

SOUTH AFRICA / JUDGMENT

Business Zone 747 (Pty) Ltd v UMK Build (Pty) Ltd and Others (D13054/2022)

[2024] ZAKZDHC 9 (5 March 2024)

[2024] ZAKZDHC 9**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

R Singh

CASE / FILE NUMBER

D13054/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
REPORTABLE / NOT
REPORTABLE
Case No: D13054/2022

In the matter between: THE BUSINESS ZONE 747
 (PTY) LTD
 APPLICANT
 And
 UMK BUILD (PTY)
 LTD
 FIRST
 RESPONDENT
 KEVIN
 TWIDDY
 SECOND
 RESPONDENT
 MARK
 PATTINSON
 THIRD
 RESPONDENT
 ORDER
 The following order is

made:	1. Judgment is granted against the first, second and third respondents, jointly and severally,
the one paying the other to be absolved for:	1.1 payment of the sum of R3 000 000; 1.2 interest on the sum of R3 000 000 at the rate of 5% per month from 24 June 2022 to date of final payment; 1.3 the costs of the application on a scale as between attorney and client. 2. As
against the first respondent only:	2.1 The first respondent is directed to provide to the applicant, within seven (7) days of service of this order upon the first respondent's
attorney of record, copies of:	2.1.1 the first respondent's debtors' ledger for the period 24 June 2022 to the date of the granting of this order; 2.1.2 the first respondent's management accounts for the period 24 June 2022 to the date of the granting of this order; 2.1.3 all outstanding (unpaid) invoices issued by the first respondent to its debtors from 24 June 2022 to the date of the granting of this order; 2.1.4 all contracts pursuant to or in terms of which the first respondent's aforesaid debtors are indebted to the first respondent as at the date of the granting of this order; 2.1.5 copies of the first respondent's bank statements from 24 June 2022 to the date of the granting of this order; 2.1.6 such documents as are necessary to establish the identity of the first respondent's debtors for the period 24 June 2022 until the date of the granting of this order, as well as the sums owed by them, and the factual basis of the first respondent's claims against those debtors. 2.2 Until such time as the judgment in paragraph 1 of this order is paid in full, the first respondent is directed to provide to the applicant,

within three (3) working days after the end of each month, with the following documents:

- 2.2.1 all outstanding (unpaid) invoices issued by the first respondent to its debtors during the previous month;
- 2.2.2 copies of the first respondent's bank statements for the previous month;
- 2.2.3 such additional documents as are necessary to establish the identity of the first respondent's debtors, that may have come into existence after the date of this order.

JUDGMENT

R. SINGH, AJ

Introduction

[1] The applicant seeks judgment for repayment of monies lent and advanced to the first respondent in respect of which the second and third respondents bound themselves as sureties. Ancillary relief relating to the enforcement of further security for the debt in the form of a cession of debts made by the first respondent to the applicant is also sought.

The material facts

[2] On 10 May 2022, the applicant and first respondent entered into a written loan agreement whereby the applicant agreed to lend and advance to the first respondent the sum of R2,5 million.

[3] The material terms of the agreement were as follows:

(a) The first respondent agreed to repay the applicant the sum of R3 million on the earlier of:

(i) the final repayment date which was defined as being thirty (30) days after the date of signature of the loan agreement by both parties if the standby letter of credit (SLBC) was issued within twenty (20) business days of such signature date, alternatively if the SLBC was not issued within that period, then twenty (20) business days after the date of the signature of the loan agreement or such longer period as may be agreed to by the parties in writing;

(ii) the date on which ACMR Capital (Pty) Ltd (ACMR) or Ruan Rabie Attorneys repaid the sign-on agreement to the first respondent as contemplated under an Escrow agreement, which was concluded between Edstan-UMK Property Developers (Pty) Ltd (UMK), ACMR and Ruan Rabie Attorneys;

(iii) one

- (1) business day after receipt by UMK of any payments from ACMR under the construction contracts entered into between them.
- (b) Interest was to accrue on the sum of R3 million at 5% per month, should the repayment amount not be paid by the agreed date.
- (c) The applicant was to advance the loan by way of an electronic funds transfer into the trust account of Ruan Rabie Attorneys, which payment the first respondent agreed would have discharged the applicant's obligation to advance the loan.
- [4] The second and third respondents bound themselves as sureties in respect of the debt by way of written agreements of suretyship signed by them.
- [5] On 9 May 2022, the first respondent further executed a written cession of its book debts in favour of the applicant, which the applicant accepted on 10 May 2022.
- [6] The cession of the book debts was signed because the loan agreement required for security to be provided in the form of a cession of book debts. It was a term of the loan agreement that the applicant would only advance the loan once the first respondent had provided the agreed security.
- [7] The cession was to remain in full force and effect until all of the secured obligations, contingent or otherwise, had been irrevocably and unconditionally paid and performed in full.
- [8] The applicant complied with its obligations by paying the loan amount into the trust account of Ruan Rabie attorneys on 9 May 2022.
- [9] The SLBC was not issued within twenty (20) business days of the date of the signature of the loan agreement, or at all. Accordingly, the final repayment date for the amount advanced was twenty (20) business days after the signature on the loan agreement. The final repayment date was 6 June 2022.
- [10] At the first respondent's request, the applicant agreed to extend the final repayment date to 23 June 2022. Despite the foregoing extension however, the first respondent failed to make good on its promise to repay the loan.
- [11] The applicant made demand for payment of the sum of R3 million together with penalty interest thereon at the rate of 5% per month. The applicant further wrote to the first respondent confirming that the applicant was exercising its rights in terms of the cession calling upon the first respondent to deliver all documentary evidence, records and instruments identifying the first respondent's debtors. The first respondent was requested to immediately notify all its debtors that payment of amounts owing to it must be made to the applicant to ensure that the first respondent's indebtedness to the applicant is discharged.

[12] The first respondent asked for a further indulgence until the end of September 2022 for payment of the loan, which indulgence was refused. The applicant also wrote to the second and third respondents in their capacity as sureties demanding payment of the loan.

[13] The parties entered into certain settlement negotiations but nothing came of it and the applicant launched the present application for the relief set forth in the notice of motion.

The respondents case

[14] The respondents delivered an answering affidavit and their opposition to the application is inter alia as follows:

- (a) a point in limine of non-joinder of Ruan Rabie Attorneys who, the respondents alleged, ought to have been joined to the proceedings;
- (b) that the first respondent is not liable to repay the loan because Ruan Rabie Attorneys misappropriated the money and it is therefore unable to pay;
- (c) the third respondent denied that he was liable as surety because the applicant did not sign the deed of suretyship; and
- (d) the first respondent, in a bald denial stated that it did not sign the cession of book debts agreement and accordingly did not admit the terms thereof.

The issues

[15] Mr Hand, who appeared for the respondents did not pursue the defences referred to in paragraphs 15(a), (c) and (d) supra. In my view, correctly so.

[16] The parties agreed that the issue to be determined was the liability of the first respondent to repay the loan on the basis that Ruan Rabie Attorneys misappropriated the loan funds.

The first respondent's liability in respect of the loan

[17] The loan agreement provided that the applicant was to make payment of the loan to the first respondent by way of an electronic funds transfer into Ruan Rabie Attorneys trust account.

[1] There is no dispute that the applicant complied with this obligation. The appointment of Ruan Rabie Attorneys to receive the loan was, in my view, an agreed method of payment by the applicant to the first respondent in fulfilment of its obligations. The applicant was not a party to the Escrow agreement and I therefore do not agree with submissions of the respondents that the applicant must bear any risk of non-payment. The argument by the respondents that as the monies advanced were misappropriated by Ruan Rabie Attorneys, the first respondent was not obliged to pay same simply cannot pass muster or alleviate the first respondent of its contractual liability to repay the loan to the applicant.

[18] I accordingly find the first respondent liable to the applicant for repayment of the loan.

Liability of the second and third respondents

[19] It is common cause that the second and third respondents bound themselves as sureties in respect of the first respondent's indebtedness. No defences were raised by the second and third respondents, save for the issue I have referred to in paragraph 15(c) supra, which was not pursued.

[20] Accordingly, I find that the second and third respondents are jointly and severally liable together with the first respondent for repayment of the sum of R3 million to the applicant.

The cession of the book debts

[21] It is evident from the loan agreement that the cession of the first respondent's book debts was a condition to the applicant advancing the loan to the first respondent. The cession of the book debts was also signed on the same day as the loan agreement by the second respondent in his capacity as director of the first respondent.

[22] The first respondent's defence to the relief claimed in paragraph 2 of the notice of motion is a bald denial that it executed the cession of book debts. No proper reasons are advanced for such denial in the answering affidavit. It is trite that the court must not come to the defence of a respondent who shelters behind bare denials or implausible versions.[2] Such denials are not to be considered to be real, material or genuine disputes of fact. Mr Hand, correctly did not pursue this point.

[23] I am of the view that the applicant is entitled to the relief sought in paragraph 2 of the notice of motion.

Order

[24] In the circumstances, I am satisfied that the applicant has made out a case for the relief sought in the notice of motion and I make the following order:

2.2.1 all outstanding (unpaid) invoices issued by the first respondent to its debtors during the previous month;

2.2.2 copies of the first respondent's bank statements for the previous month;

2.2.3 such additional documents as are necessary to establish the identity of the first respondent's debtors, that may have come into existence after the date of this order.

APPEARANCES

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Date of hearing : 26 February 2024

Date of judgment : 05 March 2024

[1] Annexure “FA2”, clause 4.1 at page 37.

[2] Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 55.

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