

SOUTH AFRICA / JUDGMENT

Auto Commodities (Pty) Ltd v Vam Zyl (205/2018) [2019] ZANCHC 64 (6 September 2019) [2019] ZANCHC 64

COURT

Northern Cape High Court, Kimberley

BEFORE

Coetzee

CASE / FILE NUMBER

205/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE HIGH COURT, KIMBERLEY)

Case

No: 205/2018

Heard

On: 6/08/2019

Delivered:

6/09/2019

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In

the matter between: AUTO
 COMMODITIES (PTY)
 LTD
 PLAINTIFF
 and
 MARTIN
 VAM
 ZYL
 DEFENDANT

JUDGMENT

COETZEE AJ

[1] Plaintiff' is Auto Commodities (Pty) Ltd, a private company, and supplier of, inter alia, petroleum products. Plaintiffs claim is based on a deed of suretyship, dated 9 June 2014, in terms whereof defendant, Mr Martin van Zyl, bound himself as surety and co principal debtor for the due fulfilment of all obligations which Blue Chip Mining and Drilling (Pty) Ltd ("Blue Chip") may have towards the plaintiff and prays as follows:

1 Payment of the sum of R 6 327 293,98 plus interest calculated at 14.5% being the prime rate charged by the plaintiffs bankers plus

4% from 10 January 2017 to date of payment in full, alternatively calculated at 10,25% per year.

2 Alternatively to prayer 1

2.1 Rectification of the deed of suretyship by deleting the words "As Witness" where the defendant signed.

2.2 Payment of the sum of R 6 327 293,98 plus interest calculated at 14.5% being the prime rate charged by the plaintiffs bankers plus

4% from 10 January 2017 to date of payment in full, alternatively calculated at 10,25% per year.

3 Costs of suit.

[2] The parties agreed at a pretrial conference that, inter alia, that the following relevant facts are not in dispute:

2.1 During or about the beginning of June 2014 the plaintiff sent forms for an application for the granting of a current account and credit facilities, which forms included a suretyship, to Blue Chip. The complete document consisted of 6 pages of which the Application for a Current Account" and the "Conditions of Trade" each consisted of a single page and the "Deed of Suretyship" of 4 pages.

2.2 The completed application for the current account and credit facility as well as the completed deed of suretyship was faxed back to plaintiff on 8 June 2019. The application was successful and plaintiff approved the application on 30 July 2019.

2.3 Pursuant to the approval of the application the plaintiff supplied petroleum products to Blue Chip on credit and did so from 1 August 2014 to 5 December 2016.

2.4 On 18 December 2014 Blue Chip was placed in Business Rescue in terms of section 129 (1) of the Companies Act, 2008 (Act 71 of 2008) ("the Act").

2.5 On or about 14 December 2015 the business rescue practitioners paid an amount of R 1 319 160.50 to the plaintiff.

2.6 As at 5 December 2016, Blue Chip was indebted to plaintiff in the amount of R 6 927 239.98.

[3] Defendant raises, in essence, the following defences:

3.1 As a result of the implementation of a business rescue plan of Blue Chip and the filing of a certificate of substantial implementation of the rescue plan in terms of section 152(8) of the Companies Act, 2008, plaintiff can no longer, in terms of section 154(2) of the Companies Act enforce any debt which was owing prior to the business rescue.

3.2 The purported deed of suretyship was not signed by the defendant as surety as his signed the document as a witness.

3.3 The defendant's suretyship is limited and for this defence he relies on the following provision in the deed of suretyship:

"Subject however that our total indebtedness Will never exceed an amount equivalent to the percentage of the debtor's interest in the principal debtor, expressed as an amount of the total of the Principal Debtor's indebtedness to the Creditor.

(My underlining)

[4] Ad 3.1 supra

4.1 Mr Theron, on behalf of the defendant, submitted that Blue Chip has been released of its obligation towards plaintiff. He contends that once the business rescue plan has been implemented, which involved the acceptance by creditors, including plaintiff, of full or partial payments from the controlled sale of Blue Chip's assets, the company would be returned to its directors and shareholder. He then submitted that once full or partial payment has been made, the creditors would retain no right against Blue Chip for payment of any part of the debt which remains unpaid. The question then arises whether the releasing

of Blue Chip of their debt towards the plaintiff extinguished the debt. For the reasons hereunder I am of the view that it does not.

4.2 In *New Port Finance Company (Pty) Ltd and another v Nedbank Ltd; Mostert and another v Nedbank Ltd* [2015] 2 All SA 1 (SCA) paragraph 8 (also reported as 2016(5) SA 503 SCA), Wallis JA said the following:

"At the heart of the submissions on behalf of Mr Mostert and New Port was the proposition that the successful outcome of the business rescue proceedings would be that the sureties would have been relieved of any indebtedness to Nedbank over and above the payment of the amounts already received by Nedbank under those two plans. For various reasons that would not have been the case."

4.3 With regard to the *New Port Finance* case Mr Theron contended that the terms of the deed of suretyship, in casu, differs from those terms considered by Wallis JA in that the present suretyship only preserves the right to claim as set out in clauses 5 and 5.4, which provide as follows:

"5 In the event of the insolvency, liquidation, sequestration or placing under judicial management of the estate of the debtor or in the event of compromise between the debtor and any creditor of the debtor:

5.4 "No dividends or payments which the Creditor will receive from the debtor shall prejudice the creditor's right to recover from us any sum which, after the receipt of such dividends or payments, will remain owing to the creditor by the debtor'

4.4 In context, there is, in my view, no difference in the wording which detracts from the cogency of the principle, enunciated, albeit obiter, by Wallis JA in paragraph 12 of the judgement where he says the following:

"[12]Of necessity, therefore, it had to be argued that the liquidation of Wedgewood and Danger Point had altered the situation. But that only brought clause six into sharper focus. It identified four broad situations when its terms would apply. They were liquidation, judicial management under the Companies Act 61 of 1973, the submission of an offer of compromise by the debtor and the submission of a scheme of arrangement by the debtor. If any of those events occurred, clause six entitled Nedbank to accept any dividend on account or any alternative securities arising out of that event and "to recover from the surety, to the full extent of this suretyship" any sums remaining owing thereafter. In other words, the fact that in any of those situations the principal debtor would be released in whole or in part from its obligations would not disentitle the bank from recovering the outstanding amount from the sureties. Neither suggestion by Counsel as to ways in which this could be avoided held water. In particular the suggestion that a clause in these terms did not encompass business rescue an institution that did not exist under that name when the deeds were executed was incorrect

4.5 Mr Theron also referred me to an unreported judgment by Williams J, in this division, in *Hitachi Construction Machinery Southern Africa Co Pty Ltd v Wiets Bates (First Respondent) and Martin van Zyl (Second Respondent)* Case number 205/2018), handed down on 15 March 2018.

4.6 Mr Theron, who, in the Hitachicase represented the respondents, repeated his submission that the remarks made by Wallis JA in New Port Finance were obiter_and urged me to find that William J was wrong in finding as follows in paragraph 16:

"Mr Theron's argument, that the pronouncements in New Port relating to the liability of sureties after a business rescue plan, are obiter, may be so in the sense that the issues in New Port were decided on a different ground. It can however not be said that these are only passing remarks, since the SCA had heard full argument on the business rescue point and had found the issues to be of such importance that it was appropriate to state why the business rescue defence would not have availed the appellants in that matter. I would be slow to ignore these findings."

4.7 I am in agreement with the finding of Williams J.

4.8 I am therefor of the view that this defence must fail

[5] Ad 3.2 supra

5.1 It is trite law that, in the present circumstances, the plaintiff carries the burden to show the existence of a valid and enforceable contract of surety which burden includes, save for the essential elements as statutory provided for, the terms of the contract and intention of the surety. (See *Di Giulio v First National Bank of South Africa Ltd* 2002 (6) SA 281 (K) Paragraph [26]. Once it has been shown that a valid suretyship exists, the surety must show, on a balance of probabilities why the caveat subscriptor rule should not be applied.

5.2 Section 6 of the General Law Amendment Act 50 of 1956 ("the Act") provides:

"No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety ..."

5.3 The validity of a deed of suretyship is dependent on its conformity with the provisions of sec 6 of the General Law Amendment Act, 1956 (Act 50 of 1956). Essential to the validity of a contract of suretyship includes the identities of the creditor, the principal debtor and the surety (*Fourlamel (Pty) Ltd v Maddison* 1977

(1) SA 333 (A) at 345AD).

5.4 The Deed of Suretyship identifies the plaintiff as "creditor", the defendant as "surety" and Blue Chip as the "debtor" and the signature of the defendant appears on the last page thereof under the heading "As Witness". The essence of the dispute is, in my view, whether the defendant appended his signature to the deed of suretyship with the intention to be bound as surety. For convenience I reproduce the concluding portion of the agreement:

Thus done and signed in Kuruman on this the 09 day of June 2014 AS WITNESS

1 Signed C P H Augustyn

2 Signed M van Zyl

Blue Chip Mining and Drilling

For APPLICANT

Thus done and signed in Krugersdorp on this the 30 day of July 2014 AS WITNESS

1 Signed (Illegible)

2 Signed (Illegible)

Signed (Illegible)

For AUTO COMMODOTIES

Initials (Illegible) Signed M van Zyl

5.5 The plaintiff called Mr Andrew Joubert and Albertus Horn whilst only the defendant testified.

5.6 Defendant testified that he is the chief executive officer of Blue Chip. He also testified that, before being involved in Blue Chip, he held a high position in the Civil service, holds multiple University degrees, inter alia, a Masters degree which he obtained in the United States of America.

5.7 In crossexamination he conceded that he signed the deed of suretyship but denied that he intended to append his signature to the deed of suretyship as surety and persisted that he only signed as a witness, as he only signed at the pencil markings on the document which markings were indicated to him by Mr Augustyn, the financial manager of Blue Chip. He further testified that all the handwritten portions on the application and deed of suretyship was completed by Mr Augustyn.

5.8 He also admitted that he signed every page of the application for credit at the foot thereof, which includes the very first and very last page of the Deed of Suretyship. Defendant's name "Martin van Zyl" appears underneath the heading "DEED OF SURETYSHIP", which is typed in capital letters and is underlined, on the first page of the deed of suretyship.

5.9 As there appears no signature in the space provided for the "Applicant's" signature he could not explain whose signature he witnessed.

5.10 The defendant admitted having received an email from Mr Andre Joubert, a director of the plaintiff, on 9 March 2016 in which email the defendant was referred to the personal suretyship which he had signed and he was asked to indicate as to how the outstanding amount would be settled. Defendant's response was that he would consult with Blue Chip after having heard from the Business Rescue Practitioners. He then thanked Mr Joubert for the understanding shown.

5.11 He further admitted that his attorney did, on his instructions, caused a letter to be written to the plaintiff's attorneys on 17 January 2017 in which letter he avers that the deed of suretyship "was intended to be no more than a draft, which accompanied the application for information purposes".

5.12 In evaluating the defendant's evidence, I must, at the outset, say that I find him not to be a good and reliable witness. He was evasive under cross-examination and could not explain why he regarded the deed of suretyship to be a "draft" for "information purposes".

5.13 I find it improbable that his financial manager would complete the application and deed of suretyship and in particular insert defendant's name in the space for the surety without informing him or, at the very least, draw his attention to the fact that he was about to sign a deed of suretyship. In this regard Mr Cilliers, on behalf of the plaintiff, submitted that, on probabilities, defendant must have gleaned that from his interaction with Mr Augustyn. This submission is, in my view, sound. In view of the contents of his attorney's letter he was aware that his name appeared on a deed of suretyship as he regarded it as a "draft".

5.14 Contrary to the defendant's defence that he signed the deed of suretyship as a witness, he contends in his attorney's letter to the plaintiff's attorney, that he "signed an application for a current account on behalf of the company", which *ex facie* the document he did not do as, *ex facie* the document he did not sign the document on behalf of the company but, on his evidence, as a witness. The fact that he regarded

the deed of suretyship to be a draft is indicative of the fact that he was, at the time of signing it, aware of the fact that it was a deed of suretyship.

5.15 Mr Theron, with reliance on *Brack v Citystate Townhouses* 1982

(3) SA 364 WLD submitted that, as the defendant, *ex facie* the deed of suretyship, signed in the space designated for witnesses, no valid suretyship came about.

5.16 Brack's case does not support this submission as the facts are distinguishable from the present case. In *casu*, the deed of suretyship provides as follows:

"By appending our signatures at the foot hereof, we bind ourselves as surety and coprinciple debtor, in terms of this deed of suretyship....."

5.17 Defendant did append his signature at the foot of the deed of suretyship.

5.18 For the above reasons I find that the defendant failed to show that the caveat subscriptor rule should not be applied and that the defendant intended to sign as surety. I therefore dismiss this defence.

[6] Ad 3.3 *supra*

6.1 The issue which the court needs to decide is whether the limitation of the suretyship should be regarded as *pro non scripto* as submitted by Mr Cilliers or, as Mr Theron contends, that on a proper interpretation of the relevant clause, the surety is limited.

6.2 GREENBERG, J.A., said in *Worman v. Hughes and Others*, 1948 (3) S.A. 495 at p. 505 (A.D.), said the following:

"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, , i.e. what their intention was as expressed in the contract. As was said by SOLOMON, J., in *van Pletsen v. Henning*, 1913 A.D. p. 82 at p. 99: 'The intention of the parties must be gathered from their language, not from what either of them may have had in mind.' (See a/so *Union Government v. Smith*, 1935 A.O. p. 232 at p. 2401; *Lanfear v. du Tait*, 1943 A.O. p. 59 at pp. 723 and, in regard to wills,

6.3 It may well have been that the defendant had in mind that his liability would be limited hence the envisaged rectification as alluded to in his attorneys letter dated 17 January 2017 where he wrote the following:

"Appropriately rectified it should read: '...each of our total indebtedness in terms of this deed of suretyship will never exceed an amount equivalent to the percentage of each's interest in the PRINCIPAL DEBTOR'"

6.4 Defendant did not plead nor move for rectification.

6.5 Applying the principle referred to above, I am of the view that, on a proper interpretation, the suretyship visavis the defendant is not limited.

6.6 Even if I am wrong in this finding, I am inclined to agree with the submission that the limiting portion should be regarded as *pro non scripto*. From a mere reading of the document it is clear that the "debtor" cannot have an interest in the "co principal debtor". This renders the limitation nonsensical and thus void for vagueness.

[7] In view of the order I intend to make there is no need to deal with the cause of action based on delict or the alternative claim for rectification respectively.

[8] No evidence was led with regard to the prime rate claimed by the plaintiff's bankers and he is not entitled to such an order.

[9] No reason has been advanced why the costs should not follow the suit.

In the above premises I make the following order:

1 Judgement in granted as follows:

1.1 Payment of the sum of R 6 327 293.

1.2 Interest calculated on the above amount at 10.25% from 10 January 2017 to date of payment in full.

1.3 Costs of suit.

W J COETZEE

ACTING JUDGENORTHERN CAPE DIVISION, KIMBERLEY

On Behalf of the Plaintiff: Adv G C Pretorius (SC)

Instructed by:

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Prepared on 14 October 2026 · Esheria