IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: 4906/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

PATRICK PHUTI

[Identity number: **8[…]**] Applicant

And

CAROSPAN (PTY) LTD

t/a NASHUA BLOEMFONTEIN

[Registration number: **201[…]**] Respondent

In re:

CAROSPAN (PTY) LTD

t/a NASHUA BLOEMFONTEIN

[Registration number: **201[…]**] Plaintiff

And

NEW BEGINNINGS PROJECTS CC

[Previously known as **AMADWALA**

TRADING 363 CC]

[Registration number: **200[…]**] First Defendant

PATRICK PHUTI
[Identity number: **8[…]**] Second Defendant

CORAM: **CRONJÉ, AJ**

HEARD ON: **13 JUNE 2023**

DELIVERED ON: **14 JULY 2023**

JUDGMENT BY: **P R CRONJÉ, AJ**

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 10h30 on 14 July 2023.

[1] On 19 April 2023, I dismissed a Special Plea of the Applicant and granted summary judgement for payment of R173 785.22 together with interest and costs against the Applicant.

[2] Dissatisfied with the judgment, the Applicant gave notice of application for leave to appeal on the following grounds, conveniently jointed together:

2.1 The Court erred in dismissing the Special Plea and granting summary judgment;

2.2 The Court erred in concluding that the written consent of the business rescue practitioners was not needed;

2.3 The postponement of the relief under claims B, C and D could not stand over as the creditor (First Defendant) was not before Court;

2.4 The Court erred in not finding that it lacked jurisdiction as there was no service of the summons on the Second Defendant and the question whether a party can choose more than one *domicilium* address needs reconsideration;

2.5 The Court erred in not taking cognisance of the fact that there were two suretyship agreements where the Appellant was a co-surety in terms of the 2015 Suretyship Agreement and why the other surety was not cited;

2.6 It appears that the Court questioned whether an attorney should depose to an opposing affidavit and the Court should consider the content of an affidavit properly filed;

2.7 The Court erred in failing to appreciate that the Second Defendant does not have to prove a defence; and

2.8 The Court erred in relying on a letter marked "*Without Prejudice*" which does not contain an acknowledgment of debt and that an acknowledgment of debt was null and void as it did not comply with the National Credit Act.

[3] On the issue of the business rescue of the First Defendant (NBP), I concluded that Carospan does not move for any relief against NBP. That disposed of the arguments in respect of non-compliance with Section 133 of the Companies Act. Mr Dlabantu's reliance on *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd*[1] is not on the point. No permission is required for suing a surety even where the company is in business rescue. This ground of appeal has to fail.

[4] Claim B was for pre-estimated liquidated damages. I was not confident in granting judgement on the basis that it is "estimated". Claims C and D are dependent on the return of the goods. The surety remains liable for any loss/damage that the creditor suffers and until the goods are returned to the creditor, the damages cannot be quantified. As Mr Phuthi is not in possession of the goods, claims C and D cannot at present be adjudicated but it does not imply that Carospan will not be entitled to claim payment from Mr Phuthi when they are returned. This ground of appeal also has to fail.

[1] (91/2020) [2021] ZASCA 43; [2021] 3 All SA 843 (SCA) (13 April 2021)

[5] I now deal with the attack on service. When Mr Dlabantu argued the application for leave to appeal I again asked him whether there was any averment in the plea or the opposing affidavit which indicates that Mr Phuthi was not residing or did not view 1[…] Frans Rumpff Street as an address for service. The agreement states Fransrand (Frans Rumpff Street) as "*Residential Address (domicilium citandi et executandi)".* Mr Dlabantu could not find any. Mr Dlabantu's argument remains that a person can only choose one *domicilium* and that the 2020 Suretyship Agreement's *domicilium* address replaced the 2015 *domicilium* address. He argues that it is a matter of interpretation as Rule 4 speaks of a *domicilium* address in the singular and does not provide that a debtor has more than one *domicilium* address. He relies on a passage in *Van Wyk Van Heerden Attorneys v Gore N.O and Another*[2] where the Court referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] that held: "*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*"."

[6] I deem it unnecessary to venture into interpretation of Rule 4. It *inter alia* reads:

> *"4 Service*
>
> *(1) (a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in <u>one or other of the following manners</u>:*
>
> *(i) …*

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[2] (828/2021) [2022] ZASCA 128; [2022] 4 All SA 649 (SCA); 2023 (1) SA 80 (SCA) (30 September 2022)

[3] [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18

(ii) by leaving a copy thereof at the place of residence or business of the said person,

(iv) if the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen."

[7] Carospan relied on both the suretyships in paragraph 14 of the particulars of claim[4]. The 2015 agreement contained the address where service took place. Mr Phuthi did not himself, nor through Mr Dlabantu, aver that he has no relationship with that address. Designation of a *domicilium* address, in my view, assists a party in that it does not have to search for the other party. The plea and opposing affidavit would have been the opportune time to dispute the address of service. It was not.

[8] I did not criticize Mr Dlabantu for deposing to the affidavit on behalf of Mr Phuthi and the provisions of Rule 7 do not apply. The fact that Mr Phuthi did not depose to the affidavit himself, and therefore did not specifically himself deal with any of the pertinent facts, is a factor to be taken into consideration as he has personal knowledge of all the facts. If Mr Phuthi was of the view that the address at 1[…] Frans Rumpff Street has no relation to him and was not a *domicilium* he should have deposed to the affidavit himself or have instructed Mr Dlabantu to raise that in his plea and opposing affidavit. There was no disowning of the address. Mr Dlabantu relies on Uniform Rule 4(1)(a)(iv) to submit that the Rule has to be interpreted to mean that a person can choose only one *domicilium*. He refers to *BMW South Africa (Pty) Ltd v William and another*[5]. The case confirms that there has to be service but the facts are distinguishable as the respondent in that case did not deny the lack of proper service. He furthermore refers to *First National Bank of South Africa Limited v Ganyesa Bottle Store (Pty) Ltd*[6]. In that matter there was no service on some of the defendants. The case is therefore distinguishable.

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[4] This is confirmed in paragraph 32 of Mr Phuti's heads of argument

[5] 2022 JDR 1801 (GP)

[6] 1998 (4) SA 565 (NC) at 568 B – C

[9] In *Van Niekerk and Others v Absa Bank Limited*[7] it was held:

> *"[25] The higher courts have discretion in matters of service, to determine on the facts, whether service was good. This discretion has to be exercised in a manner consistent with the Constitution. Acknowledging the courts' discretionary power in matters of service, Shongwe JA stated in Arendsnes Sweefspoor CC v Botha at para 13: 'it is trite that each case must be dealt with on its own particular facts and merits. There is no differentiation or exception. The court, if service is contested, must determine whether service was good and legally recognised or substantially compliant with the rules of service.' The high courts' discretionary power to regulate its process including service, was recently affirmed in ABSA Bank Limited v Lekuku."*

[10] I did not find that non-service should have been raised as an irregular step in terms of Rule 30 or Rule 23 of the Uniform Rules. I merely referred to submissions made by Mr Sander in respect of those Rules. The Notice in terms of Rule 35(12) was not critical for determination of the matter. Mr Phuthi was in possession of all the documentation wherein the address was reflected.

[11] Mr Phuti's suretyship is not covered by the National Credit Act. Mr Dlabantu advanced no legal precedent contrary to what I found.

[12] I found that none of the other issues raised in the special plea had any prospects for success. Mr Phuthi did not deny any liability in any of the letters marked "*Without Prejudice*". The submission that he had a triable defence was not to be found in the plea or the opposing affidavit. To the contrary, the letters that he appended evidences an acknowledgement of liability. He knew what case he has to meet.[8] I did not find that the acknowledgment of debt was the cause of action. I merely refer to it as it was part of the pleadings.

[13] Mr Dlabantu argues that another court "*<u>might</u> well come to a different*

[7] (8763/2013) [2014] ZAGPJHC 408 (15 December 2014); See also: *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) at para 13

[8] This is contrary to the submissions of Mr Phuti in his heads of argument at para 45

conclusion" [my emphasis]. Section 17 of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the court is of the opinion that the appeal "*would have a reasonable prospect of success*". Mr Sander referred to *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another*[9]where it was confirmed: *"… The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success."*

[14] I concluded that there is no reasonable prospect that another Court would find in favour of Mr Phuti, nor are there any compelling reasons.

[15] Carospan asks for costs on punitive scale. The grounds of appeal and the arguments in respect thereof did not raise any prospect that would satisfy the test on appeal. I conclude that it would be appropriate to order costs on attorney and client scale.

ORDER:

1. The Application for leave to appeal is dismissed with costs on attorney and client scale.

P R CRONJÉ, AJ

Counsel for Applicant: Mr T.O. Dlabantu
Dlabantu & Associates Inc
Bloemfontein

Counsel for Respondent: Adv A Sander
Attorneys for Respondent: Peyper Attorneys
Bloemfontein

[9] (213/16) [2017] ZASCA 17 (22 March 2017) at para [18]; See also: *School Governing Body Grey College, Bloemfontein v Scheepers and others (South African Teachers Union intervening)* [2019] JOL 41823 (FB) para [4] – [5]; *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) para [16] – [17]