of the June judgment.

- (a) The application is dismissed with costs;
- (b) Costs to include the costs of 2 counsel where so employed.

Baartman, J'