**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 21128/2015**
**6/12/2016**

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

…….. ……..
DATE SIGNATURE

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA LIMITED** Applicant
(Registration Number: 1962/000738/06)

and

**LEAH ANN McCRAE** Respondent
(Identity Number: …)

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**J U D G M E N T**

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**WEINER, J:**

INTRODUCTION

[1] The applicant seeks judgment against the respondent for:

1.1. payment of the amount of R4 331 375,75 plus interest;

1.2. payment of the sum of R42 524,19 plus interest;

1.3. payment of the amount of R4 139 820,67 plus interest; and

1.4. costs on the attorney and own client scale.

BACKGROUND

Basis of the respondent's indebtedness

[2]

2.1. A written loan agreement was concluded between the applicant and Strike Productions (Pty) Limited (Strike Productions) on the 12th November 2009.

2.2. Certain securities were required which included a pledge of US $800 000 held in the name of Robert Andrew McCrae (McCrae) at Standard Bank Jersey/Guernsey.

2.3. An event of default would occur if *inter alia* Strike Productions was liquidated.

2.4. In the event of such default the applicant could require full payment of all Strike Productions' indebtedness under the loan agreement.

2.5. A written addendum to the loan agreement was concluded by the applicant and Strike Productions on the 5th July 2011.

2.6. The addendum related to the deletion of the clause in terms of which McCrae had to pledge the amount held at Standard Bank Jersey/Guernsey to the applicant and instead the collateral required

was an irrevocable undertaking by McCrae, in a form and substance acceptable to the bank.

2.7. The conclusion of the loan agreement, the addendum and the reschedule of payments are common cause.

[3]

3.1. A written fleet management agreement was also concluded by the applicant and Strike Productions on the 12th December 2011, the conclusion of which is also common cause. Similarly, if Strike Productions was placed in liquidation the applicant could claim payment of all amounts owing in terms of this agreement.

3.2. A written overdraft agreement was also concluded by the applicant and Strike Productions on the 20th November 2009. There is no real dispute in regard to the conclusion of the written overdraft agreement despite the original agreement having been lost. Similarly default would occur if Strike Productions was placed under liquidation. A written variation of this overdraft agreement was concluded by the applicant and Strike Productions on the 12th April 2011. Although the respondent denies the conclusion of the written variation there appears to be no valid basis therefor as she was the sole director of Strike Productions at the time and she signed the document on behalf of Strike Productions.

[4] The respondent signed a deed of suretyship in favour of the applicant in respect of the indebtedness of Strike Productions on the 26th May 2011.

The signature by the respondent and the terms of the deed of suretyship are common cause.

[5] Strike Productions was liquidated in 2014, and as result the full amounts owing to the applicant by Strike Productions in terms of the loan agreement, the fleet management agreement and the overdraft agreement became due and payable.

[6] The amounts which are alleged to be due are recorded in certificates of balance which, although denied by the respondent, are not denied upon any factual or legal basis. Accordingly, absent evidence on the part of the respondent to rebut the certificate, the certificate becomes sufficient proof of the indebtedness. See *Solomon N.O. and Others v Spur Cool Corporation (Pty) Ltd and Others*[1].

[7] The respondent raised the following defences:

7.1. At the time that she signed the deed of suretyship, she was intentionally, alternatively, negligently not advised by the applicant (who had a duty to so advise her), that the collateral security required by the applicant, being the pledge by McCrae referred to above, had not been obtained.

7.2. Secondly, she signed the deed of suretyship at a time when it was not explained to her by the applicant what document she was signing nor the implications thereof. She alleges that she was going through a mental breakdown at the time, that Padyachee of the applicant knew

[1] (3215/00) [2002] ZAWCHC 1 (30 January 2002)at paras [70] to [72]

of her condition, and failed to explain to her what the document comprised.

7.3. Thirdly, Padyachee told her she had to sign the deed of suretyship or else the applicant would terminate all existing loan agreements and demand repayment of all funds. On that basis he was able to "unduly influence" her to sign the document.

[8] The respondent also relies upon the alleged untoward conduct of another representative of the applicant, one Ramjan, to demonstrate that she was unduly influenced. However, this influence appears to have been exerted over her during November 2011/December 2011, at a time which is not relevant to the present proceedings.

[9] The respondent accordingly contends that during May 2011 she was in no mental state to freely and voluntary, in her sound and sober mind, make an election to sign a deed of suretyship *alternatively* she had no legal capacity to enter into and conclude same. Secondly, she lacked the necessary mental capacity to have entered into the agreement because of her mental breakdown, and she was not of sound mind to know what she was signing.

[10] The applicant submits that the respondent's defences are mutually destructive of each other. She could not simultaneously have been incapacitated, under undue influence, and subject to a non-disclosure at the time she signed the deed of suretyship.

NON DISCLOSURE

[11] The respondent does not state upon what basis the applicant had a duty to disclose to her that the pledge from McCrae had not been obtained. In *ABSA Bank Ltd v Fouche*[2] Conradie JA held that a p*arty* expected to speak when the information he has to part falls within his exclusive knowledge.

[12] The respondent was fully aware when she signed the deed of suretyship that McCrae had not provided the pledge. This is apparent from the divorce settlement agreement concluded between respondent and McCrae on the 25th March 2011, in particular clauses 19.1 and 19.2 thereof. She signed the deed of suretyship on the 6th May 2011. These clauses provide as follows:

> Clause 19.1:
>
> "*The Defendant ( McCrae) undertakes to furnish Standard Bank of South Africa with the requested unlimited Deed of Suretyship, alternatively, the Pledge of the Limited Surety, in the sum of US Dollars 800,000 being the sum held in the Defendant's Standard Bank Jersey/Guernsey CFD Account, if again after signature hereof by the parties hereto, be called upon by the Standard Bank of South Africa to furnish either of these requirements of Standard Bank of South Africa*.
>
> Clause 19.2:
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> "*The Defendant warrants and records that after signature hereof he has and shall have no claim to any shares in any company relating to Strike Productions (Pty) Ltd and for the avoidance of any doubt, he hereby cedes, transfers and makes over unto and in favour of the Plaintiff, any rights, title or interest which he enjoys to any assets, benefits, including shares relating to Strike Productions*"

[2] (344/2001) [2002] ZASCA 111; [2002] 4 All SA 245 (SCA) (19 September 2002) (at para [5])

[13] The respondent states that it was not explained to her what the implications of the deed of suretyship were. She does not state that she did not read the deed of suretyship or that she did not understand what she was signing. The fact that it was not explained to her does not therefore assist her.

[14] Furthermore, by the time the respondent signed the addendum to the loan agreement on the 5th July 2011, she acknowledged that McCrae had not provided the pledge (the addendum amended the term loan agreement to the effect that the pledge was no longer required. Despite this knowledge, and despite having signed the suretyship agreement some two months before, the respondent did not raise with the applicant any issue in regard to McCrae not having provided the pledge or that, at the time she signed the deed of suretyship, she did not understand its implications and /or was not in her sound and sober senses. Furthermore, it is apparent from the deed of settlement that it was contemplated that the respondent would be obliged to sign a deed of suretyship. She was to become the sole shareholder and director of Strike Productions and the deed of settlement provided for that event.

Clause 19.4 provides as follows:

> "*After repayment of the full amount owed to the Standard Bank, the Plaintiff and Defendant shall take all reasonable and necessary steps and sign all documentation necessary to procure both the Plaintiff and Defendant's release as sureties and co-principal debtors with Strike Productions (Pty) Ltd (if necessary) …*"

Clause 19.5 reads as follows:

"*The Defendant indemnifies the Plaintiff against all claims of whatsoever nature and howsoever arising in respect of any damages which may arise as a result of his failure, refusal and/or neglect to furnish Standard Bank with his unlimited Deed of Suretyship, alternatively, his refusal, failure and/or neglect to Pledge the sum of US Dollars 800,000 as aforementioned.*"

JOINDER OF MCCRAE

[15] It is pertinent to point out that as a result of this clause the respondent, on the 21st November 2016, applied for the main application to be postponed on the basis that she had instituted a joinder application to join McCrae based upon his indemnity.

[16] I found that there was no reason for the matter to be postponed as the respondent could separately sue McCrae on the indemnity if she believed it was in her interests to do so and that she could establish a cause of action. There was no reason for the applicant to be involved in that application. It appeared that the only reason for the matter to be postponed, pending the joinder application, was a plea *ad misericordiam* in that the respondent did not want to be held liable to pay without simultaneously enforcing her right of indemnity from McCrae. Accordingly, I refused the application for postponement with costs.

UNDUE INFLUENCE

[17] The applicant also contends that the respondent has not made out a case for undue influence by either Padyachee or Ramjan.

[18] As set out above, the allegations relating to Ramjan took place in November/December 2011 which is irrelevant in regard to the signature date of the deed of suretyship being in May 2011.

[19] The signature of the deed of suretyship came about as a result of the settlement agreement between the respondent and McCrae. McCrae transferred his shareholding in Strike Productions to the respondent and the settlement agreement, as stated above, clearly envisaged the respondent signing a deed of suretyship for the debts of Strike Productions.

[20] The respondent does not allege she would not have signed the deed of suretyship had she had "normal free will", and not been influenced by Padyachee. See *Patel v Grobbelaar*[3] and *Hofer and Others v Kevitt NO and Others*[4].

MENTAL CAPACITY

[21] In relation to this defence, the respondent attached the report and affidavit of a clinical psychologist, Ms Lorraine Barbara De Raay. The psychologist states that in May 2011, the respondent's state of mind was such that she would not have appreciated what she was signing. Although, the evidence in this regard, is not totally convincing, in my view it would be just and equitable to refer this aspect to oral evidence.

[22] Accordingly, the following order is made:

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[3] 1974 (1) SA 532 (A) at 534A-B
[4] (122/96) [1997] ZASCA 79; 1998 (1) SA 382 (SCA); [1997] 4 All SA 620 (A); (26 September 1997) at 388E-F

22.1. The issue of whether the respondent had the mental capacity to appreciate the implications of signing the deed of suretyship, when same was signed, is referred for the hearing of oral evidence on a date to be arranged with the registrar of Weiner J.

22.2. The evidence of any person who has provided an affidavit in these proceedings may be led in this regard;

22.3. if any other witnesses are to give evidence, a summary of same is to be provided 10 days before the hearing of the oral evidence.

22.4. Costs are to be in the cause.

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**S WEINER**
**JUDGE OF THE HIGH COURT**
**OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION,**
**JOHANNESBURG**

**Appearances**

**For the Applicant:** Advocate L Hollander

**Instructed by:** Jason Michael Smith Incorporated Attorneys

**For the Respondent:** Advocate M Nowitz

**Instructed by:** Nowitz Attorneys

**Date of hearing:** 22 November 2016

**Date of Argument:** 22 November 2016

**Date of Judgment:** 6 December 2016