

SOUTH AFRICA / JUDGMENT

Incredible Sand (Pty) Ltd v Vos (2376/2018) [2018] ZAGPPHC 698 (28 September 2018) [2018] ZAGPPHC 698

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Schyff

CASE / FILE NUMBER

2376/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO

OTHER JUDGES

(3)

NOT REVISED

CASE NO: 2376/2018

28/9/2018

In

the matter between: INCREDIBLE
 SAND (PTY)
 LTD
 Applicant
 and
 ANETTE
 VOS
 Respondent

JUDGMENT

Coram: VAN DER SCHYFF, AJ

Introduction

- [1] This matter was set down for hearing on the unopposed court roll on 17 September 2018. The applicant seeks an order that the respondent be placed under provisional sequestration.
- [2] The notice of motion was personally served on the respondent on 25 April 2018. The application was also served on the Master of the High Court and the South African Revenue Services. A subsequent notice of set down was served on the respondent personally on 11 June 2018.
- [3] As set out below in more detail,[1] the applicant's locus standi is based on the fact that the respondent bound herself as surety and co-principal debtor in favour of Bucon Development and Construction

(Pty) Ltd, a company indebted to the applicant. The identity of the principal debtor is however not stipulated in the suretyship

agreement. The relevant part of the suretyship reads:

SURETYSHIP

I the undersigned

ANETTE VOS

[....]

IDENTITY NUMBER

(hereinafter referred to as the Surety)

And

INCREDIBLE SAND (PTY) LTD

(hereinafter referred to as the Creditor)

Hereby bind my I our self as sureties and co- Principal Debtors in favour of:

Its successors-in-title or assigns, arising from or out of or in terms of an acknowledgement of debt between the Creditor and the Debtor dated 6 September 2016 in respect of monies due owing and payable in the sum of R218.700.50 (including VAT).

[4] The matter was stood down after I requested counsel appearing on behalf of the applicant to prepare concise heads of argument on the validity of the suretyship agreement on which the applicant relies, with specific reference to compliance with the provisions of s 6 of the General Law Amendment Act, No 56 of 1956, (hereafter GLAA).

[5] The validity of the suretyship agreement is inextricably linked to the question whether the applicant has a liquidated claim against the respondent. This in turn is inseparably linked to the applicant's locus standi to bring this application.[2]

[6] Due to the specific facts of this matter, the mere 'uncontested' averment that the applicant has a liquidated claim against the respondent is not sufficient to prove the existence of the claim. The Court is obliged to take cognisance of the provisions of s 6 of the GLAA, even if mero motu, since compliance with formalities is a question of law and the onus rests on a creditor to prove proper compliance.[3] The court must therefore be satisfied that a valid suretyship agreement came into existence, before the applicant can be considered

a creditor of the respondent.

[7] In order to prove his locus standi, the onus therefore rests on the applicant to prove a valid suretyship agreement. In terms of s 6 of the GLAA the terms of the suretyship

agreement must be embodied in a written document signed by or on behalf of the surety.

[8] It is settled law that the document wherein the suretyship agreement is embodied must contain at least:[4]

i. The identity of the creditor;

ii. The identity of the surety;

iii. The identity of the principal debtor; and

iv. The nature and amount of the principal debt must be capable of ascertainment by reference to the provisions of the written document,

supplemented if necessary by admissible extrinsic evidence.

Factual basis of the applicant's case

[9] The applicant states in the founding affidavit that its claim emanates from the indebtedness of an entity, Bucon Development and

Construction (Pty) Ltd, hereafter "Bucon", and the respondent.

[10] On 6 September 2016 Bucon, represented by the respondent, admitted and acknowledged its indebtedness towards the applicant in an

acknowledgement of debt in the capital amount of R218, 700.50, interest on the mentioned amount at the rate of 10.5% per annum and legal costs-collection commission at 4% paid monthly with the repayments of the capital amount.[5] A copy of the acknowledgment of debt is annexed to founding affidavit.

[11] At the same time, and during the same meeting, and in the presence of the deponent of the applicant's affidavit, the respondent and the applicant signed a document , annexed to the founding affidavit as annexure B. In the founding affidavit the applicant states in paragraph 23 " Annexure "B" is a suretyship agreement in terms of which the Respondent bound herself as surety and co- principle debtor, along with Bucon, towards the Applicant. In terms of the suretyship the Respondent bound herself as surety and co-principle debtor, specifically for the obligations "arising from or out of or in terms of an acknowledgement debt between the Creditor and Debtor dated 6 September '16 in respect of certain monies owing and payable in the sum of R218,700.50 (including VAT)". As indicated below the point of contention revolves around the phrase "along with Bucon" as stated in this paragraph.

[12] Applicant contends that the acknowledgement of debt that is referred to in the suretyship is in fact the acknowledgement of debt attached as annexure A and consequently the incorporated through reference in the suretyship agreement.

[13] Bucon subsequently failed to comply with its obligations in terms of the acknowledgement of debt and was at November 2016 indebted to the applicant in the amount of R163, 350.50 with interest.

[14] During November 2016 the applicant issued a provisional sentence summons against Bucon and the respondent, a copy which is attached to the founding affidavit as annexure "C". The summons was initially defended by both the respondent and Bucon, but the attorneys who represented both parties eventually withdrew as representatives of Bucon and only represented the respondent. The respondent filed an affidavit in opposition to the Applicant's claim, a copy of which is attached to the founding affidavit as annexure "D".

[15] In paragraphs 25 and 26 of the applicant's founding affidavit it is then stated: [25] "The Respondent, in provisional sentence proceedings, alleged that Annexure "B" does not comply with section 6 of the General Law Amendment Act. The basis for this contention is, so the argument goes, that Annexure "B" does not define a debtor. This is clearly, incorrect. [26] Annexure "B" specifically and clearly incorporates Annexure "A", by reference.

[16] Although the current exposition is aimed providing an overview of the factual basis of the applicant's case, it is important to note that the respondent also stated in in the affidavit opposing provisional sentence that "the Second Defendant ought to be allowed to file its Plea and the matter should go to trial". It is not stated in the founding affidavit that provisional sentence was granted and I proceed on the basis that no sentence was granted against the respondent.

Legal argument presented by applicant's counsel

[17] Counsel acting on behalf of the applicant provided me with heads of argument wherein he dealt extensively with the question whether the suretyship agreement is valid with specific reference to compliance with the provisions of s 6 of the General Law Amendment Act (supra) in light of the fact that the debtor's identity is not stated in the suretyship agreement. I am indebted to him in this regard.

[18] It is counsel's contention that the suretyship agreement is "saved from legal extinction" by virtue of the fact that the

acknowledgment of debt was incorporated by reference into the suretyship agreement. Since the identity of the debtor is stated in the acknowledgement of debt, the lacuna in the suretyship agreement has sufficiently been supplemented. Counsel referred me to *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003

(1) SA 365 (SCA).

[19] I was also referred to the unreported case *Stan Rio Pipe and Steel (Pty) Ltd v Esterhuizen* (case number: 64166/2015) where Vilakazi AJ in summary judgment proceedings and without any extrinsic evidence to confirm the incorporation, accepted that documents signed by the same parties on the same day, were incorporated by reference to each other even though the space where the principal debtor's identity had to be filled in, was left blank. "This was held so, due to the fact that the documents/agreements were entered into simultaneously with one another." [6] A copy of the judgments was attached to the heads of argument for my convenience.

[20] The main gist of the contention made on behalf of the applicant is that the court should accept (or find) that the acknowledgment of debt was incorporated through reference into the suretyship agreement because:

- i. The acknowledgment of debt and the suretyship was entered into on the same day during the same meeting to which the deponent of the applicant's affidavit was present;
- ii. The suretyship refers to an acknowledgment of debt between the creditor and the debtor dated 6 September '16 in respect of certain monies due and payable in the sum of R218,700.50. (For so far as it might be relevant I am cognisant to the fact that the debtor's physical address as set out in the acknowledgement of debt corresponds with the surety's chosen domicilium citandi et executandi, although this was not pointed out during argument).

iii. Both the acknowledgement of debt and the suretyship was signed by the current respondent on behalf of the debtor and the surety. (It must once again be reiterated that although the signature on both documents on face value is the same, the respondent is not referred to by name in the memorandum of agreement between the applicant and Bucon that constitutes the acknowledgement of debt).

Question before the court

[21] The question before the court is simple but multi-dimensional. The question is whether the acknowledgement of debt was incorporated by reference into the suretyship agreement. In order to answer this question the following aspects should be considered:

- i. The provisions of s 6 of the GLAA pertaining to the validity of suretyship agreements;
- ii. The requirements for a document incorporated by reference;
- iii. The admissibility of extrinsic evidence in determining whether the acknowledgement of debt was incorporated by reference in the suretyship agreement.

[22] The question whether "a deed of suretyship which does not identify the principal debtor as such can be saved from legal extinction by virtue of its reference to a loan agreement which does identify the principal debtor and which is stated in the deed of suretyship to give rise to the debt so secured", was dealt with in *Industrial Development Corporation of SA (Pty) Ltd v Silver*,^[7] (hereafter "Industrial Development!"; Counsel for the applicant relied extensively on this precedent in his heads of argument.

[23] In *Industrial Development* the appellant noted an appeal against a decision of the court a quo where an exception was upheld. The Supreme Court of Appeal held that the principle of incorporation by reference is applicable to suretyship agreements,^[8] and that extrinsic evidence is admissible "provided that such evidence is not of negotiations between the parties prior to the execution of the written agreement or their consensus."^[9]

[24] SJ van der Merwe^[10] concisely summarises the legal position when he states:

"In the case of a contract required by Jaw to be in writing, the juristic act is constituted by the written declaration (or declarations) of intent. Whether other requirements for the contract have been met must therefore be established with reference to the document or other documents incorporating the agreement. This is especially true of the requirement of certainty. The agreement will be void for vagueness where the document does not specify the identities of the parties, the essentialia and all other material terms in such a manner that they are ascertained or objectively ascertainable without recourse to evidence from the parties as to their negotiations and consensus. ... Extrinsic evidence is impermissible to cure a lack of certainty in respect of the identity of parties and the subject matter of the contract, but may be resorted to in order that the provisions of a formally sufficient deed might be applied to the facts of the case. (Citations omitted).

- [25] On the facts as stated in Industrial Development the only aspect on which it can be distinguished from the matter currently before the court is that it was specified in the document purported to be the suretyship agreement that "the loan agreement was to be entered into simultaneously with the signing of the deed of suretyship".[11] A provision to this effect is not incorporated in the agreement currently considered. However the suretyship agreement refers to an "acknowledgement of debt between the Creditor and the Debtor dated 16 September '16 in respect of certain monies due owing and payable in the sum of R21B.700.50 (including VAT)".
- [26] I accordingly find that the acknowledgement of debt is sufficiently identified to be incorporated by reference in the suretyship agreement. The identity of the debtor is accordingly regarded to be incorporated by reference into the suretyship agreement. On the documents before me the applicant succeeded to prove that it has a liquidated claim against the debtor, and subsequently against the surety, who is the respondent before this court. The applicant accordingly has the necessary locus standi to bring the application for the respondent's provisional liquidation.

ORDER

In light of the above it is ordered that the draft order marked 'EVDS' is made an order of court.

E VAN DER SCHYFF

Acting Judge of the High Court

Heard on:

17 September 2018

For the Plaintiff/Applicant: R Raubenheimer

Instructed by:

Prinsloo Attorneys

For the Defendant/Respondent : NO APPEARANCE

Instructed by:

Date of Judgment:

28 September 2018

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 2376/2018

ON THIS 19TH DAY OF SEPTEMBER 2018 BEFORE JUSTICE VAN DER SCHYFF AJ

In the matter between:-

INCREDIBLE SAND (PTY) LTD

Applicant

ANETTE VOS

Respondent

Having read the papers filed of record and having heard counsel for the Applicant, the following order is made:

1. That the estate of the Respondent is placed under provisional sequestration;
2. That the Respondent, or any interested person, is called upon to advance reasons , if any, why the court should not order the final sequestration of the said estate, of 10h00 on 15 January 2019 (#3);
3. That this provisional order be published in the Government Gazette and Citizen newspaper; and served on the Respondent personally.
4. That the costs of this application be in the administration of the estate of the Respondent.

BY ORDER

THE REGISTRAR

- [1] See paras [7] - [15] below.
- [2] S 9(1) of the Insolvency Act, No 24 of 1936.
- [3] Stewart & Lloyds of SA Ltd v Croydon Engineering & Mining Supplies (Pty) Ltd 1981 (1) SA 305 (W).
- [4] Sapirstein v Anglo African Shipping Co (SA) Ltd 1978
- (4) SA 1 (A); Du Toit v Barclays Nasionale Bank 1985
- (1) SA 563 (A); Stewart & Lloyds of SA Ltd v Croydon Engineering & Mining Supplies (Pty) Ltd 1981 (1) SA 305 (W); General Accident Insurance Co SA Ltd v Dancor Holdings (Pty) Ltd 1981 (4) SA 968 (A).
- [5] Although it is stated in the applicant's founding affidavit that Bucon Development and Construction (Pty) Ltd was represented by the respondent in this matter when the acknowledgement of debt was signed, the respondent is not referred to by name in the memorandum of agreement constituting the acknowledgment of debt between Incredible Sand (Pty) Ltd and Bucon Development and Construction (Pty) Ltd.

[6] Counsel's heads of argument para 18.

[7]

[2002] 4 All SA 316 {SCA} (20 September 2002).

[8] Industrial Development para [6].

[9] Industrial development para [9]

[10] Contract: General Principles, JUTA, 4th ed , 146 -147 .

[11] Industrial Development para [2].

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