

SOUTH AFRICA / JUDGMENT

Flotek Piping & Irrigation (Pty) Ltd v Grace and Another (12260/2021) [2021] ZAGPPHC 739 (3 November 2021) [2021] ZAGPPHC 739

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

12260/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

3/11/2021

Case number: 12260/2021

Date:

In

the matter between:

FLO-TEK

PIPING & IRRIGATION (PTY) LTD

PLAINTIFF

And

WAYNE

ALLEN

GRACE

DEFENDANT/RESPONDENT

RONNIE

DENNISON

DEFENDANT/RESPONDENT

JUDGMENT

TOLMAY, J:

- [1] This is a summary judgment application instituted against the defendants in their capacity as sureties of Ronnie Dennison Agencies (Pty) Ltd which changed its name to Water Africa Systems (Pty) Ltd (the principal debtor and who has been liquidated).
- [2] On 18 November 2013 the defendants acting on behalf of the principal debtor signed a credit application, in terms of which the plaintiff would sell and deliver goods to the principal debtor on credit. It was a term of the application that the principal debtor would pay any costs on attorney and client scale and that the National Credit Act No 34 of 2005 (the NCA) would not apply, as the annual turnover of the principal debtor exceeded R1 million. The principal debt exceeded R250 000-00 and therefore the NCA does not apply. It was alleged that the plaintiff accepted the principal debtor's application and goods and services were delivered to the principal debtor.
- [3] The first claim against the principal debtor is for the amount of R800 000-00 for goods sold and delivered during January to September 2015. The principal debtor made payments of R800 000-00, but after liquidation of the principal debtor, the liquidators found that the payments were preferential payments in contravention of the Insolvency Act and accordingly the plaintiff paid the amount of R800 000-00 back to the liquidators.
- [4] The second claim against the principal debtor is for goods sold and delivered to the principal debtor during January 2015 to September 2015 in the amount of R318 908-89
- [5] On 18 November 2013 the defendants bound themselves as sureties and co-principal debtors jointly and severally with the principal debtor for all amounts being due and payable by the principal debtor. This surety is incorporated in the second page of the credit application. On 18 November 2013 the first defendant also signed a separate deed of suretyship.
- [6] The defendants renounced the benefits of exclusion and division and/or the legal exceptions *non numeratae pecuniae* and *non causa debiti* and acknowledged themselves to be fully acquainted with the meanings of these terms.
- [7] On 19 September 2016 the defendants furthermore acknowledged their indebtedness to the plaintiff in writing for an amount of R1 278 906-89. They undertook to repay the amounts together with interest at a rate of 10.25% per annum calculated from 1 December 2015 to date of payment at a rate of R30 000-00 per month from 30 September 2016. It was a term of the agreement that should they default on the payment, the full balance owing would become due and payable. The defendants paid the sum of R960 000-00 but failed to pay the outstanding amount of R318 906-89.

- [8] The defendants raised several defences, including prescription, that the NCA does not apply and that the Consumer Protection Act applies. These defences were abandoned during argument and correctly so, as there was no merit in them.
- [9] The defendant however continued to argue that the credit application was not signed by plaintiff and that it was merely an offer. This allegation has no merit as it was never denied that goods were sold and delivered in terms of the agreement. This argument does also not explain why the acknowledgment of debt was signed and partially complied with.
- [10] Clause 1 of the Terms and Conditions of Sale as annexed and forming part of the credit application states that any orders resulting from the application "... shall be subject to the conditions stated herein, unless specifically varied by the creditor in writing ...". It is not disputed that the defendants signed the credit application as well as the terms and conditions incorporated thereto and that goods were indeed delivered and credit granted.
- [11] The defendants went on to allege that seeing that the credit limit was R250 000-00, the sureties liability was limited to that amount. The credit application make no mention of such a limit. In terms of clause 1 and clause 23 of the agreement referred to, there can be no further terms other than those contained in the credit application unless reduced to writing and signed by the parties. The defendants did not place any written agreement containing such a term limiting the amount to R250 000-00 before Court, and consequently any oral agreement in this regard cannot find application.
- [12] In any event in terms of clause 6 of the agreement the sureties confirmed that they will be liable for "... all amounts which may at any time be payable by the debtor to the creditor from any cause of action whatsoever ...". The surety is clearly of an unlimited nature.
- [13] In the affidavit the defendants made vague allegations of a fraud being committed between unnamed employees of the defendants and the plaintiffs, to place orders in excess of the limit to the prejudice of the principal debtor and the defendants. The defendants' argument is that the alleged corrupt relationship with the defendants' employees, as the reason why the alleged agreed limit of R250 000-00 was exceeded. No particularity is provided regarding these serious allegations. It is trite that a bona fide defence, with sufficient particularity is required to resist summary judgment. It is also trite that the summary judgment procedure is intended to prevent "sham defences which merely delay the enforcement of legitimate rights.
- [14] The defendants continue to complain that they were forced into signing the acknowledgment of debt to the alleged corrupt relationship. This allegation also lacks any particularity. It is trite that this will not suffice as a bona fide defence resisting summary

judgment.

[15] The defendants further make the surprising allegation that the principal debt has been extinguished as a result of the liquidation of the principal debtor and consequently it was argued that the sureties are no longer liable. This aspect was not raised in the affidavit resisting summary judgment, and it is bad in law. It is trite that if a principal debt remains unpaid, and the principal debtor is liquidated, the sureties nonetheless still remain liable for the principal debt to the extent that it is still outstanding.

[16] In the circumstances the defendants have not established that they have a bona fide defence, and as a result summary judgment must be granted.

[17] I make the following order:

Summary judgment is granted against the first and second respondents/defendants, jointly and severally, the one paying, the other to be absolved, in favour of the plaintiff, as follows:

1. Payment of R800 000-00.
2. Payment of R318 906-98.
3. Interest on the amounts at the rate of 7% per annum from 1 December 2015 to date of final payment.
4. The defendants to pay the costs on a scale as between attorney and client.

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:

5 OCTOBER 2021

DATE OF JUDGMENT:

3 NOVEMBER 2021

ATTORNEY FOR APPLICANT: NIXON & COLLINS ATTORNEYS

ADVOCATE FOR APPLICANT: ADV S L P MULLIGAN

ATTORNEY FOR RESPONDENT: PJD LAW FIRM

ADVOCATE FOR RESPONDENT: MR P DENNISON

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