
SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Loggenberg and Another (31306/2009) [2018] ZAGPPHC 915 (5 November 2018) [2018] ZAGPPHC 915

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

31306/2009

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 31306/2009

5/11/2018

In the matter between;

ABSA BANK LIMITED

Plaintiff

and

LOGGENBERG, LESLIE

1st Defendant

FORD, HENRY ADEN

2nd Defendant

JUDGMENT

MNGQIBISA-THUSI, J

- [1] The plaintiff, ASSA Bank Limited, is seeking payment in the sum of R1, 653, 030.02, together with interest at the rate of 10.5% per annum, calculated and capitalised monthly from 6 June 2017 to date of payment; and costs. The claim is based on a suretyship agreement concluded between the plaintiff and the second defendant on 5 April 2005.
- [2] The first defendant, Mr L Loggenberg, was finally sequestered in December 2016. At the time of the hearing of these proceedings, a trustee for the first defendant's insolvent estate had not been appointed. The plaintiff's claim against the first defendant was postponed sine die, with costs reserved. The plaintiff's claim is only against the second defendant, Mr HE Ford.
- [3] The second defendant will hereinafter be referred to as 'defendant'.
- [4] The following facts are common cause. On or about 10 May 2005 the plaintiff and Property Specialists 1 (Pty) Ltd ("the principal debtor"), concluded a loan agreement in the amount of R1, 624, 600, covered by a mortgage bond over immovable described as Erf 1262 Parkrand Extension 3 Township, Registration Division I.R., The Province of Gauteng ("the property").
- [5] In its particulars of claim ABSA Bank pleads, inter alia, that:
- "13. On or about 5 April 2005, and at Boksburg, the 1st and 2nd Defendant, acting personally and in writing, bound themselves as surety for and co-principal debtor in solidum with the Principal Debtor in favour of the Plaintiff in respect of any indebtedness of the principal Debtor to the Plaintiff whensoever and howsoever arising.
- The 1st and 2nd Defendants renounced the benefits of cession of action and no cause of debt.
14. It was a term of the suretyship that the 1st and 2nd Defendant would be bound by a certificate purporting to be signed by a manager of any branch of the Plaintiff.
15. A copy of the said Deed of suretyship signed by the 1st and 2nd Defendant, acting personally is annexed hereto marked "C".
16. The Credit Agreement upon which the action is based is a large agreement and falls outside of the provisions of the National Credit Act 35 of 2005".
- [6] The defendant, as a director of the principal debtor, together with the second defendant bound themselves as sureties and co-principal debtors jointly and severally with the principal debtor for payment of any amounts, from time to time, due and payable to ABSA Bank. The suretyship agreement signed by the defendant provides, inter alia that:

6.1 I bind myself 'for the repayment on demand of any sum or sums of money, which the debtor owes or may owe to the Bank from whatever cause arising and the due fulfilment of all obligations of the Debtor to the Bank in his own name or in the name of any business under which he may be trading either solely or jointly with others (in partnership or otherwise) and whether such obligations arise from any suretyship given by the Debtor to the Bank in respect of the debts of any third party and whether such debts already exist or may arise in future' (clause 1).

6.2 I 'acknowledge and agree that that the Bank may at its discretion, without reference to me and without prejudice to its rights in terms hereof:

6.2.1 determine the extent, nature and duration of any facility or other advance to the Debtor;

6.2.2 release in whole or in part present or future security, including this suretyship of the suretyship of co-securities, in respect of the Debtor's obligations to the bank;

6.2.3 enter into any arrangement , compromise or settlement or grant an extension to the Debtor or any surety;

6.2.4 cede its claims or other rights against the Debtor or against me/us to any person of its choice" (clause 7).

[7] It is common cause that the principal debtor, despite the plaintiff performing its obligations in terms of the loan agreement, failed not pay a single instalment to the plaintiff. In order to avoid litigation, the principal debtor offered the property for sale at a public auction on or about 10 June 2009. The offer to purchase the property was accepted by a third party, Lola Citato Pubs CC ("Lola CC"). However, Lola CC failed to secure finance or a bond grant

in order to pay the purchase price. As a result the plaintiff issued summons and default judgment in the sum of R1, 780, 299.85 (plus interest at the rate of 13.4% per annum calculated and capitalised monthly in advance from 29 January 2009 to date of payment; and costs) was granted on 27 July 2011.

[8] The plaintiff obtained a writ of execution and on 25 November 2011 the property was sold by public auction without reserve to Eliza Sodiria Mastouroles for the sum of R848, 000.00.

[9] In view of the fact that the proceeds of the auction sale are less than the principal debtor's indebtedness to ABSA Bank, the bank issued summons against the sureties, amongst which is the defendant. The action was defended and the defendant was granted leave to defend during the summary judgment proceedings .

[10] The defendant is disputing the following:

10.1 the domicilium address of the principal debtor;

10.2 the existence of an underlying cause of action;

10.3 the terms of the loan agreement;

10.4 that the debt is due and the quantum of the debt;

10.5 the applicability of the National Credit Act[1].

However, as submitted by counsel for the plaintiff, it became apparent that the defendant was no longer pursuing the defences raised in sub- paragraphs 10.1 and 10.5 above.

[11] It is not in dispute that there is a valid suretyship agreement. However, in view of the fact that the defendant is disputing the existence of an underlying causa, the plaintiff bears the onus of only proving the principal debtor's indebtedness. The defendant has the onus of proving the following:

11.1 that there is no underlying causa; and

11.2 that he has been released from the suretyship because of the alleged prejudicial conduct of the plaintiff; and

11.3 that the interest charged as reflected in the certificate of balance was incorrectly calculated.

[12] The plaintiff did not call any witnesses. Instead counsel made submissions with regard to the indebtedness of the defendant to the plaintiff.

[13] On behalf of the plaintiff it was submitted that in accordance with clause 9 of the mortgage bond, the certificate of balance issued by the plaintiff is prima facie proof of the defendant's indebtedness to the plaintiff. In its declaration, the plaintiff had attached a certificate of balance dated 28 February 2009 in which it was reflected that the defendant was indebted to the defendant in the amount of R1, 780, 300.85 plus interest at 13.4% capitalised. At the hearing of this matter an updated certificate of balance dated 5 June 2017 was handed up by agreement. The latest certificate of balance reflected that the defendant is liable for payment of an amount of R1, 653,030.02 plus interest charged at 10.5% per annum capitalised monthly until date of payment.

[14] Counsel based his submissions on the indebtedness of the defendant on clause 14 of the suretyship agreement, which is similar to clause 9 of the mortgage bond, which provides that

"14 A certificate signed by any manager of the Bank shall be sufficient proof of any applicable rate of interest and of the amount owing in terms hereof or of any other fact relating to the suretyship for the purposes of judgment ; including provisional sentence and summary judgment, ... and if I dispute the correctness of such certificate, I shall bear the onus of proving the contrary. It shall not be necessary to prove in such certificate the appointment or capacity of the person signing such certificate'.

[15] It was further submitted on behalf of the plaintiff that in view of clause 14 of the suretyship agreement (supra), the defendant bore the evidential burden of showing that the amount owing as reflected in the certificate of balance is incorrect. In support of these submissions, plaintiff relies on the decision in *Senekal v Trust Bank of Africa Ltd*[2] where the court held that the certificate as envisaged in clause 14 of the suretyship agreement has value in the sense of constituting

prima facie evidence of the amount of indebtedness.

[16] One of the issues raised by the defendant is that the interest charged is incorrectly calculated and that the certificate of indebtedness was not reliable and should not be admitted. In this regard in the *Senekal* matter (supra) the court further stated that:

"As to the second of the grounds referred to above, Mr Du Tait's contention was, in effect, that once such a certificate is shown to be suspect as to its accuracy or reliability in any respect whatever, it has no evidential value and must be entirely disregarded. I have no doubt that that broad contention must be rejected. There might be several items to which such a certificate

relates, some of which may appear to be unassailable while others may either be shown be inaccurate or appear to be of dubious reliability, or might require some modification or to adjustment. I can find no reason why in such circumstances the certificate is to be entirely disregarded merely because it is found or thought to be inaccurate or unreliable in certain respects. At the end of the case, when all the evidence (which includes the certificate) is in, the Court must decide whether the party upon whom the onus rests has discharged it on a proper balance of probabilities. If the prima facie evidence or proof remains unrebutted at the close of the case, it becomes "sufficient proof" of the fact or facts (on the issues with which it is concerned) necessarily to be established by the party bearing the onus of proof"[3]

[17] Counsel submitted that in the absence of any evidence rebutting the prima facie indebtedness of the defendant, the prayers sought in the declaration, as amended, should be granted and thereafter closed the plaintiff's case.

[18] Counsel for the defendant sought absolution from the instance on the grounds that in view of the plaintiff closing its case, it has not proven its case against the defendant on a balance of probabilities. This contention is based on the following arguments made by counsel for the defendant. Firstly, counsel argued that the onus wholly rested on the plaintiff to prove the defendant's indebtedness in that there was disputes on the following:

(i) the terms of the loan agreement;

(ii) the terms of the bond as pleaded by the plaintiff and that the plaintiff has not presented any evidence to prove the above- mentioned issues which are in dispute.

[19] In their plea the defendant alleged that the loan agreement between the plaintiff and the principal debtor provided, inter alia , that:

"2.2 The following constituted the express alternatively implied further alternatively tacit terms of the said Loan agreement:

2.2.5 in circumstances where the principal debtor was not able to repay the relevant instalments in respect of the Loan, it would be entitled to sell the property, subject to the Plaintiff's knowledge and consent and provided that the indebtedness owing by the principal debtor to the Plaintiff, at the date of such sale would be covered by the purchase price so as not to prejudice the Plaintiff".

- [20] Counsel for the defendant submitted that the plaintiff could not rely on the terms of the mortgage bond since the mortgage bond was one of the terms of the main agreement (i.e the loan agreement) and that in the absence of the main agreement the plaintiff could not allege that the principal debtor was in breach of the main agreement, hence the putting into effect of the acceleration clause rendering the full amount owed due and payable. At this point it is apposite to point out that in its discovery affidavit, the plaintiff did indicate that the loan agreement between itself and the principal debtor could not be found. Counsel further submitted that it is the defendant's case that there were other agreements which were covered by the mortgage bond. Counsel did not elaborate on the relevance of this submission although it is common cause that the suretyship agreement was unlimited.
- [21] It is the defendant's contention that the plaintiff has not proven that at the time the acceleration clause was invoked the principal debtor was in breach of the main agreement. When confronted about clause 2.2.5 in the plea, counsel for the defendant conceded that when an agreement of sale was concluded with Lola CC at the initial auction sale in 2009, the principal debtor must have been in arrears. Despite this concession, however, counsel persisted with his assertion that the plaintiff has not proven the terms of the loan agreement.
- [22] It is trite that a suretyship agreement is a separate contract from that of the principal debtor, though it is accessory to the main agreement. The surety is liable to the creditor not under the main agreement but in terms of the suretyship agreement in that the surety is not party to the main agreement. In *Bulsara v Jordan & Co Ltd (Conshu Ltd)*[4] the court stated that:

"The principal contract and the suretyship contract are two separate and distinct contracts in respect of the same debt. They give distinct obligations on the part of the principal debtor and the surety in respect of the original debt".

Therefore , the defendant's counsel's insistence on proof of the terms of the loan agreement is misplaced.

- [23] Furthermore counsel argued that since the defendant's liability as surety is accessory to the principal debtor's liability, and since the plaintiff had not shown that at the time the property was put on sale the principal debtor was in breach of the loan agreement., the plaintiff has not shown that it was entitled to call-up the loan and proceed against the sureties.

[24] It is common cause that on 27 July 2011 the plaintiff obtained default judgment against the principal debtor, which judgment as conceded by the defendant in his evidence, has not been set aside. Furthermore, the defendant is bound by clause 6 of the suretyship agreement which provides that:

"I agree that all admissions by or on behalf of the Debtor, including but not limited to the acceptance of the Bank's claim by a trustee or liquidator in the event of the insolvency or liquidation of the Debtor, as well as any judgment granted by a competent court against the Debtor in favour of the Bank, shall be binding on me".

[25] Therefore by virtue of the default judgment obtained against the principal debtor, the default judgment and the suretyship agreement are the bases upon which the plaintiff basis its claim against the defendant.

[26] The only issue remaining to be determined is whether the plaintiff through its conduct of selling the property in execution has acted to the prejudice of the defendant as surety and that the defendant is therefore entitled to be released from the suretyship.

[27] The defendant's evidence is that he had knowledge of the auction sale which took place on 10 June 2009 and proceeded with pursuant to clause 2.2.5 alleged by the defendant to have been a term of the loan agreement. He admitted that the property was put on sale as the plaintiff had instituted proceedings against the principal debtor for non-payment of monthly instalments. Further the defendant testified that it was his understanding that transfer of the property to the purchaser, Lola CC, would take place once all the conditions of sale were fulfilled. He testified that he believed that with the conclusion of the sale agreement between the principal debtor and Lola CC, the bond amount would be extinguished with the proceeds from the sale as the offer to purchase was in the sum of R1 700, 000.00 and at that stage the principal debtor owed the plaintiff an amount of R1, 780, 300.85.

[28] The defendant further testified that as summons had been issued against him as one of the sureties, this litigation was suspended pending Lola CC obtaining a bond grant. However, when the property was not transferred to Lola CC and the property was again put on sale at an auction sale without reserve after the plaintiff obtained a writ of execution, litigation against him and Mr Loggenberg proceeded. Defendant admitted that neither at the time of the initial auction sale and after the sale in execution had the principal debtor paid any instalment to the plaintiff towards the loan granted.

[29] The defendant further testified that the plaintiff had no entitlement to any further payment because firstly, the progress payments made were not exhaustive of the amount of the loan granted. Secondly that since the plaintiff had sold the property for an amount of R848, 000.00, the proceeds of the sale should be applied in order to reduce his indebtedness to the plaintiff. Furthermore, in his evidence the defendant appeared to be blaming the transferring attorneys, Hammond Poole Attorneys, for the non-registration of the transfer of the property into the name of Lola CC, despite being aware that Lola CC was unable to raise finance for the purchase price. The defendant further testified that the latest certificate of

indebtedness dated 5 June 2017 does not give an indication that the proceeds of the sale in execution were applied to the debt.

[30] Under cross examination, the defendant admitted that once the bond grant was not approved for Lola CC, the plaintiff had no obligation towards the principal debtor or the sureties to wait indefinitely until an approval was obtained. The defendant further conceded that although a sale agreement had been concluded between the principal debtor and

Lola CC, the sale was never completed as Lola CC failed to pay the purchase price and the property could not therefore be transferred to Lola CC. The defendant further conceded that the sale agreement with Lola CC was subject to Lola CC obtaining bond approval. Even though the defendant admitted that the plaintiff was not a party in the auction sale that led to an agreement between the principal debtor and Lola CC being concluded, the defendant testified that the plaintiff still had an obligation to protect the interests of the sureties. However, the defendant did not substantiate on this proposition. The defendant also finally conceded under cross examination that it was not the plaintiff's fault that the sheriff stopped bidding during the sale in execution at R848, 000.00.

[31] On being referred to the principal debtor's quarterly statement received from the plaintiff and dated 31 August 2013 which showed a positive entry of R956, 756.00, an opening balance of R2, 563, 051.00 and a closing balance of R1, 653, 030.02, the defendant conceded that it was possible that the credit entry was proceeds from the sale in execution, particularly if one takes into account that the transfer of the property was registered during June 2013.

[32] The defendant was not an impressive witness as he tended to prevaricate when questioned about whether the principal debtor had made any payments towards the loan to the plaintiff.

[33] In argument counsel for the plaintiff argued that there is no dispute that the underlying cause of action for the plaintiff's claim was the default judgement granted against the principal debtor and the suretyship signed and admitted by the defendant. Counsel further argued that in terms of Uniform Rule 46(5) where the execution creditor is the bondholder, a sale in execution is without reserve. Counsel argued that as the initial auction sale of 2009 was not complete as the purchaser failed to secure finance for the property, this could not be ascribed to the plaintiff as it was not a party to that sale and had no obligation to intervene.

[34] On behalf of the defendant it was argued that once the defendant cast doubt on the correctness of the amount said to be owed, including the calculation of the interest, and the application of the proceeds of the sale in execution, the court should make a finding that the plaintiff has failed to prove its claim.

- [35] Counsel for the defendant further argued that based on what the defendant alleged in paragraph 2.2.5 (above) of their plea, the plaintiff was obliged to sell the property at an amount sufficient to satisfy the principal debtor's indebtedness to the plaintiff. Counsel submitted that since the property was sold for a lesser amount, the defendant was released from his obligations under the suretyship agreement and were not liable for any shortfall.
- [36] As correctly pointed out by counsel for the plaintiff, defendant has not shown that there was agreement that in the event of the principal debtor defaulting on its obligation, the property could be sold at an amount sufficient to satisfy the debt. Even if there was such an agreement, it is not in dispute that at the sale of the property initiated by the principal debtor was offered with a reserve price.
- [37] In *ABSA Bank Ltd v Davidson*[5] the Supreme Court of Appeal held that the so-called 'prejudice principle' to the effect that, if a creditor should do anything in his dealings with the principal debtor that has the effect of prejudicing the surety, the surety is released from his obligations,

does not exist. The court went further and stated that:

"As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by the conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer."[6].

- [38] There is no obligation on the owner of property sold at an auction sale to stop a bid if the price offered is less than the market value of the item sold. At an auction goods are sold to the highest bidder unless it is stipulated that they are to be sold with a reserve price. The defendant bore the onus of proving that the loan agreement provided

for the sale of the property at an amount sufficient to discharge the principal debtor's indebtedness to the plaintiff. At the trial the defendant did not present any evidence in this regard.

- [39] In order to determine the rights and obligations of the relationship between the plaintiff and the defendant one has to look at the provisions of the suretyship. Nothing in the surety agreement puts an obligation on the plaintiff, in the event of the principal debtor being in breach, to sell the property at an amount sufficient to extinguish the principal debtor's indebtedness to the plaintiff. Further, as pointed out by counsel for the plaintiff, Uniform rule 46(5) allows an execution creditor who is also a bondholder to sell the property without reserve.
- [40] I am therefore satisfied that the defendant has failed to prove that they suffered any prejudice as a result of the conduct of the plaintiff.

[41] With regard to the amount owed the defendant has not proffered any explanation as to why he did not seek the rescission of the default judgment, which he was aware of, if he was of the view that the quantum of the debt owed was incorrect. On the basis of the evidence presented in the documents discovered by the plaintiff, there is no other explanation other than that the entry in the quarterly statement of August 2013 is the application of the proceeds of the sale in execution to the debt owed. Nevertheless I am of the view that the defendant has not discharged its evidentiary burden of rebutting the prima facie evidence of the certificate of balance signed by the plaintiff's manager. As stated in 16 (above), if prima evidence is not rebutted at the close of the proceedings, the prima facie evidence become conclusive proof of the fact sort to be proved.

[42] In the result the following order is made:

1. The defendant's application for absolution from the instance is refused.

2. The Defendant is ordered to pay to the plaintiff:

2.1 The sum of R1, 653, 030.02;

2.2 Interest on the sum of R1, 653, 030.02 at the rate of 10.5% per annum capitalised monthly from 6 June 2017; and

2.3 Costs of suit.

NP MNGQIBISA-THUSI, J

Judge of the High Court

For Plaintiff Adv. M De Oliveira (instructed by Hammond Pole Attorneys) and for Defendant Adv. MW Verstar (instructed by BMV Attorneys).

[1] Act 34 of 2005.

[2] 1978 (3) SA 375 (A) at 382.

[3] At 382-383.

[4]

[1995] ZASCA 106; 1996 (1) SA 805 at 810.

[5] 2000 (1) SA 1117 (SCA).

[6] At para [19]. See also *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA).

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