

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 09/1041

In the application between

INVESTEC BANK LIMITED

Applicant

And

SILVANATHAN NAIDOO

Respondent

JUDGMENT

EF Dippenaar AJ

[1] This is an application in which the Applicant seeks a money judgment against the Respondent on the basis of a deed of suretyship (limited to R14 million) in respect of the indebtedness of the principal debtor, Tropical Paradise Trading (Pty) Ltd (“Tropical Paradise”) to the Applicant. It is contended that the principal debtor is indebted to the Applicant pursuant to a written loan agreement concluded between it and the Applicant. The

Applicant seeks payment of the amount of R14 million together with interest on the aforesaid amount at the rate of 14,25 % per annum calculated daily from 5 November 2008 to date of payment and compounded monthly.

- [2] The Applicant previously obtained judgment against the Respondent in this application by default and also brought an application for sequestration of the estate of the Respondent based on a *nulla bona* return of service and the default judgment obtained by the Applicant against the Respondent.
- [3] The Respondent brought an application for rescission of the default judgment and opposed the sequestration application. The rescission application was opposed by the Applicant but was successful before His Lordship Mr Justice Lamont ("Lamont J"), who granted an order on 23 November 2009 rescinding the default judgment and dismissing the sequestration application. After the filing of answering and replying papers, the matter has been referred to me for adjudication.
- [4] The Respondent has relied heavily on the judgment of Lamont J and contends that it is relevant to the merits of the Respondent's defence, in as much as Lamont J found that the facts relied upon by the Respondent in the rescission application, being substantially the same facts now relied upon by the Respondent, constitute a triable issue to be determined at trial. I have been favoured with a copy of the said judgment and with a copy of the papers in the rescission application.

[5] The Respondent made some moment of the conduct of the Applicant in launching sequestration proceedings against the Respondent and opposing the rescission application. These issues have been dealt with by Lamont J, who granted the rescission application and in my view it is not necessary to comment further on those issues.

[6] It is common cause between the parties that Tropical Paradise is indebted to the Applicant in an amount of R27 021 030.98 together with interest thereon calculated at 14,25 % per annum from 5 November 2008 to date of payment, calculated daily and compounded monthly. It is further common cause that on or about 20 September 2005 the Respondent executed a written deed of suretyship in favour of the Applicant in which he bound himself onto and in favour of the Applicant as surety in solidum for and co-principal debtor, jointly and severally with Tropical Paradise limited to an amount of R14 million plus finance charges and costs.

[7] Of relevance is clause 16 of the deed of suretyship, which provides as follows:

"NON VARIATION

No variation or cancellation (whether oral, consensual or otherwise) of the terms of this Deed of Suretyship shall be of any force or effect unless it is reduced to writing and signed by the Surety and Investec..."

[8] The clause contemplates that, notwithstanding any oral cancellation of the deed of suretyship, it would have no force or effect unless reduced to writing and signed by both parties.

[9] The Respondent does not take issue with the indebtedness of Tropical Paradise to the Applicant, but contends that it is not liable to the Applicant on essentially three grounds: first; as the Applicant orally undertook to release him from the deed of suretyship, written confirmation of which allegedly exists although it does not form part of the papers before court; secondly, that the conduct of the Applicant in undertaking to thus release him, was a representation which founds an estoppel to the Applicant's reliance on the said clause; and thirdly, in the alternative to the estoppel that the Applicant's alleged conduct amounted to a waiver by the Applicant to rely on clause 16 of the deed of suretyship, if not the whole suretyship.

[10] The Respondent alleges thus in his answering affidavit:

“30. On 29 June 2007, Bronkhorst and I met at the Applicant's office with, inter alia, Sizu Ncunu and Ratsalsenyana Zebediela, both of whom are employed by the Applicant..., during which meeting:

30.1 A new written loan agreement between the Applicant and the Bronkhorst Family Trust in respect of the purchase of my shares in Tropical Paradise was concluded.

30.2 *Pursuant to the conclusion of the new loan agreement between the Applicant and the Bronkhorst Family Trust, I enquired as to my release as surety. Zebediela advised that the Applicant was awaiting the signature of Rwayitare on the suretyship which was required in terms of the loan facility for the Bronkhorst Family trust, and upon signature thereof, the Applicant would forward to me confirmation in writing of my release as surety. I had no reason to doubt Zebediela's undertaking. The Applicant must have obtained Rwayitare's suretyship and must have advanced the loan to the Bronkhorst Family Trust because:-*

30.2.1 *I received payment from Bronkhorst in respect of my shares; and*

30.2.2 *The Applicant has obtained judgment against Bronkhorst and the Bronkhorst Family Trust in respect of the loan facility; and”.*

[11] The Respondent then contends that the conduct of the Applicant, represented by Zebediela and Ncunu, in having undertaken to the Respondent during the meeting of 29 June 2007 to release the Respondent as surety, amounted to a representation which the Respondent relied upon to his detriment, i.e. he relied on what was said to him and he did not insist

on a written cancellation of the suretyship signed by the Applicant and him. In the circumstances the Respondent contends that the Applicant is stopped from enforcing the suretyship and/or from relying on clause 16 thereof.

[12] He further alleges that the conduct of the Applicant, represented by Zebediela and Ncunu, in having undertaken to the Respondent during the meeting of 29 June 2007 to release him as surety, amounted to a waiver of the suretyship, alternatively clause 16 thereof.

[13] The Respondent further contends that the conduct of the Applicant in attempting to enforce the suretyship in the circumstances set out by the Respondent, i.e. the oral agreement by the Applicant (represented by Ncunu and Zebediela) to release the Respondent from the deed of suretyship and/or the oral undertaking to provide the Respondent with a written release, is fraudulent and contrary to public policy.

[14] The Applicant denies all the aforesaid contentions.

[15] The nub of the dispute is accordingly whether the provisions of clause 16 of the deed of suretyship precludes the Respondent's reliance on an oral release. Secondary issues are whether the Respondent was indeed released from the deed of suretyship and whether the estoppel and waiver relied on by the Respondent are sustainable.

[16] It is settled in our law that as a matter of policy a non variation clause should be recognised as enforceable and that it effectively entrenches both itself and all the other provisions of the contract against oral amendment. See: **SA Sentrale Ko-op Graanmaatskappy Beperk v Shiffren en Andere**, 1964 (4) SA 760A; **Tsaparas and Others v Boland Bank Ltd**, 1996 (1) SA 719A at 724D-E; **Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd**, 2007 (2) SA 570 SCA; **Brisley v Drotsky**, 2002 (4) SA 1 SCA; **Telcordia Technologies Inc v Telkom SA Ltd**, 2007 (3) SA 266 SCA.

[17] The Applicant further relies on **HNR Properties CC v Standard Bank of SA Ltd**, 2004 (4) SA 471 (SCA) para [19] - [21], pp479, 480, which it contends is definitive of the issue and which precludes any oral release from the deed of suretyship.

[18] The Supreme Court of Appeal in **HNR Properties**, *supra* explained the purpose of a non variation clause in a deed of suretyship thus, at paragraph [15] 477I - 478B:

“The object of a clause in a suretyship agreement providing that the surety shall not be released from any liability unless such release be in writing is to protect the creditor. It enables the creditor to determine its rights with reference to the documents in its possession. The creditor does not have to rely on the memory of its employees or ex-employees. It protects the creditor against spurious defences and unnecessary litigation. The need for such

provision is the greater where the creditor is a large organisation comprising different divisions and employing a large number of people. The surety, on the other hand, is unlikely to be prejudiced. Institutions such as banks do not lightly release sureties where the debt of the principal debtor remains extant. If there is release, it is in the interest of both parties that it be readily capable of proof."

- [19] Regarding the issues of estoppel and waiver, the legal position is stated thus by Scott JA in **HNR Properties** at paragraphs [19] to [21], 479C - D, F/G - G/H and 480A - A/B:

[19] The further grounds upon which the appellants rely in support of their contention that they were released as sureties are waiver, estoppel and the reliance theory of contract. I shall deal with each in turn. Clause 16 of the suretyship agreements provides as follows:

'No cancellation or variation of this suretyship shall be of any force or effect whatsoever unless and until it is recorded in writing signed by or on behalf of the bank and the surety.'

In SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) this Court held that a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding. The principle has been consistently reaffirmed,

most recently by this Court in *Brisley v Drotsky* 2002 (4) SA 1 (SCA). (A non-variation clause is not necessary in a contract of suretyship by reason of the provisions of s 6 of Act 50 of 1956 - *Tsaperas and Others v Boland Bank Ltd* (supra at 725B - C)[1996 91] SA 719A] - but that does not detract from the legal force of such a clause where it exists.) Courts have in the past, often on dubious grounds, attempted to avoid the *Shifren* principle where its application would result in what has been perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the *Shifren* principle, for example, where it amounts to a *pactum de non petendo* or an indulgence in relation to previous imperfect performance. (For an interesting discussion on the topic, see Hutchison 'Non-variation Clauses in Contract: Any Escape from the *Shifren* Straitjacket' (2001) 118 SALJ 720.) But nothing like that arises in the present case.

[20] The appellants contend that they were released as sureties by virtue of the conduct of the bank, coupled with a consensual waiver of the provisions of clause 15. In my view, a factual basis for such a contention was not established on the evidence. But even if it had been, it would have amounted, in the circumstances of the present case, to no more than a variation of clause 15 which was not in writing.

This is precluded by clause 16. To hold otherwise, would be to render the principle in Shifren wholly ineffective.

[21] The same applies to the appellants' reliance on estoppel. In their plea, the appellants alleged that Linnell had represented to H Berthold that the appellants were released from their suretyship obligations and that, relying on such a representation, the appellants had acted to their prejudice. The representation was clearly not established and in argument counsel sought to rely on a representation based more generally on the bank's conduct together with the letter dated 20 April 1998. But even if there had been such a representation, it would not assist the appellants. Where a release is required to be in writing, as in the present case, it may perhaps be possible, in limited circumstances, to frame an stoppel in such a way as not to violate the Shifren principle. It is unnecessary to consider what those circumstances would have to be.

What is clear is that an estoppel cannot be upheld when the effect would be to sanction a non-compliance with provisions in a suretyship agreement of the kind contained in clauses 15 and 16. It follows that the appellants' reliance on waiver and estoppel must similarly fail."

[20] The non variation clause in the present instance is couched in similar terms. I am of the view that in the present instance, and based on the foregoing

principles the estoppel relied on by the Respondent would be one which would in effect sanction a non compliance with the non variation clause contained in clause 16 of the agreement in issue. Moreover, I am not satisfied that the Respondent has factually provided sufficient evidence in support of all requirements of such an estoppel.

[21] Similarly, the evidence provided by the Respondent in support of its alleged waiver falls short of the required mark and would similarly violate the Shiffren principle.

[22] In the circumstances I agree with the Applicant that the aforesaid defences of waiver and estoppel raised by the Respondent do not pass muster and do not defeat the Applicant's claim.

[23] The Respondent's contentions that the alleged conduct of the Applicant orally agreeing to release the surety from a suretyship (in the face of a clause such as clause 16) and thereafter seeking to enforce the suretyship, is tantamount to fraud and must be *contra bonos mores*, are issues which were not specifically considered in **HNR Properties**, *supra*. Although notionally such contentions may be sustainable (where the necessary evidence is provided to sustain such conclusions), as was considered by Lamont J in the rescission application, and with which I respectfully agree, it must be considered whether the Respondent has made out such a case. These contentions are denied by the Applicant.

[24] The Respondent sought the dismissal of the application and in the alternative sought the referral of the matter to trial, alternatively oral evidence.

[25] The Respondent's contentions that irresolvable factual disputes exist on the papers, must be seen against the backdrop of the requirements of a bona fide factual dispute, as formulated by Heher JA in **Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 SCA paragraphs 11 to 13, as follows:

“[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondent's answering affidavit at face value. The truth about the preceding events lies concealed behind irresolvable disputes. On that basis, the applicant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I must respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict. Accept the version set up

by his opponent unless the latter/s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623A at 634E-635C. See also the analysis by Davis J in Ripoll-Dausa v Middleton NO and Others 2005 (3) SA 141C at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate).

[13] *A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they are not true or accurate but, instead of doing so, resets his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied, I say ‘generally’ because factual averments rarely*

stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit he commits himself to his contentions, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[26] In my view, the Respondent has failed to set out any defence based on fraud in sufficient particularity to justify a conclusion that he is *bona fide*, *inter alia*, for the following reasons:

[26.1] On the Respondent’s own version, the alleged undertaking by the Applicant to furnish him with a written release, was conditional and would still not comply with the requirements of clause 16 of the agreement as there was no alleged undertaking or agreement to conclude a consensual written cancellation agreement which would be signed by both parties. The Respondent speculates about the

fulfilment of the condition and does not provide positive facts in support of his averments.

[26.2] The details of the alleged meeting are stated in very broad terms and there is no detailed particularity provided of the discussions which transpired thereat.

[26.3] The Respondent does not provide factual evidence of all the averments necessary to sustain this defence and does not even aver any fraudulent intention on the part of the Applicant or facts from which such intention can be inferred.

[26.4] The Respondent is inconsistent in his different versions on oath regarding when the meeting with the Applicant allegedly took place. In his affidavit supporting the rescission application, the Respondent contends that the meeting took place on 29 June 2009, whereas in the affidavit resisting the current application, the Respondent changes his version and avers that the meeting took place on 29 June 2007, without any explanation being proffered for the apparent discrepancy and only after the Applicant pointed out the improbability of the Respondent's then version in its opposing papers in the rescission application.

- [26.5] In terms of clauses 9 and 11 of a sale of shares agreement concluded between the Respondent and Bronkhorst dated 18 May 2007, it was incumbent upon the Respondent to have himself removed as surety and Badenhorst provided him with a full indemnity if such removal could not be procured. No particularity is provided by the Respondent in his earlier affidavit of the reasons for the time lapse between the conclusion of the agreement and the meeting.
- [26.6] The Respondent further does not provide any explanation for the supine attitude adopted by him after the alleged meeting (if it took place in 2007) and does not even contend that he made any attempt to demand compliance from the Applicant with its alleged undertaking. Furthermore, no documentary evidence was produced by the Respondent evidencing any attempt to confirm the alleged meeting or to follow up on the Applicant's alleged undertaking, which one would reasonably have expected in the circumstances and no explanation is provided why the Respondent did not take any such steps.
- [26.7] Other than bald contentions of fraud, the Respondent has not provided primary facts sustaining such conclusion.

[27] I am in the circumstances not convinced that the Respondent's defence is bona fide or that bona fide factual disputes exist which necessitate a referral to oral evidence or trial.

[28] I am satisfied that for all the above reasons, the Applicant is entitled to the relief it seeks on the papers.

[29] I accordingly make the following order:

[29.1] The Respondent is directed to pay the Applicant:

[29.1.1] the amount of R14 000 000. 00 (Fourteen million rand);

[29.1.2] interest on the aforesaid amount at the rate of 41.25% per annum calculated daily from 5 November 2008 to date of payment;

[29.2] The Respondent is directed to pay the costs of the application.

EF DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	13 May 2010
Date of judgement	:	24 November 2010
For applicant	:	Adv DF Fischer SC
	:	Blakes Maphanga Inc
For respondent	:	Adv L Hollander
		Louis & Associates Attorneys