

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 16373/2021

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

21 February 2024

Judge Dippenaar

In the matter between:

NEWTOWN MOTOR DEALERSHIP (PTY) LTD

PLAINTIFF

and

STEPHEN NALE

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic case file system. The date and time for hand-down is deemed to be 10h00 on the 21st of FEBRUARY 2024.

DIPPENAAR J:

[1] In this action, the plaintiff seeks a monetary judgment against the defendant. It is contractual in nature and pertains to the enforcement of two unlimited deeds of suretyship executed by the defendant in favour of the plaintiff on 13 November 2017. Those deeds of suretyship were executed as security for two written lease agreements. The first, concluded between the plaintiff and Sovereign Seeker investment 156 (Pty) Ltd t/a Joburg City Ford ("Sovereign"), ("the Ford lease agreement") on 13 July 2016. The second, concluded between the plaintiff and Nungu Trading 711 (Pty) Ltd t/a Joburg City Auto-BMW ("Nungu"), ("the BMW lease agreement") on 13 July 2016. A first addendum to that lease agreement was concluded on 30 August 2018.

[2] The defendant's attorneys of record withdrew on 16 January 2023. On the morning of the hearing on 22 January 2024, the defendant appeared personally at 10h10 whilst the plaintiff was moving an application for judgment by default. From the bar, the defendant sought a postponement of the trial, alternatively for the matter to stand down to afford him some time to prepare. The plaintiff opposed both. After hearing argument, I allowed the matter to stand down until 23 January 2024 in the interests of justice, to allow the defendant some time to prepare. The trial proceeded on 23 January 2024. Once the trial concluded, the defendant was afforded time to consider and prepare on the plaintiff's heads of argument and authorities, given that he was self-represented. As the defendant was self-represented at the trial and is not legally trained, consideration was given to the

heads of argument delivered on his behalf by counsel in the summary judgment proceedings. The issues raised therein, insofar as they are presently relevant, were canvassed by plaintiff's counsel during argument.

[3] Only two witnesses testified: Mr Hiemstra, employed by the plaintiff as head of its legal department and the defendant. Both witnesses were forthright and there is no reason to criticise their evidence in any respect. The defendant did not challenge Mr Hiemstra's evidence under cross examination and on a factual level, his evidence stands uncontested¹.

[4] The plaintiff's case was by and large common cause. The defendant admitted the conclusion of the various agreements in their terms, including the lease agreements and the unlimited suretyships concluded by him. During evidence the defendant did not dispute the debt asserted by the plaintiff against Nungu, Sovereign or himself in the amount claimed.

[5] The crisp issue which requires determination is whether the special defence raised by the defendant, exculpates him from liability for payment of the debt. The onus is on the defendant to prove this defence.

[6] The special defence raised in the defendant's plea is that reliance is placed on a sale purchase agreement concluded between Atterbury Property Fund (Pty) Ltd ("APF"), K202150042 (South Africa) (Pty) Ltd ("K2012") and Stephen Nale Properties (Pty) Ltd ("SNP") on 10 October 2019 ("the sale purchase agreement"). Those parties were all shareholders of the plaintiff. The agreement relates to the sale of the 20% shareholding held by SNP in the plaintiff to AFP and K2012. The plaintiff was included as a party to the agreement.

¹ *President of the Republic of South Africa and Others v South African Rugby Football Union* 1999 (4) SA 147 (CC) paras [61]–[64]

[7] In terms of that agreement, the sale price of the shares would be R20 plus an agterskot amount, being 20% of the plaintiff's Net Asset Value ("NAV") (as agreed or determined under clause 5.5 of the agreement), less any amount already paid to SNP in respect of the sale purchase price. The agreement placed an obligation on APF and K2012 to provide SNP with a calculation reflecting the plaintiff's NAV. In terms of the agreement, SNP ceded to plaintiff as an out and out cession all or such portion of the agterskot amount required to settle the arrears, damages, legal costs and interest (the arrears due to plaintiff under the lease agreements).

[8] It was further pleaded that *"it was an express, alternatively tacit, alternatively implied terms of the cession between Plaintiff and SNP, that Plaintiff would take steps to ensure that AFP and K2012 calculated Plaintiff's NAV and determined the agterskot amount as contemplated by clause 5.5"*. No evidence was led at the trial to substantiate such a term.

[9] The defendant further pleaded that:

"18 AFP and K2012 failed alternatively neglected to provide SNP with Plaintiff's NAV calculation at either the date of signature or by 15 June 2020, and a determination on the agterskot amount has not been made.

19 Notwithstanding the above, the agterskot amount is sufficient and/or exceeds Plaintiff's claims in respect of both the BMW and Ford lease agreement, including the arrears, as defined at clause 5.6 of the SP agreement.

20 In full compliance with its contractual provisions under the SP agreement, SNP ceded to plaintiff all or such portion of the agterskot amount that is required to settle the arrears that may be due to it in terms of both the BMW and Ford lease agreements.

21 There is accordingly no amount due and payable to Plaintiff by Defendant, as alleged, or at all.

22 Alternatively, in the event of it being determined that the agterskot amount has not been calculated, the plaintiff's claim is premature, for the following reasons:

22.1. Plaintiff has a duty to take steps and ensure that AFP and K2012 calculates plaintiff's NAV and determine the agterskot amount, whereafter Plaintiff is entitled to demand from them their respective portions of the agterskot amount in order to settle the arrears.

22.2 It is only in the event that the agterskot amount is not sufficient to settle the arrears, that Plaintiff is entitled, in terms of clause 5.6 2 of the SP agreement, to recover the balance of the arrears from BMW and Ford, or their sureties."

[10] The same defence was raised in a summary judgment application launched by the plaintiff. Leave to defend was granted, with costs to be in the cause.

[11] In his affidavit, the defendant made it clear that at all times he was representing SNP in relation to the share purchase agreement. The defendant further articulated his position thus:

"The primary objective of the SPA was to allow for the disposition and sale by SNP of its shares, title and interest in, and to, its 20% shareholding of the applicant to APF and K2012, with the proceeds of the sale being used settle (sic) the arrears of both BMW and Ford".²

[12] The defendant did not institute any counterclaim for specific performance of any obligation emanating from the sale purchase agreement. The defendant further did not institute any claim for rectification of any of the agreements relevant to this action. Significantly, the defendant was not a party to the sale purchase agreement.

[13] For the sake of completeness, the defendant had further in his plea disputed that the lease agreements were validly cancelled, placing reliance on clause 32 of the respective lease agreements. The validity of the cancellation was not however an issue

² The nub of the defence is articulated in paras 24-27 of the affidavit resisting summary judgment

which featured in the trial and no evidence was led to place the validity of the cancellation of the lease agreements in dispute.

[14] At the trial, it was undisputed that the plaintiff's claim was calculated with reference to the respective dates on which Sovereign and Nungu vacated the properties after cancellation of the respective lease agreements between the plaintiff and those entities.

[15] The nub of the defendant's evidence at trial was that time should be afforded for the calculation of the NAV to take place in order to determine his liability as no independent valuation was done in accordance with the sale purchase agreement and that the action should not be pursued until this occurs. His primary contention was that the plaintiff's claim was accordingly premature.

[16] The defendant under cross examination conceded that, if after such valuation was done, there was a shortfall, he would be liable for payment of such amount. He further conceded that he would be liable for payment of the debt and judgment should be granted against him if it was found that the sale purchase contract does not constitute a defence to the plaintiff's claim.

[17] It was undisputed that the defendant was not a party to the sale purchase contract and accrued no rights thereunder. From his evidence it was clear that the defendant did not draw any distinction between himself and SNP, of which he is the sole shareholder and director and did not appreciate the separate legal personality of the company distinct from its shareholders.³

[18] In terms of the deeds of suretyship,⁴ the defendant expressly interposed and bound himself to the plaintiff as surety and co- principal debtor with Nungu and Sovereign for the due, proper and timeous performance by the lessees of all their obligations to the

³ City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others 2018 (4) SA 71 (SCA) par [27]

⁴ Which are in similar terms

plaintiff, arising from any cause whatsoever, including the obligations emanating from the lease agreements and otherwise relating to the occupancy of the leased premises. The defendant further waived the benefits of excussion and division.

[19] In relevant part, the suretyship agreements⁵ further provide:

"4 Any indulgence or latitude which the Landlord may grant to the Tenant in respect of any obligation in terms of or relating to the Lease or any amendment thereof, or the release of any surety or security which the Landlord may hold in respect of any obligation arising therefrom or related thereto, will not prejudice the rights of the Landlord against the Surety under this Suretyship, or affect the validity or enforceability of this Suretyship.

10 All the Landlord's rights, without exception, applicable against the Tenant will be equally applicable against the Surety, the Surety being deemed to be the Tenant thereunder and the Landlord has against the Tenant as if the Surety had from the beginning of the Lease Agreement and at all times been liable jointly and severally with the Tenant in favour of the Landlord"

[20] In terms of the express provisions of the suretyships the parties thus agreed that the defendant became a co-debtor with the lessees, rather than merely being a co-principal debtor within the normal meaning of the term.⁶

[21] The relevant principles pertaining to suretyships are well established and do not require repetition. They are summarised by the Supreme Court of Appeal in *Van Zyl*.⁷ Relevant to the current context, it was held that it follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligations of the principal debtor. When the principal debtor's debt is discharged or reduced by compromise, the surety's obligation is likewise discharged or reduced. It was further held:

⁵ Which are both in similar terms

⁶ *Liberty Group Limited v Illman* (1334/2018) [2020] ZASCA 38 (16 April 2020) par [20]

⁷ *Van Zyl v Auto Commodities (Pty) Ltd* (279/2020) [2021] ZASCA 67 (3 June 2021) paras [11] - [12]

“This will be subject to any terms of the deed of suretyship that preserve the surety’s liability notwithstanding the release or discharge of, or any other benefit or remission afforded to, the principal debtor”.

[22] Considering the wording of the suretyships, the rights of the plaintiff to proceed against the defendant in respect of any amount that he is obliged to pay the plaintiff were in the present instance expressly preserved.⁸

[23] Moreover, clause 5.6.2 of the sale purchase agreement, expressly provides as follows:

“the cession of the Agterskot Amount is without prejudice to the rights of the Company’s to recover the balance of the Arrears for the tenants and sureties under the Lease Agreements”.

[24] This clause makes it clear that the plaintiff retained the right to proceed against Sovereign and Nungu as well as the sureties,⁹ irrespective of SNP’s cession of the agterskot amount and the agreement reached in the share purchase agreement. There is no indication that the plaintiff, in concluding the share purchase agreement, abandoned its other remedies.

[25] The case advanced by the defendant further disregards the distinct rights of the various parties. Under the sale purchase agreement, only the rights and liabilities of Atterbury, K2012, the plaintiff and SNP could be altered pursuant to that contract. Neither Sovereign nor Nungu obtained any rights or benefits pursuant to the sale purchase agreement and are, as distinct legal persons, not party to the sale purchase agreement. As stated, neither is the defendant in his personal capacity. Neither the defendant nor the lessees obtained any rights or benefits pursuant thereto. Whatever rights and benefits

⁸ Van Zyl para [31]-[33]; New Port Finance Company (Pty) Ltd v Nedbank Ltd (30/2014) [2014] ZASCA 210 (1 December 2014) paras [10]-[11]

⁹ Wile NO & Others v Griekwaland Wes Korporatief Ltd (1327/2019) [2020] ZASCA 182 (23 December 2020) paras [11]-[12], [20]-[21]

that may have been conferred upon SNP do not accrue to the defendant in his personal capacity.

[26] The share purchase agreement is a distinct and separate agreement which is independent of the lease and suretyship agreements and is not a contractually compliant novation or variation of the lease agreements or the suretyships.

[27] Moreover, the express terms of the sale purchase agreement provide that the very transaction relied on by the defendant and contemplated by the share purchase agreement is without prejudice to the plaintiff's rights to recover the balance of the arrears from Nungu and Sovereign and from the sureties under the lease agreements.

[28] For these reasons, the defendant's reliance on the sale purchase agreement is misconceived. That agreement does not constitute a defence to the plaintiff's claim and is irrelevant to the present dispute.

[29] There is a further reason. The evidence established that no steps were taken to ensure compliance with clause 5 of the sale purchase agreement. The defendant testified that he agreed to forego his own valuation but that two valuations would be provided, which he contended were never provided, resulting in the NAV never being calculated.

[30] In evidence, the plaintiff produced an evaluation in the form of the signed annual financial statements of the plaintiff for the year ending 30 June 2020. Those statements are for the relevant period applicable to the calculation of the plaintiff's NAV.

[31] The defendant did not object to the production of the financial statements which were presented as part of the application for default judgment and the affidavits utilised therein. Mr Hiemstra testified to the contents of those statements in evidence.

[32] Although disputing that the financial statements were independent, it was conceded that Deloitte was an independent party. The defendant's argument was that as they were produced by the plaintiff's auditors, they were not independent. I am not persuaded that that argument bears scrutiny and am satisfied that the financial statements constitutes cogent and satisfactory evidence.

[33] The said financial statements reveal that the plaintiff's Net Asset Value at the relevant time was some minus R80 million, being the difference between the plaintiff's total asset value of R106 902 345 less its total liabilities of R186 781 356. Of relevance to the present proceedings is that this means that no agterskot amount would be payable, given that there was a negative asset value.

[34] In those circumstances, the defendant's contention that the plaintiffs claim is premature does not bear scrutiny. From the available undisputed evidence it is clear that the agterskot value was R nil. The defendant's contention as pleaded that the agterskot amount that was ceded to the applicant was sufficient and/or exceeded the arrears of both Sovereign and Nungu is thus not sustained by the evidence and it is highly improbable, if not impossible, that the agterskot amount would have been sufficient to extinguish or reduce the debts owed to the plaintiff.

[35] Any such payment would in any event have been a payment on behalf of SNP, and not the defendant in his personal capacity. The defendant did not lead any evidence to controvert this case made out by the plaintiff. Thus even on the pleaded version of the defendant, the plaintiff would be entitled to recover the balance from either Sovereign, Nungu or their sureties, including the defendant.

[36] The undisputed evidence was further that no funds flowed to the plaintiff pursuant to the SNP cession in reduction of the debts of Sovereign and Nungu and that the full amount remains owing. It was further undisputed that no payments were made to the plaintiff by either Atterbury, K2012 or SNP pursuant to the sale purchase agreement. The evidence of Mr Hiemstra on this issue, was not challenged by Mr Nale.

[37] Thus, not only the existence of the sale purchase agreement, but also its effect and consequences do not avail the defendant and do not constitute a defence to the plaintiff's claim. The defendant has thus not proved his defence and has not discharged his onus on the issue.

[38] In evidence, the defendant further conceded that: (i) he is a surety contemplated by clause 5.6.2 of the sale purchase agreement; (ii) the arrears contemplated by clause 5.6.2 of the sale purchase agreement referred to in the amount of R86 245 525.56 is admittedly due, owing and payable to the plaintiff by him and the lessees; (iii) that the plaintiff seeks to recover the arrears from him which is expressly permitted and the entitlement to do so is expressly recognised and preserved for the plaintiff in terms of the sale purchase agreement.

[39] Considering all the facts, the plaintiff's evidence established its entitlement to judgment in the amounts claimed,¹⁰ supported by the requisite certificate of balance which complies with clause 9 of the suretyships and clause 50 of the lease agreements. Ultimately, the defendant in evidence conceded that the amount due, owing payable and outstanding to the plaintiff by Nungu, Sovereign and himself is the amount of R86 245 525.56. It follows that the plaintiff's claim must succeed.

[40] There is no reason to deviate from the normal principle that costs follow the result. In terms of the deeds of suretyship, the plaintiff is entitled to costs on the scale as between attorney and client.

[41] In the result, I grant the following order:

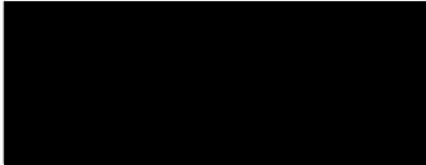
[1] Judgment is granted against the defendant for:

¹⁰ R42 501 293.44 + R43 744 232.12 = R86 245 525.56

[1.1] Payment of the amount of R86,245,525.56.

[1. 2] Interest on the amount in [1.1] above at the prime rate quoted by Nedcor Bank Limited from time to time, plus 2% thereon, from 1 January 2024 until date of final payment.

[1.3] Costs of suit on the scale as between attorney and client.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 22, 23 and 25 JANUARY 2024
DATE OF JUDGMENT	: 21 FEBRUARY 2024
PLAINTIFF'S COUNSEL	: Adv. P. Lourens
PLAINTIFF'S ATTORNEYS	: Strydom Rabie Inc.
DEFENDANT	: Mr. Stephen Nale (In person)