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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14714/2016

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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In the matter between –

NEDBANK LIMITED

Applicant

and

GRANT STUART McGLASHAN

First Respondent

(ID NO. [...])

ALISTAIR IAN McGLASHAN

Second Respondent

(ID NO. [...])

SUGAR PROPERTY DEVELOPMENTS (PTY) LTD

Third Respondent

(Reg. No. 2007/020697/07)

THE AFRICAN BLACKFOOT SHARE TRUST

Fourth Respondent

THE CIELO INVESTMENT TRUST

Fifth Respondent

ILIMA SHARE TRUST	Sixth Respondent
THE SILVERCLOUD SHARE TRUST	Seventh Respondent
THE MERCURIO INVESTMENT TRUST	Eighth Respondent
THE JAGUAR BUSINESS TRUST	Ninth Respondent
THE MILELE INVESTMENT TRUST	Tenth Respondent
THE SUGAR FAMILY TRUST	Eleventh Respondent

JUDGMENT

Headnote

A bank sued on a standard suretyship containing a clause providing for a certificate of balance which stated: ‘...upon the mere production thereof is binding on us and be proof of the contents of such certificate on the face of it...’. Defendant argued that the clause was unenforceable because it did not allow the prospect of rebuttal, and relied on the decision in *Nedbank v Binder* which struck down the identical clause. The Bank argued that *Nedbank v Binder* was wrongly decided because the phrase ‘on the face of it’ meant ‘prima facie’ and thus a rebuttal was possible.

Held: Nedbank v Binder 1483/2011 [7 April 2016, per van der Linde J] was not wrongly decided – the phrase ‘..on the face of it..’ means ‘ex facie’ not ‘prima facie’- accordingly, bank cannot rely on the clause because the meaning of ‘ex facie’ is conclusive and not admitting of a rebuttal

In the alternative the bank argued that the certificate clause in the underlying contract in respect of which the suretyship was accessory was valid and if the ‘principal’ debt could be established on the strength of such a certificate that certificate could be applied to the accessory obligation too.

Held: the argument had to fail in summary judgment proceedings in respect of proceedings based on a suretyship because a defendant was not called upon to meet a case premised on the underlying contractual obligation of another person towards the creditor

SUTHERLAND J:

Introduction

[1] The applicant (Nedbank) has sued the eleven respondents for payment of the indebtedness of Immobile Transport systems (Pty) Ltd (Immobilise). A sum of R2,250,000 was lent to Immobilise in terms of a loan agreement which should have been repaid by 1 August 2016 together with interest. However, on 18 April 2016 Immobilise was liquidated. Nedbank claims that the respondents are all sureties for the debt.

[2] The respondents all entered an appearance to defend which precipitated the application for summary judgment. A common defence is put up for all. The deponent is the first respondent Grant McGlashan.

[3] There are two parts to the defence proffered.

[4] The first part of the defence is a challenge to the scope or applicability of the suretyships. There are no disputes about the validity of suretyships *per se*. The contention is that the debt in respect of which the suretyships were given does not include or cover the loan agreement relied upon by Nedbank.

[5] The second part of the defence is that, even assuming the suretyships cover the loan agreement, Nedbank, cannot produce a legally binding certificate of balance. The certificate proffered is alleged to be *contra bonis mores* because it purports to be conclusive proof of the debt, and as such unenforceable as decided in *Ex Parte: Minister of Justice: In Re Nedbank v Abstein Distributors (Pty) Ltd & Donnelly v Barclays National Bank Ltd 1995 (3) SA 1 (A)*. Thus, runs the contention, in the absence of a binding certificate to establish the quantum, the claim is not liquid. Thus, for that reason summary judgment cannot not be granted.

The Scope of the suretyships

[6] The Suretyships were all executed by 4 April 2015. McGlashan, says that the understanding of all the sureties was that the security thus given was linked exclusively to a revolving credit agreement with Immobilise which was cancelled. The loan agreement upon which Nedbank relies, was concluded later and the suretyships, so it is said, were not intended to cover it. If that is true then reliance on the suretyships for the outstanding amount of loan owing must fail. It is, however, common cause that after the cancellation of the revolving credit agreement Nedbank and the Immobilise concluded the subsequent loan agreement for the same sum as the sum provided for in the revolving credit agreement.

[7] The question whether or not the scope suretyships extended beyond the revolving credit agreement then becomes the focus of the controversy.

[8] In my view, the defence put up by the respondents fails.

[9] The first reason is that the terms of the suretyship are wide enough to encompass the indebtedness of Immobilise on grounds other on the revolving credit agreement. Secondly, the papers disclose that when the revolving credit agreement was cancelled, it was cancelled in order to supplant it with a loan agreement for the same sum.

[10] The suretyships are not exclusively related to performance in terms of any specific agreement. Clauses 1, 2, 3, 4 and 16 of the suretyship substantiate this intention. I cite the relevant passages: Clause 1 provides that 'Webind ourselves jointly and severely as sureties and co-principal debtorsfor the repayment on demand of all the amounts which the principal debtor may now or at any time hereafter owe Nedbank. Clause 2 provides that the obligation 'may arise from moneys lend and advanced or to be lent and

advanced'. Clause 3 provides 'It should always be at Nedbank's discretion to determine the extent, nature and duration of the banking facilities to be allowed to the principal debtor'. Clause 4 provides that the suretyship is unconditional. Clause 16 provides that 'we agree that this suretyship is in addition and without prejudice to any other securities, including other suretyships, now or in the future held from or on behalf of the principal debtor and that it shall remain in force as a continuing covering security for all any sum or sums of money which may now or in the future be owing to or claimable by Nedbank from any clause aforementioned and any other clause of whatever nature.....'. Accordingly the sureties are not limited to the revolving credit agreement.

[11] The second leg of this defence is that it was the 'of the respondents that whatever the wording of the suretyship may have been, their liability would be limited to the revolving credit agreement and could not be linked to any other form of indebtedness. This line of defence cannot be invoked because it would require a rectification which is unsustainable in the face of the express terms of the agreement.

[12] A variation of this theme is that no *consensus ad idem* existed and the suretyship agreements fail on that ground. The intentions of both parties are relevant. If such a defence was viable, one would have expected the affidavit to deal extensively with the facts which might support it. Rule 32 requires full disclosure and the required degree of disclosure is absent.

[13] Lastly, an attempt was made to suggest that steps by Nedbank to secure other further security for the loan agreement implies that 'new' security was necessary because the suretyships did not apply. This is incorrect. Although true that Nedbank did initially pursue further security, the steps were abandoned. At best, the probabilities are that the decision not to procure more security was motivated by the fact that the existing security was sufficient; after all, the capital sum was identical.

The certificate of Balance

[14] The contention is that the certificate is contaminated and unusable because it stipulate that a rebuttal was not possible. Paragraph 6 of the suretyship reads:

“The nature and amount of our obligation.....shall be determined and proved by a certificate purporting to have been signed by the managerof Nedbank, whose capacity or authority it will not be necessary to prove (or any other form evidence contemplated in section 169(2) of the National Credit Act... if applicable. This certificate or other form of evidence as the case may be, will upon the mere production thereof be binding on us and be proof of the contents of such certificate on the face of it and of the fact that such amount is due and payable in any legal proceedings against us, and will be valid as a liquid document against us in any competent court’ (underlining added)

[15] It was contended that there was support for the proposition that this clause was unenforceable from the recent unreported decision of Van der Linde J in *Nedbank Ltd v Binder SHGJ 1483/2011*, delivered on 7 April 2016. This was a judgment in which Van Linde J had to deal with the identical text as this suretyship. It was held:

“[7] The clause in the suretyship agreement relied upon by the plaintiff for the legitimacy of exD is clause 6.” (The Judge then quoted the clause which is identical to that being addressed now)

[8] Interpretation starts with the ordinary meaning of words. The ordinary meaning of the words used in this clause has the effect of that the defendant cannot challenge the certificate of balance. Clauses of this ilk

were specifically referred to and authoritatively examined by [the Abstein case]”

[9] That Court held that the clause such as the one under discussion is on the authority of *Sasfin v Beukes* invalid as offending public policy. The offensive aspect was that the terms purported to oust the jurisdiction the Courts to inquire into and determine the accuracy and the validity of the issue covered by the certificate. The Court held that where the certificate was authored by an independent third party, that was different, and was permissible. But where as in that case, and also in the present case, a certificate was to be authored by the other contracting party the objection applied.’

[16] The effect of that judgment is that clause 6 is unenforceable. That has the inevitable consequence that all of Nedbank’s suretyships with this text are invalid to that extent.

[17] However, to counter this contention, counsel on behalf of Nedbank invited me to hold that Van der Linde J was clearly wrong in *Binder*.

[18] The basis advanced for such a finding is premised on an alleged error which is said to be Van der Linde J ignoring the import of the words “on the face of it” as they appear in clause 6. Counsel argued that clause 6 of the suretyship with those words is of *identical import* to clause 16 in the loan agreement with Immobilise. Clause 16 reads:

“The nature and amount of the client’s indebtedness to the bank in terms of this agreement , as well as the interest payable in respect thereof, will at any time be determined and proved by a certificate purporting to have been signed by a manager or accountant for the time being of the branch or head office of the bank whose capacity or the authority it will not be necessary to prove, which certificate or other form of evidence as the

case may be will upon the mere production thereof be binding on the client and be *prima facie* proof of the contents of such certificate and of the fact that such amount was due and payable in any legal proceedings against the client, and will be valid as a liquid document against the client in any competent court.” (underlining added)

[19] The contention is that when these two clauses are compared it is apparent that Van der Linde J overlooked giving due weight to the phrase in clause 6 “on the face of it” which has the same meaning as “*prima facie* proof” in clause 16 and if that is so, the contention runs, the judgment is clearly wrong.

[20] In my view, this submission must fail. In clause 16 the critical phrase is: “....upon the mere production thereof be binding on the client and be *prima facie* proof of the contents of such certificate.” The critical phrase in clause 6 is:, “will upon the mere production thereof be binding upon me and be proof of the contents of such certificate on the face of it.....”

[21] The two clauses are not saying the same thing. Clause 6 does not provide for *prima facie* proof. The use of the phrase “on the face of it” in the particular sentence does not give rise to a meaning that there is ‘prima face’ proof, but rather that the contents of the certificate itself ‘on the face of it’ are to be taken as proof. The source of the error in the submission is the assumption that the words “*prima facie*” when translated into English mean “on the face of it”. This is incorrect. The words “on the face of it” if one is obliged to use Latin, it is correctly translated as “*ex facie*” not *prima facie*. *Prima facie* means the first or provisional view. ‘On the face of it’, or *ex facie*, means exactly that, on the face of it, it is so.

[22] Accordingly there is no basis upon which to find that Van der Linde J was clearly wrong in this case. Indeed I express my agreement with his views as set out in *Binder*.

[23] The consequence of that outcome is that Nedbank cannot rely on its certificate of balance. Indeed, any suretyship with the text of clause 6 is unenforceable as to the extent of clause 6.

[24] Recognising that difficulty, counsel for Nedbank invited me to have a look at the certificate which had been issued in regard to the loan agreement between the bank and Immobilise, the principal debtor. The argument, is if you can conclude that the principal debtor owes money, then by using its certificate in respect of that debt, the accessory debt of the surety can also be proven.

[25] In my view, this is not a viable proposition. In the first place, the claim which the respondents had to meet was not one based on any certificate being issued in terms of the loan agreement in relation to Immobilise but rather on a certificate of balance in respect of their suretyships.

[26] It may well be true that there is little reason to doubt that proof of the principal debt is easily and sensibly proved by a certificate in terms the loan agreement. But for the purposes of summary judgment where that is not what the respondents are invited to respond to and where there is no room to expand, by way a rebuttal of the plaintiff's claim, after the answering affidavit is filed, it seems to me to be inappropriate that any reliance can be placed on the certificate which relates to Immobilise, for summary judgment purposes.

[27] The consequence of that is that the amount owing has not been established for the purposes of summary judgment and on that ground, therefore, the resistance by the respondents is well founded.

The Order

[28] The appropriate order to make in this case is for leave to defend to be granted and costs to be costs in the action. It is so ordered.

Roland Sutherland

Judge of the High Court, Gauteng Local Division,
Johannesburg

Hearing and judgment: 28 June 2016

Judgment revised: 4 August 2016

For applicant:

Adv M. de Oliveira, instructed by KWA attorneys

For Respondents:

Adv L. Morland, instructed by SC Vercell attorney