

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Chapter II Farm (Pty) Ltd and Others (31150/11) [2016] ZAGPPHC 228 (12 April 2016) [2016] ZAGPPHC 228

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw

CASE / FILE NUMBER

31150/11

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REPUBLIC

OF SOUTH AFRICA

IN

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

12/4/2016

CASE

NO: 31150/11

Not

reportable

Not

of interest to other judges

Revised

In

the matter between:

NEDBANK
LIMITED Plaintiff
and
CHAPTER
II FARM (PTY) LTD
and
five
others First
Defendant

JUDGMENT

J W LOUW, J

[1] Summary judgment has been granted in favour of the plaintiff against the first defendant, to whom I shall refer as Farm, in the amount of R896 992.06 together with interest. The plaintiff now claims payment of the judgment debt from the second to sixth defendants on the basis of suretyships which they have signed in favour of Farm. The dispute between the parties is whether the suretyships cover the debt for which the plaintiff obtained the judgment against Farm, which was for the outstanding amount owing on an overdraft facility of R750 000.00 granted by the plaintiff to the first defendant on 13 November 2008. The second to sixth defendants contend that they don't. They rely on a number of defences in this regard. The second defendant was not represented at the trial and I have been informed by counsel that her estate has been sequestrated. Her trustee has not been joined to the proceedings. I will hereafter refer to the third to sixth defendants as the defendants.

[2] The suretyships relied upon by the plaintiff are the following:

- A suretyship signed by the third defendant, Mr. Tyrone Willemse, in his personal capacity on 19 February 2007 for a limited amount of R5,45 million.
- A suretyship signed by the fourth defendant, Mr. Andre Immelman, in his personal capacity on 21 February 2007 for a limited amount of R5,45 million.
- Chapter II Farming Enterprises (Pty) Ltd Enterprises ("Enterprises"), represented by Mr. Immelman, signed a suretyship on 21 February 2007 for payment of any sum of money which Farm may owe to the plaintiff, limited to R7,2 million. Mr. Immelman signed a suretyship on 7 June 2001 in his personal capacity for the repayment of any sum of money which Enterprises may owe to the plaintiff. The plaintiff therefore alleges that Mr. Immelman is liable as "achterborg" to the plaintiff for the obligations of Farm.
- A suretyship signed by the Micali Trust, represented by Mr. Immelman as trustee, on 21 February 2007 for a limited amount of R5,45 million.
- A suretyship signed by the fifth defendant, Mrs Immelman, in her personal capacity on 7 June 2001 for the repayment of any sum of money which Enterprises may owe to the plaintiff. As in the case of Mr. Immelman, the plaintiff relies on the suretyship signed by Enterprises on 21 February 2007. The plaintiff therefore alleges that the Mrs. Immelman is also liable as "achterborg" to the plaintiff for the obligations of Farm.

[3] A plaintiff who wishes to claim on a deed of suretyship must prove a valid contract of suretyship, that the *causa debiti* is one in respect of which the defendant undertook liability and the indebtedness of the principal debtor, i.e. that the amount is due. The defendants admit that the deeds of suretyship were signed by them. Adv. Baguley, who appeared for the plaintiff, submitted that the defendants had undertaken liability in respect of the *causa*

debiti. He relied in this regard on the wording of the suretyships that the sureties are liable for "all or any sum or sums of money which the debtor may now or from time to time owe or be indebted to the bank whether such indebtedness arises from money already advanced or hereafter to be advanced or by virtue of any individual or joint suretyship, guarantee or bond." The defendants admit that Farm failed to repay the amount of R896 992.06 to the plaintiff on due date. Mr. Baguley accordingly submitted that the plaintiff had proved its case and indicated that it would lead rebutting evidence after the defendants had led their evidence in respect of their defences. He then closed the plaintiff's case.

[4] The defences relied upon by the defendants are the following:

- That there was no consensus ad idem in regard to the terms of the suretyships.
- That the defendants laboured under a mistake as to the terms of the suretyships when they signed them, which mistake was caused by the negligence of the plaintiff (justus error).
- Alternatively, that the deeds of suretyship stand to be rectified in that the scope of the security had been intended by the parties to cover and to be limited to the amount of R5,45 million advanced by the plaintiff to Farm and to only secure the second bond to be registered for that amount over a property of Farm.
- That the wide wording of the suretyships referred to above, which makes the defendants liable for an unlimited set of obligations in an unlimited amount and for an unlimited period, does not comply with s 6 of the General Law Amendment Act 50 of 1956 which, as it has been interpreted by the courts, requires that the nature and amount of the principal debt must be capable of ascertainment by reference to the provisions of the written document; alternatively that such wide wording is contra bonos mores.
- That the plaintiff agreed to accept payment of an amount of R6,5 million in full and final settlement of all amounts due to the plaintiff by Farm, including any securities given by the second to sixth defendants.
- That the defences of lack of consensus, mistake and rectification also applied to the suretyships signed by the fourth and fifth defendants in 2001 in respect of the debt of Enterprises to the plaintiff, making them so-called 'achterborgen'.

Consensus ad idem

[5] The first witness for the defendants was Mr. Tyrone Willemse, the third defendant. The fifth defendant, Mrs. Michelle Immelman, is his aunt. The Immelmans are the trustees of the Micali Trust which, according to Willemse's understanding, owns the shares in Farm and Enterprises. Before Mr. Willemse became involved in the business of Farm and Enterprises, Mr. Immelman conducted the farming business of the companies in George on his own. His wife was not involved at all.

[6] Mr. Willemse testified that he became involved in the farming business of Farm and Enterprises in about 2003. Mr. Immelman handed

the management of the business over to him and he was appointed as the chief operating officer of the two companies. In 2005, Willemse

and Immelman realised that the companies needed to raise capital to be able to proceed with their business. A loan of R 1,75 million was raised with the plaintiff against security of a first mortgage bond registered over the farm property of Farm. As further security for the loan, deeds of suretyship limited to R 1,75 million were signed by Immelman and the Micali Trust on 24 April 2006.

[7] During this time, Willemse and Immelman got involved in the business of a company called Performance Consumer Technologies (Pty) Ltd ("PCT") in Johannesburg. The owner of PCT was the second defendant, Mrs. Shelly Maynard, although the business was run by her husband. Willemse and Immelman invested part of the R 1,75 million in PCT. They became shareholders of PCT through a trust. The other shareholders were the second defendant, Mr. Maynard and a Mr. Harold Nimmo.

[8] At some stage, an opportunity came up for PCT to do business with Nissan which was considered very promising. Mr. Maynard approached

Willemse and Immelman to assist PCT with the funding which was required. They agreed to try to raise funds with the plaintiff against security of a further mortgage bond over Farm's property. It was further agreed that the second defendant, Willemse, Immelman, the Micali Trust and Nimmo would participate in the loan application.

[9] Willemse was then mandated by the shareholders to approach a Ms. Val Leeming, a bond originator known to Nimmo and who was approved by the banks, including by the plaintiff, to assist in obtaining a loan from the plaintiff for an amount of R5,45 million. When discussing the matter with Leeming, he told her that the shareholders would be co-applicants and sureties for the loan for a limited amount of R5,45 million. Willemse's evidence was that the shareholders were all involved in the negotiations for the loan. Willemse represented himself, Mr. Immelman and the Micali Trust. Maynard represented his wife and Nimmo represented himself. Willemse's evidence was that the gist of all conversations was that the shareholders would be co-applicants for the loan and sureties for a limited amount of R5,45 million for the specific transaction. Willemse and Immelman's personal banker at the plaintiff's George branch, Mr. Patrick Schwartz, became involved in the process. Willemse had numerous discussions with Schwartz. The sureties were all treated equally by the plaintiff. Willemse was asked in cross-examination whether he and Maynard and Nimmo had expressly agreed with Schwartz that their suretyships would be only for the bond of R5,45 million. His answer was that it was expressly discussed with the bond originator, not with Schwartz.

[10] On 21 December 2006, Schwartz, in his capacity as the business manager of the plaintiff's Garden Route George branch, addressed a letter, referred to in evidence as a term sheet, to the directors of Farm, the relevant part of which reads as follows:

"Bond Application Chapter II Farm Pty Ltd & Co-Applicants

With reference to the abovementioned we have pleasure in advising that we have granted a commercial bond of R5 450 000.00 (five million four hundred and fifty thousand rand) subject to the following conditions:

- Second covering bond of R5 450 000 over portion 24 of the farm geelhoutboom 217 and First covering bond over portion 65 of the farm geelhoutboom 217.
- As proposed Mr Willemse, Mrs Maynard and Mr Nimmo will be co-applicants to the bond and as such will be party to the loan agreement.
- Limited suretyships for R5 450 000 of Mr Willemse, Mrs Maynard and Mr Nimmo in favour of Chapter ii Farm Pty Ltd.
- Limited suretyships incorporating cession of loan funds of Mr A L Immelman and Micali trust for R5 450 000 in favour of Chapter ii Farm Pty Ltd.
- Limited suretyship incorporating cession of loan funds by Chapter ii Farming Enterprises Pty Ltd for R7 200 000 in favour of Chapter ii Farm Pty Ltd."

[11] Mr. Willemse said that his understanding of the letter was that it accorded with what had been discussed with the bond originator,

namely that the suretyships would be limited to R5,45 million for the specific transaction. Two months later, during February 2007,

Willemse was contacted by the plaintiff's George attorneys who said that their correspondents in Johannesburg required the relevant

documents to be signed. He and Maynard went together to the offices of the plaintiff's Johannesburg attorneys. They were asked to sign each document at the end thereof. They were there for less than ten minutes. They did not read the documents, which was a thick pack. Nothing was explained to them. Willemse said in cross-examination that they signed the suretyships based on the discussions they had with the bond originator and that he assumed that the documents reflected what had been discussed, namely that one of the conditions of their application was that their suretyships would be limited to R5,45 million for the bond. He assumed that Ms. Leeming conveyed this to the plaintiff and that is how he understood the plaintiff's letter.

[12] Mr Nimmo[1] testified on behalf of the defendants and confirmed that Mr. Willemse was mandated to approach Ms. Leeming in regard to the loan required from the plaintiff. She then approached all the shareholders individually to obtain the necessary information and documents from them. Her function was to interact with the plaintiff and to revert to say

whether or not the bond had been approved. He made his instructions clear to Ms. Leeming, namely that he would sign surety for R5,45 million and limited to the second bond. He did not have any discussions with the plaintiff.

[13] Mr. Nimmo testified that he went on his own to the plaintiff's Johannesburg attorneys to sign the relevant documents. He asked the attorney in question whether the documents he was required to sign were the same as the documents signed by the other shareholders. He was assured that they were the same. He said that there was a plethora of documents and that he didn't read them. He agreed in cross-examination that he shouldn't have signed the documents without reading them, but said that he would have expected the plaintiff to have used the correct wording.

[14] Mr. Immelman testified that his relationship with the plaintiff went back 40 years. He was originally a client of the plaintiff's Sandton branch and all transactions were done telephonically with his personal banker, a certain Kevin. When he and his wife moved to George during 1988/89, the account was taken over by the plaintiff's George branch where Mr. Schwartz became his personal banker. He had, and still has, a very good relationship with Mr. Schwartz. In all transactions which he concluded with Mr. Schwartz, e.g. for the purchase equipment such as a tractor, it was always clearly understood that the suretyship signed by him would not apply to anything else than for the particular transaction. He signed the suretyship as security for the loan of R5,45 million without reading it and his wife signed the deed of suretyship as trustee of the Micali Trust in good faith when he asked her to sign. She is not involved in the business. Mr. Immelman regarded the plaintiff's reliance on the deeds of suretyship as a betrayal of his trust as they did not reflect what he had discussed with Mr. Schwartz whom he regarded as a man of integrity.

[15] The plaintiff did not call either Mr. Schwartz or Ms. Leeming to rebut the evidence of the defendants. It is, in my view, particularly significant that Mr. Schwartz was not called to testify. If he had testified, he could either have denied that he was informed by Ms. Leeming that the defendants had insisted that their suretyships had to be limited to the specific loan transaction of R5,45 million, or he could have confirmed that he was so informed. If he had denied that he had been so informed, and also denied that it was so discussed with Mr. Immelman, it would have followed, unless there was reason to reject the evidence of the defendants, that there was no consensus ad idem between Mr. Schwartz and the defendants. If, on the other hand, he had confirmed that he was so informed by Ms. Leeming and that it was so discussed with Mr. Immelman, the defendants would have been entitled to the rectification of the suretyships which they claim.

[16] There is, in my view, no reason to reject the evidence of the defendants. Their evidence was consistent and I found them to be credible and satisfactory witnesses. On their evidence, there was no consensus ad idem between them and the plaintiff as to the disputed term of the suretyship agreements.

- [17] The suretyships signed by Mr. and Mrs. Immelman in favour of Enterprises during 2001 do not assist the plaintiff in holding them liable as "achterborgen". The suretyship of Enterprises in favour of Farm which was signed by Mr. Immelman on behalf of Enterprises on 21 February 2007 was signed under the same circumstances as the signing of his personal suretyship.
- [18] In the result, I conclude that the defendants' defence of lack of consensus must succeed. In view of this conclusion, I find it unnecessary to consider the other defences which have been raised by the defendants.
- [19] The plaintiff's claim against the third to sixth defendants is accordingly dismissed with costs.
- Counsel for plaintiff: Adv. D W Baguley
- Instructed by: Van der Spuy Attorneys, Cape Town
- Counsel for 3rd to 6th defendants: Adv. A Kantor
- Instructed by : Dewey Hertzberg Levy Inc, Sandton
- [1] Mr. Nimmo was not cited as a defendant. The plaintiff wrote a letter to him on 5 January 2009 in which it confirmed that his personal suretyship was not obtained for the overdraft facility after the plaintiff had sent him a letter of demand.

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