**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION – PORT ELIZABETH)**

**CASE NO: 3753/2011**
**DATE HEARD: 27/11/2012**
**DATE DELIVERED: 31/01/2013**

In the matter between

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| **ABSA BANK LIMITED** | **PLAINTIFF** |

and

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| **CHRISTO ALBERT SWART** | **1ST DEFENDANT** |
| **JOHAN GEORG MULLER** | **2ND DEFENDANT** |
| **HAROLD HENRY LARSEN** | **3RD DEFENDANT** |
| **JARL IVAR JOHNSON** | **4TH DEFENDANT** |
| **MIRANDA CORNELIA LAKE** | **5TH DEFENDANT** |

**JUDGMENT**

**ROBERSON J:-**

[1] This is an application for summary judgment. The plaintiff instituted action against the defendants for payment based on deeds of suretyship, in terms of which they bound themselves as sureties and co-principal debtors for payment of any sums of money owing to the plaintiff by Erf 1109 Marina Martinique CC (now

in liquidation), the principal debtor (the CC). With the exception of the first defendant, the suretyships signed by the defendants were subject to certain limitations of the amount recoverable by the plaintiff. The obligations of the CC to the plaintiff arose in terms of a mortgage loan agreement.

[2] The second defendant has consented to judgment and this judgment is in respect of the first, third, fourth and fifth defendants.

[3] Two defences were raised in the opposing affidavit, which was deposed to by the first defendant: (i) rectification and (ii) conduct on the part of the plaintiff causing prejudice to the defendants.

[4] The first defendant first set out the background which led to the granting of a loan to the CC, and the conclusion of the suretyship agreements. The first defendant and one Lottering were the members of the CC, which owned certain immovable property on which luxury apartments were to be built, in four phases. Negotiations were initiated with First Rand Bank (FRB) for the granting of a loan of R40 million to finance the first phase. The loan was granted by FRB on condition, *inter alia*, that a certain number of sales had to be concluded before funds would be made available. However, FRB's representative informed them (presumably the members) that FRB had a discretion to advance certain funds before the contemplated sales figures had been achieved. When the available funds were depleted, they were assured by FRB that they could continue with

building. However, a few days before registration of a bond in favour of FRB was to take place, they found out that FRB had no intention to advance funds prior to the contemplated sales figures being achieved. By this time the builder was owed approximately R6 million and it appeared that the development would collapse.

[5] Against this background, they approached the plaintiff and negotiated with Mr Hein Swanepoel, general manager of the plaintiff's commercial property department in Port Elizabeth. Within a few days a mortgage loan in excess of R100 million was approved. The plaintiff indicated that it would advance R15 million once the required documents were signed. The plaintiff required personal suretyships from the first defendant and Lottering. At the last moment Lottering refused to sign as surety, causing a crisis because money was owed to the contractor. The plaintiff agreed to accept other personal suretyships, which were then provided by the defendants. Swanepoel repeatedly assured the defendants that the plaintiff would not act against them before the mortgaged property had been sold in execution and only if there was still a balance owing. Swanepoel also said that the plaintiff would closely monitor the debt against the value of the mortgaged property and would foreclose immediately if it thought there was a risk that the security would be inadequate to cover the amount owing on the mortgage loan agreement. Acting on these assurances, the defendants signed the suretyships.

[6] The first defendant stated that he had been advised that the defendants have a claim for rectification of the suretyships, to include "these terms mentioned by Mr. Swanepoel". At the time, because of the financial crisis, there was no time for the defendants to negotiate and alter the standard forms which they signed. The plaintiff successfully applied for the liquidation of the CC and instituted action against the defendants without first complying with the oral terms alluded to.

[7] With regard to the defence of prejudicial conduct on the part of the plaintiff, the first defendant stated that the plantiff had sold the property for R30 million. He qualified this statement by saying that the property was nominally sold by the liquidator of the CC, but said that all negotiations were conducted by the plaintiff. He attached to his affidavit certain e-mails sent by a Mr. Faure Mould, an accountant negotiating on behalf of the purchaser, to the representative of the purchaser, and to officials of the plaintiff. One of the e-mails indicated that a Mr. Leon Steunenberg represented the plaintiff with regard to the proposed sale and that he required certain information from the purchaser. A further e-mail was from Mould to the second defendant, informing him that the offer to purchase had expired but the parties were still pursuing the sale, and that this information had been given to Steunenberg.

[8] The first defendant stated that the sale price was far below the market value, and attached to his affidavit a valuation of the property for R65 million. He

further stated that in selling the property at such a low price the plaintiff breached its duty of good faith towards the sureties and that they should therefore be released from their obligations in terms of the suretyships.

RECTIFICATION

[9] In *Soil Fumigation Services v Chemfit Technical Products* 2004 (6) SA 20 (SCA) at paragraph [21] Brand JA said the following (authorities omitted):

> "It is a settled principle that a party who seeks rectification must show facts entitling him to that relief 'in the clearest and most satisfactory manner' ………... In essence, a claimant for rectification must prove that the written agreement does not correctly express what the parties had intended to set out therein. In the opposing affidavit there is no suggestion whatsoever of any common intention different from the one recorded in clause 1 of the credit agreement. Consequently, the argument based on rectification cannot succeed."

(See also *Levin v Zoutendijk* 1979 (3) SA 1145 (WLD) at 1147H-1148B.)

[10] As was submitted on behalf of the plaintiff, the opposing affidavit did not state precisely which clauses of the suretyships were to be rectified, and what clauses were to be included or substituted. There was simply a reference to loosely described assurances on the part of Swanepoel. The suretsyships were signed on various dates: three were signed in Port Elizabeth, one in Jeffreys Bay, and one in George, but the first defendant did not state where and when the assurances were given. There was no mention of an antecedent agreement between the parties incorporating these terms and evidencing a common intention. There was no clear reference to a common intention at all. On the

contrary the first defendant stated that there was no time to negotiate and alter the terms of the standard form deed of suretyship. This suggests rather that the omission of the terms was not the result of a mistake. There was no suggestion in the opposing affidavit that it was agreed that these terms, although agreed upon, would not be recorded in the written agreement. Further, the averment that there was no time to negotiate, is contradicted by the dates on which the suretyships were signed. The first one was signed on 18 May 2007, the second one on 23 May 2007, and the other three more than a month later, during which period there would have been time to negotiate. In any event, it is clear from the affidavit that the first defendant was always prepared to provide a personal suretyship, and the other sureties were procured following Lotter's refusal to be a surety.

[11] As was further submitted, the assurances given by Swanepoel, if included as terms, would have the effect that material portions of the suretyships would have to be rectified. For example: the clauses providing for individual and joint liability; the clause providing for the discretion of the plaintiff, *inter alia* to determine the extent, nature and duration of any facility or other advance to the CC; the clause providing that the suretyships were to be a continuing covering security; the clause that the suretyships comprised the entire agreement and the plaintiff would not be bound by any undertakings, representations or warranties not expressly recorded; and the clause in which the defendants confirmed that the suretyships were in accordance with the agreement with the plaintiff, and

were not, as a result of a common mistake, not representative of their true intentions. The opposing affidavit did not deal in any manner with these clauses, for example how they came to be recorded and how they were to be rectified to bring them in line with the terms contended for.

[12] In the result, in my view, the affidavit fails to set out sufficient facts to support a defence of rectification.

[13] It was submitted on behalf of the defendants that a defence of a misrepresentation inducing the agreements could be read into the opposing affidavit. The immediate difficulty with that argument is the clause in the suretyships, already mentioned above, that the plaintiff would not be bound by any undertakings, representations or warranties not expressly recorded. There was no suggestion of a fraudulent misrepresentation by Swanepoel. It follows that no facts were set out to support a defence on this ground.

CONDUCT CAUSING PREJUDICE

[14] The agreement of sale of the property between the purchaser and the CC, reflected that the CC was represented by Punithan Quentin Naidoo in his capacity as liquidator, appointed by the Master. As accepted by the defendants, the plaintiff did not sell the property. The alleged prejudicial conduct was that “all negotiations were done by ABSA Bank”. In my view this averment falls far short

of supporting this defence. It is very widely stated and does not specify precisely what took place between the plaintiff and the purchaser or the purchaser's representatives, and in my view does not detract from the legal position that only the liquidator had the authority to conclude the sale agreement. If the defendants based this allegation on the contents of the e-mails referred to above, then in my view their allegation was speculative. The e-mails show that Mould was in direct contact with the plaintiff's officials and that the plaintiff was kept informed of developments and probably consulted. I do not think that one can infer from this that the plaintiff controlled and dictated the terms of the sale agreement. The defendant relied on the case of *Nedfin Bank v Muller and Others* 1981 (4) SA 229 (D). In this matter damages claimed by the plaintiff from sureties were reduced because the plaintiff had failed to obtain a fair price for leased property which it had recovered following cancellation of the lease with the principal debtor. In my view this case does not assist the defendants because the plaintiff bank was the seller of the property, and decided the value of the property and what purchase price to accept.

[15] Once again the defendants set out insufficient facts to support this defence.

[16] In summary, I am of the view that it is not possible to determine from the facts stated in the opposing affidavit that the defendants have a bona fide defence to the action and the application for summary judgment must succeed.

[17] Summary judgment is granted against the first, third, fourth, and fifth defendants as follows:

[17.1] Against the first defendant for payment of R39 377 337.91

[17.2] Against the third defendant for payment of R6 789 337.00

[17.3] Against the fourth defendant for payment of R4 257 725.00

[17.4] Against the fifth defendant for payment of R2 134 826.00

[17.5] Payment of interest on the amount due by each defendant at the rate of 10,5% per annum, capitalised monthly, from 1 December 2010 to date of payment, both days included.

[16.7] Payment of the costs of the action as between attorney and client.

[16.8] Payment of the costs of the application for summary judgment.

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**J M ROBERSON**
**JUDGE OF THE HIGH COURT**

**For the Plaintiff: Adv A. Beyleveld SC, instructed by Sanderbergh Nell Haggard, c/o McWilliams & Elliott Inc., Port Elizabeth**

**For the Defendant: Adv M. Beneke, instructed by Goldberg & Victor Attorneys, Port Elizabeth**