

SOUTH AFRICA / JUDGMENT

Standard Bank of South Africa v Norris (480/2012) [2012] ZAWCHC 142 (28 June 2012) [2012] ZAWCHC 142

COURT

Western Cape High Court, Cape Town

BEFORE

D H Zondi

CASE / FILE NUMBER

480/2012

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Republic of South Africa
IN THE HIGH COURT OF SOUTH
AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)
REPORTABLE
CASE
NO: 480/2012

In the matter between:

THE
STANDARD BANK OF SOUTH AFRICA
.....Plaintiff
and
PHILLIP
NORMAN JOHN NORRIS
.....Defendant
CORAM
D H ZONDI
J

JUDGMENT

BY D H ZONDI J

FOR THE PLAINTIFF ADV. FSG SIEVERS

INSTRUCTED BY WILLIAM INGLIS INC

FOR THE DEFENDANT ADV. EJJ SPAMER

INSTRUCTED BY DU PLESSIS & HOFFMEYER INC

DATE OF HEARING 5 JUNE 2012

DATE OF JUDGMENT 28 JUNE 2012

REPORTABLE

Case Number: 480/2012

JUDGMENT DELIVERED ON 28 JUNE 2012

ZONDI, J:

[1] The plaintiff seeks summary judgment against the defendant for payment of the sum of R7 207 786.78, interest thereon at the rate of 7.1% per annum from 12 January 2012 calculated on daily balance and capitalised monthly in arrear and costs to be taxed.

[2] The plaintiff's claim against the defendant is based on a deed of suretyship dated 29 August 2005 in terms of which the defendant, renouncing inter alia the benefits of excussion and division, bound himself jointly and severally as surety and co-principal debtor in solidum, to the plaintiff for One Vision Investments 33 (Pty) Ltd (in liquidation) indebtedness to the plaintiff.

[3] The plaintiff alleges in its summons that the amount claimed is the balance due in respect of monies lent and advanced by the plaintiff by way of a home loan secured by a first mortgage of erf 4705 Somerset West, City of Cape Town, to One Vision Investments 33 (Pty) Ltd (in liquidation) ("One Vision").

[4] It is common cause that the defendant was a shareholder in One Vision, and served as one of its directors until its liquidation at the instance of the plaintiff in November 2010. The primary business of One Vision was in the field of property development in the Helderberg area. In August 2005 in the course of its business, One Vision bought an undeveloped property in Somerset West at a purchase prices of R12 million. The plaintiff financed the acquisition of the property through a home loan, secured through registration of a first mortgage over the property in favour of the plaintiff.

- [5] As additional security for One Vision's obligations under the mortgage loan, and as a condition of the financing arrangement, the plaintiff obtained a deed of suretyship signed by the defendant.
- [6] The defendant in his opposing affidavit alleges that in 2006 the City of Cape Town consented to the subdivision of the property into three separate erven, on condition that the consent would expire if bulk services were not installed within five years. The defendant states that One Vision decided rather to develop the property into 18 free-standing residential units. However, the development application along these lines was refused by the City of Cape Town in 2010.
- [7] By this time One Vision had fallen into arrears with its payments to the plaintiff under the mortgage loan, due to the delays in obtaining the necessary development approval from the City of Cape Town. Due to One Vision's inability to service its debt under the mortgage loan the plaintiff sought and obtained the liquidation of One Vision.
- [8] The suretyship on which the plaintiff sues *inter alia* provides that:
1. the amount that the plaintiff is entitled to recover from the defendant under the suretyship is unlimited (clause 5);
 2. it shall always be in the discretion of the plaintiff and the plaintiff shall be entitled without affecting or prejudicing its rights thereunder to release either in whole or in part any security (clause 8.2);
 3. failure by the plaintiff to prove a claim against the principal debtor in the liquidation of the principal debtor to the full extent thereof or at all shall not detract from the right of the plaintiff to recover from the surety the full amount for which the surety bound under the suretyship (clause 10.3);
 4. the defendant renounced the benefits of excussion and division (clause 12.1);
 5. the suretyship shall be fully enforceable against the defendant regardless of any breach of contract on the part of the plaintiff or the principal debtor (clause 12.2);
 6. A certificate signed by any manager or accountant of the plaintiff whose appointment need not be proved, shall be *prima facie* proof of the amount owing, the fact that such amount is due and payable, the rate of interest thereon and the date from which interest is to be reckoned (clause 19).
- [9] The defendant has filed an affidavit opposing summary judgment. In the opposing affidavit the defendant admits signing the deed of suretyship in favour of the plaintiff, as surety for and co-principal debtor with One Vision. He also admits the indebtedness of One Vision to the plaintiff and that the immovable property over which the mortgage bond was registered to secure a home loan, was realised in the course of the liquidation of One Vision, and that its proceeds were not sufficient to satisfy One Vision's obligation towards the plaintiff in full.

- [10] The defendant's defence is that in his capacity as surety he is fully released from his obligations towards the plaintiff, through the plaintiff's own conduct in the winding-up proceedings of the principal debtor (One Vision) in respect of whose indebtedness he stood surety. He contends that the prejudice that was caused to him by the plaintiffs conduct, which directly caused the realisation of One Vision's main assets in an amount far below its inherent value, is sufficient in law to grant him a release from his duties towards the plaintiff as a surety for One Vision.
- [11] In substantiating his defence the defendant alleges that when he received the plaintiff's application for the liquidation of One Vision he immediately sent a series of correspondence to the plaintiff's attorneys, in an effort to seek a negotiated solution to the dispute. He says in his correspondence to the plaintiff's attorneys he expressed his concern that the liquidation of One Vision would entail a "fire sale" of the property in unsatisfactory market conditions, which would not serve any of the parties' interests.
- [12] He further alleges that he also informed the plaintiff that he had an offer from a prospective purchaser who was interested in the property. He says the plaintiff failed to respond to his proposals and as a result thereof he had no option but to agree to the liquidation of One Vision.
- [13] The defendant contends that after the liquidation of One Vision he made contact with a liquidator, who had been appointed to attend to its winding-up in an effort to urge her to persuade the plaintiff to not sell the property by way of auction. He suggested to the liquidator that the property be subdivided into three erven as approved by the City of Cape Town and that the erven be sold separately to purchasers that he could have introduced to the liquidator. He says this would obviously represent a beneficial solution to all the parties, since the plaintiff's claim against the estate would be satisfied in full and the other creditors of the estate would receive payment of a significant portion of their claims.
- [14] The defendant says his efforts in obtaining an optional value for the property in its realisation by the liquidator were mainly directed towards a total satisfaction of the plaintiff's claim against One Vision, which would have released him in his personal capacity from any obligations towards the plaintiff.
- [15] The defendant alleges that the plaintiff ignored his suggestions and instructed the liquidator to sell the property by auction. The property was sold at an auction for R6.8 million which was a price far below its market value which he estimated to be about R15 million.
- [16] In conclusion the defendant contends the plaintiff failed to act in good faith and in the interest of the estate, in circumstances when it could easily have applied its power as the petitioning, and the only secured, creditor of the estate to facilitate the optimum realisation of the property at its true value.

- [17] Rule 32 of the Uniform Rules deals with summary judgment. It provides the framework for the adjudication of summary judgment applications. It is a procedure aimed at the defendant, who although he has no bona fide defence to the action brought against him, gives notice of intention to defend solely in order to delay the grant of the judgment in favour of the plaintiff {Breitenbach v Fiat SA (EDMS) Bpk 1976
- (2) SA 226 (T)). Its purpose is to prevent a defendant who has no defence to a claim from delaying the matter unnecessarily by abusing the Court's process and to enable it to grant a final judgment without a trial despite the fact that a defendant has entered an appearance to defend (Maharaj v Barclays National Bank Ltd 1976
- (1) SA 418 (A)).
- [18] A defendant who wishes to defeat a claim for summary judgment must satisfy the Court that he has a bona fide defence to the action. In doing so he must set out the nature and the grounds of his defence as well as the facts upon which it is founded. The defence which he discloses must be both bona fide and good in law. (Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint Venture 2009
- (5) SA 1 (SCA).
- [19] Returning to the present case, the defendant's defence is that he was prejudiced as surety by the plaintiff instructing the liquidator to sell the property of One Vision by auction at which it was sold at a price far less than its market value. This conduct by the plaintiff, so the argument goes, prejudiced the defendant, in that had the property been sold by private sale it would probably have caused the full satisfaction of the plaintiff's claim against One Vision with the result that he would have been released in his personal capacity from his obligation towards the plaintiff.
- [20] Mr Spamer submitted that the defendant is released from suretyship because the plaintiff in its dealings with the principal debtor acted in a manner that was prejudicial to the defendant as surety.
- [21] In support of his submission he relied on a passage in Wessels The Law of Contract in South Africa vol 2 para 4341 where it is stated that: "where the person guaranteed does any act injurious to the surety or inconsistent with his right, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged". Mr Spamer submitted that the principles underlying this rule have become firmly embedded and have been established for a long time as part of our law (Fry and Another v First National Bank of South Africa Ltd 1996
- (4) SA 924 (C) at 931 G - H).
- [22] The scope of this rule was considered by the Supreme Court of Appeal in Absa Bank Ltd v Davidson 2000

(1) SA 1117 (SCA). In Absa case the plaintiff had instituted action against Davidson and Myburgh based on separate but identical deeds of suretyship which they had signed in which each of them bound himself to the plaintiff as surety and co-principal debtor.

[23] Davidson's defence was that he was prejudiced as surety by the plaintiff honouring the cheques and orders for a personal debt of Myburgh without informing him of its intention to do so, well knowing that he had sold his shares to Myburgh and wished to be released as surety.

[24] It was submitted on behalf of Davidson that there is a general so-called "prejudice principle" in our law to the effect that if a creditor should do anything in his dealings with the principal debtor which has the effect of

prejudicing the surety, the latter is fully released. The Court doubted whether such a wide and unqualified principle exists in our law.

[25] At para 19 of the judgment Olivier JA formulated the correct position to be as follows:

"[19] As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. Counsel who drafted the plea was therefore on the right track when he sought to base his case upon prejudice which flowed from the breach of an obligation, contractual in the present circumstances. In the event, however, Davidson failed to prove such a breach."

[26] This dictum was quoted with approval by Harms JA in *Bock and Others v Duburoro Investments (Pty) Ltd* 2004

(2) SA 242 (SCA) at para 21 and disapproved of the criticism of Caney's *The Law of Suretyship in South Africa* 5th ed at 205 -

206. (See also *Investec Bank Ltd v Lewis* 2002

(2) SA 111 (C) at 116G - 117B - C).

[27] In spite of the disapproval of their criticism by Harms JA in *Bock and Others Investments* supra in their latest edition, the authors of Caney's *The Law of Suretyship in South Africa* 6th ed at 207 still hold the view that there is ample authority for the proposition that there is an implied duty on the part of the creditor not to act in his dealings with the principal debtor in a way that prejudices the surety.

[28] Inspired by this view of the learned authors Mr Spamer submitted on behalf of the defendant that the duty to act in good faith is implied in the suretyship and that if the creditor breaches that duty and causes prejudice to the surety the latter may be released. He

emphasised that there is a duty on the creditor in his dealings with a debtor or surety to act fairly and he argued that in the instant case the plaintiff did not act fairly by failing to respond to the defendant's proposals regarding how the principal debtor's indebtedness to the plaintiff under the home loan was to be discharged.

- [29] I disagree with Mr Spamer's contention. While I accept that fairness and good faith are considerations which are deeply embedded in our law of contract, (*Fry and Another v First National Bank of South Africa*, supra at 931 G; *South African Forestry Co Ltd v York Timbers Ltd* 2005
- (3) SA 323 (SCA), para 27), I, however, reject the suggestion that fairness and good faith can on their own be used as instruments in determining the contractual relationship of the parties (*Potgieter and Another v Potgieter N O and Others* 2012
- (1) SA 637 (SCA), para 34). In my view the question whether or not a surety should be discharged from suretyship by reason of the creditor's prejudicial conduct must be considered on the basis of the approach as set out by Olivier JA in para 19 in *Absa Bank v Davidson* supra which is that the nature and effect of the plaintiff's conduct which the defendant alleges caused him prejudice, must be considered by reference to the terms of the principal agreement and the deed of suretyship which are the sources of the parties' rights and obligations. If the prejudice complained of arises from performance by the plaintiff of the act which the agreement or a deed of suretyship authorises, then there is no basis for the contention that the defendant is prejudiced because the prejudice which he suffers is one which he undertook to suffer.
- [30] I agree with Mr Sievers, who appeared for the plaintiff, that plaintiff in this matter in its dealing with the principal debtor or the defendant did not act in a manner which is prejudicial to the defendant. In the first place the sale of One Vision's property occurred pursuant to the liquidation order which was granted by a competent Court. The sale was authorised by a liquidator who was appointed by the Master to attend to the winding-up of the principal debtor's estate. Moreover in terms of clause 12.2 of the deed of suretyship, the suretyship could be enforced against the surety regardless of "any negligence or breach of contract on the part of the Bank or the debtor, or the non-notification to the surety of any default, delay, omission or contractual breach on the part of the Debtor".
- [31] In the circumstances, I find that the defence of "prejudice" or "breach of implied duty", upon which the defendant relies in resisting the granting of summary judgment, is not a bona fide defence which is good in law and is dismissed.
- [32] In the result summary judgment is granted in favour of the plaintiff as follows:
1. Payment of the sum of R7 207 786.78
 2. Interest on the sum in 1 at the rate of 7.1 % per annum from 12 January 2012, such interest to be calculated on daily balance and capitalized monthly in arrear;

3. Costs of suit (to be taxed). D H ZONDI

- [29] I disagree with Mr Spamer's contention. While I accept that fairness and good faith are considerations which are deeply embedded in our law of contract, (*Fry and Another v First National Bank of South Africa*, supra at 931 G; *South African Forestry Co Ltd v York Timbers Ltd* 2005
- (3) SA 323 (SCA), para 27), I, however, reject the suggestion that fairness and good faith can on their own be used as instruments in determining the contractual relationship of the parties (*Potgieter and Another v Potgieter N O and Others* 2012
- (1) SA 637 (SCA), para 34). In my view the question whether or not a surety should be discharged from suretyship by reason of the creditor's prejudicial conduct must be considered on the basis of the approach as set out by Olivier JA in para 19 in *Absa Bank v Davidson* supra which is that the nature and effect of the plaintiff's conduct which the defendant alleges caused him prejudice, must be considered by reference to the terms of the principal agreement and the deed of suretyship which are the sources of the parties' rights and obligations. If the prejudice complained of arises from performance by the plaintiff of the act which the agreement or a deed of suretyship authorises, then there is no basis for the contention that the defendant is prejudiced because the prejudice which he suffers is one which he undertook to suffer.
- [30] I agree with Mr Sievers, who appeared for the plaintiff, that plaintiff in this matter in its dealing with the principal debtor or the defendant did not act in a manner which is prejudicial to the defendant. In the first place the sale of One Vision's property occurred pursuant to the liquidation order which was granted by a competent Court. The sale was authorised by a liquidator who was appointed by the Master to attend to the winding-up of the principal debtor's estate. Moreover in terms of clause 12.2 of the deed of suretyship, the suretyship could be enforced against the surety regardless of "any negligence or breach of contract on the part of the Bank or the debtor, or the non-notification to the surety of any default, delay, omission or contractual breach on the part of the Debtor".
- [31] In the circumstances, I find that the defence of "prejudice" or "breach of implied duty", upon which the defendant relies in resisting the granting of summary judgment, is not a bona fide defence which is good in law and is dismissed.
- [32] In the result summary judgment is granted in favour of the plaintiff as follows:
1. Payment of the sum of R7 207 786.78
 2. Interest on the sum in 1 at the rate of 7.1 % per annum from 12 January 2012, such interest to be calculated on daily balance and capitalized monthly in arrear;
 3. Costs of suit (to be taxed).

D H ZONDI

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2012/142.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/standard-bank-of-south-africa-v-norris-unknown-topic-awchc-2012>

Prepared on 12 October 2026 · Esheria