

REPUBLIC OF SOUTH AFRICA



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

Case Number: 48908/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
04/01/24	[REDACTED]
DATE	SIGNATURE

In the matter between:

ACTISOL 145 CC

Plaintiff

and

SERYT TYRES (PTY) LTD

First Defendant

ANTON VAN ROOYEN

Second Defendant

JUDGMENT

Nkutha-Nkontwana J:

Introduction

- [1] This is an action for damages against the first and second defendants pursuant to the written credit facility agreement concluded between the plaintiff (Actisol) and the first defendant on 16 October 2016. The second defendant (Mr Van

Rooyen) duly represented the first defendant and signed the credit facility agreement, binding himself as surety and co-principal debtor. The first defendant was liquidated in 2019. Thus, Mr Van Rooyen remains liable for the first defendant's debt to Actisol as surety.

- [2] The matter was heard on 30 October 2023. Mr Van Rooyen was unrepresented as his attorneys of record withdrew their appearance in September 2022. I gave him an opportunity to indicate whether he would like to seek legal representation. He answered in the negative, assuring me that he was ready to proceed unrepresented. At the end of the leading of evidence, the parties were directed to file their written closing argument by 3 November 2023. Actisol duly obliged, while Mr Van Rooyen did not avail himself to the opportunity.
- [3] The issue for determination is crisp. Mr Van Rooyen accepts that he had bound himself as a surety. He, however, impugns the extent of his liability. Actisol is claiming an amount of R593 524.00 with interest.

Actisol's case

- [4] Actisol led evidence of Mr Stefanos Phytides (Mr Phytides), a director and owner of Actisol. He testified that on 18 October 2016 Mr Van Rooyen, representing the first defendant, completed a credit application form which enabled the first defendant to transact and place orders for tyres from Actisol. Even though the approved credit that was initially limited to R200 000.00, the first defendant increased its orders and were ultimately above the credit limit per the credit agreement. As such, Mr Van Rooyen's suretyship pertains to all the amounts which would be due and payable by the first defendant to Actisol.
- [5] Mr Phytides was taken through the orders that had been delivered to the first defendant and the related invoices over the period up until 2017. The first defendant paid part of the amount that was due on instalments. He explained that the first defendant was still owing an amount of R593 524.00 with interest.

Mr Van Rooyen's case

- [6] Mr Van Rooyen raised two defences in his plea. Firstly, that the suretyship he agreed to in respect of the first defendant's indebtedness to Actisol is limited to R200 000.00. Secondly, that the verbal agreements in terms of which the tyres were ordered by the first defendant and delivered by the Actisol could not have come into being as the credit application contained a non-variation clause, providing that any amendment would only be of force and effect if it is reduced to writing and signed by both parties. Yet, he conceded under cross examination that the orders that were placed by the first defendant and delivered by Actisol were more than R200 000.00 in value.
- [7] During his evidence, Mr Van Rooyen raised further defences that were not pleaded. He implicated his former partners in the first defendant. He also relied on the previous attempts at settlement and instalment arrangements between the other members of the first defendant and Actisol. Nonetheless, he conceded during cross examination that he is the only member and director of the first defendant that bound himself as the surety. Thus, I do not have to pronounce on these defences as they are irregularly taken and, obviously, as an afterthought.

Legal principles and evaluation

- [8] In *Jans v Nedcor Bank Ltd*¹, Scott JA, pertinently defined a conventional surety in contemporary business dealings as follows —

"The typical surety in modern society is one who binds him- or herself as co-principal debtor and guarantees the debts of a company or close corporation which has little in the way of share capital or assets but is dependent on credit in order to conduct its business. More often than not the business is that of the surety or a spouse who for various reasons chooses to conduct it through the medium of a company or close corporation with limited liability. A creditor will ordinarily refuse to afford credit to such a legal persona in the absence of a personal suretyship and few businesses can operate successfully without credit. The very existence of the debt is therefore dependent upon the existence of the suretyship while the object and function of the latter is, of course, to ensure proper payment of the

¹ 2003 (6) SA 646 (SCA) para 30 at 6611-662B.

former.' It would not make sound commercial sense if it were to be held that a creditor who elects to rely on its security in proof of its claim thereby and without more waives or abandons any rights that it has against the surety."

- [9] In the present instance, Mr Van Rooyen seems to suggest that, as a surety, his liability is limited to the credit limit of R200 000.00 as reflected in the credit agreement. To the extent that the credit agreement has a nonviable clause, he further contends that any variation that extended the credit limit was unlawful and thus not binding.
- [10] The obvious challenge with Mr Van Rooyen's contention is that he concedes that he bound himself as surety and co-principal debtor in *solidium* with the first defendant for the payment all amounts that were due then and/or anytime thereafter became payable to Actisol.
- [11] It is common cause that the first defendant placed orders that exceeded the credit limit and accordingly received delivery. In fact, it is clear from the invoices, delivery notes, spread sheet reflecting the orders and invoiced amounts and amounts that had already been paid that there was consensus *ad idem* pertaining to the evolution of the parties' contractual relationship. That is supported by the fact that the first defendant made payments towards the orders that were above R200 000.00 credit limit without any qualms.
- [12] In my view, the construction of the credit agreement proposed by Mr Van Rooyen is untenable as it does not accord with following tenets of interpretation expounded in *Natal Joint Municipal Pension Fund v Endumeni Municipality*² —

"[T]he present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in

² 2012 (4) SA 593 (SCA).

the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production.... The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."³ (Own emphasis)

[13] It follows that the construction that seems to suggest that Mr Van Rooyen's liability is limited to the amount reflected in the credit agreement despite the fact that the first defendant received the goods that were above the credit limit amount in value would clearly lead to absurdity and unbusinesslike results. Moreover, it would undermine the apparent purpose of a surety as articulated in *Nedcor Bank Ltd*⁴ matter.⁵ That, to my mind, leaves no room for ambiguity in the interpretation of the credit agreement, nor doubt in terms of the extent of Mr Van Rooyen's liability.⁶

[14] In the circumstances, the plaintiff has made out a case for the relief that it seeks.

Order

[15] I therefore make the following order—

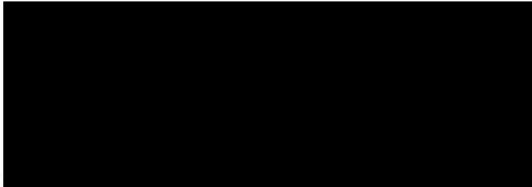
- a. The second defendant, Mr Van Rooyen, shall pay the plaintiff, Actisol 145 CC, an amount of R593 524.00.
- b. The second defendant shall pay the plaintiff interest on the sum of R593 524.00, at the rate of 10.5% per annum (the prescribed rate that applied on 25 July 2017, the date of demand).
- c. The second defendant shall pay the costs of suit.

³ *Id* at para 18.

⁴ footnote 1 above.

⁵ See also *FJ Hawkes & Co Ltd v Nagel* 1957 (3) SA 126 (W) at 131F to 132B.

⁶ *Patel v Patel and Another* 1968 (4) 51 (D) 55B to 56B.



P. Nkutha-Nkontwana J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances:

For the applicant: Adv C Bekker

Instructed by: De Wet Leitch Hands Inc

For the respondents: Mr Anton Van Rooyen appeared on behalf of the
close corporation and in person.

Date of Hearing: 30 October 2023

Date of Judgement: 04 January 2024