REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1)	REPORTABLE: YES/~~NO~~
(2)	OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3)	REVISED.

Case no: HCAA 08/2019

In the matter between:

OSZ TAYOB TRADING PIETERSBURG (PTY) LTD **APPELANT**

And

PAULINA NTEBO RAMUSI **RESPONDENT**

APPEAL JUDGMENT

MULLER J:

[1] This is an appeal against the judgment and order of Makgoba JP. Leave was granted by the learned Judge President to the Full Court of this Division.

[2] The appellant, is a company, which instituted action against the respondent as surety and co-principal debtor for the recovery of R 3 520 490.45 and costs in respect of goods sold and delivered to a closed corporation, Ntema Investments CC[1] in terms of a written agreement which embodied a credit facility, a cession of debts and a surety.

[3] The written agreement which incorporated the surety was not disputed at the trial. It is therefore common cause that the respondent bound herself jointly and severally as surety and co-principal debtor with the principal debtor Ntema Investments CC to the appellant. The appellant elected to institute action against the respondent, who is a member of the CC, instead of the closed corporation.

[4] The defence of the respondent, simply put, was that the debt had been paid and as a matter of fact the appellant was overpaid.

[5] It was agreed at a pre-trail conference held between the parties and also at the commencement of the trial that the respondent had the onus to prove payment and the duty to begin.[2]

[6] The appellant, in its particulars of claim, relied on a certificate of indebtedness as proof of the amount due and payable, which certificate purported to be a certificate as envisaged by clause 18(e) of the deed of surety.

[7] Clause 18(e) reads:

> "The amount of the signatory/ies indebtedness hereunder and that of the Applicant to EH Hassim at any time, shall be determined and proved by a certificate signed by EM

[1] Hereinafter "the CC".
[2] *Pillay v Krishna* 1946 AD 946,958, *Standard Bank of SA v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (A) 823D.

> Hassim (or by one of EH Hassim's directors or managers whose appointment, qualification and/or authority need not be proved) and a certificate in terms hereof shall be binding on the signatory/ies, shall be prima facie proof of the amount of the signatory/ies indebtedness hereunder and shall be valid as a liquid document against the signatory/ies in any competent court for the purpose of obtaining provisional sentence or judgment against the signatory/ies thereon."

[8] At the commencement of the trial counsel for the appellant handed up to the court a certificate of indebtedness for the amount of R2 731 392.34 as proof of the amount due and owing by the respondent.[3]

[9] The respondent testified and thereafter closed her case. The appellant elected to close its case without calling any witness.

[10] After having heard argument Makgoba JP granted absolution of the instance and ordered that each party pays its own costs.

[11] The first ground of appeal is that an order for absolution of the instance, in law, is incompetent where a defendant is burdened with the onus to prove its defence. I agree that such an order is incompetent. In the event where the defendant has the burden of proof, the court may grant judgment for the plaintiff, if the defendant is unable to prove its defence in respect of which it has the onus. If the court is satisfied that the defendant has succeeded in proving its defence, dismissal of the claim must follow. There is no room for an order for absolution of the instance when the onus of proof rests with a defendant.[4] The appeal must therefore succeed in respect of the first ground of appeal.

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[3] The certificate was admitted into the record as Exhibit A although there is no indication on record when it was done.

[4] *Hirschfeld vEspoch* 1937 TPD 19, 21; *Schoeman v Moller* 1949(3) SA 949 (0) 957; *Challinger v Speedy Motors* 1951 (1) SA 340 (C) 349F-G; *Scheepers v Video & Telecommunications Services* 1981 (2) SA 490 (E) 491H-492A.

[12] But that is not end of the appeal. Attached to the particulars of claim were two reconciliation statements and a certificate of indebtedness. The first reconciliation statement is in respect of contract NTE 004 in the amount of R2 670 749.54 and the second in respect of contract NTE 006 for R849 740.91. Totalling the amount claimed of R3 520 490.45.[5]

[13] The certificate of indebtedness attached to the particulars of claim only confirms that the amount of R3 520 490.45 is claimed in in respect of goods sold and delivered and monies loaned and advanced, which amount is due and payable.

[14] The respondent pleaded that the appellant was paid the amount of R3 895 084.52[6] in respect of contract NTE 004 which included "returns".[7] And in respect of contract NTE 006 the appellant was paid an amount of R6 435 691.84[8] which included "returns" as embodied in Annexure A and B which are attached to the plea as proof of payments made.

[15] Annexures A[9] and B[10] are a reconciliation statements issued by the appellant in respect of contract NTE 004 which showed an outstanding balance in the amount of R1 713 573.41[11] and contract NTE 006 which shows an outstanding balance of R346 298.96.[12] The total amount outstanding in respect of both annexure A and B is R2 059 872.37.[13]

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[5] The reconciliation statements attached to the particulars of claim are for the period 31 March -31 August 2011.
[6] Payments as per reconciliation annexure A R3 109 968.67 plus R785 115.85 totals R3 895 084.52.
[7] Returns are goods purchased that were returned and credit notes were issued in respect of which.
[8] Payments as per reconciliation annexure B R5916 376,08 plus returns R519 315.76 totals R 6 435 691.84
[9] Annexure A is a reconciliation statement for the period 31 March 2011 until 16 July 2014.
[10] Annexure B is a reconciliation statement for the period 13 April 2012 until 2 June 2014.
[11] The totals are: Purchases R5608 657.93; Returns R785 115.85; Payments R3 109 968.67; Outstanding balance R1 713 573.41.
[12] The totals are: Purchases R6 781 990.80; Returns R519 315.76; Payment R5 916 376.08; Outstanding balance R346 298. 96.
[13] R1 713 573.41 plus R346 298.41.

[16] The respondent testified that the CC was involved in two projects. In respect of contract NTE 004 the CC was contracted to build 65 RDP houses and in respect of contract NTE 006 the CC was required to build 100 houses. The department who contracted with the CC paid the appellant directly by virtue of the cession in favour of the appellant which is embodied in the credit agreement. For the 65 houses the appellant received R3 109 968.67. The amount excluded the "returns" of materials which were not used in the building project. The amount also excluded the labour in respect of the 65 houses in the amount of R560 000.00[14] which should have been added to the figure. The department paid out R3.5m on the project.

[17] The respondent testified in respect of contract NTE 006 that the appellant was paid R5 916 376.08. The amount excluded labour in the amount of R800 000.00.[15] The appellant was paid the labour by the department due to the cession to which the appellant had no claim whatsoever. As a result the appellant in actual fact received R6 700 000.00 and the CC by contrast was paid R57 000.00 per house on the project. The contract value was R5 700 000.00.

The respondent also suggested in her evidence that the appellant never supplied the CC with delivery notes but at the completion of the project certain materials delivered and not utilised were returned for which the CC was credited in the amount of R519 315.76.

[18] In cross examination the respondent, when she was referred to the total amounts reflected in annexures A and B insisted that those amounts excluded

[14] R8 000.00 per house.
[15] R8 000.00 per house.

labour which the appellant was obliged to pay to the CC after the appellant received payment from the department in terms of the cession.

[19] It was also put to the respondent that her calculation was incorrect when she added the "returns" to the total instead of deducting the "returns" in respect of which the CC received credits for the returns. The respondent conceded but stated that with the cost of labour added, the total costs would have exceeded that contract value and that the appellant have received all the money paid in terms of the contract by the department. The respondent was of the opinion that it makes no business sense to spend more on the projects than she contracted for and that she obtained the expertise of the appellant to assist her to remain within her budget.

[20] It was put to her that annexures A and B do not support her version that she overpaid the appellant. The respondent maintained that the cost of the labour was paid to the appellant to which the appellant has no right. She was firmly of the opinion that in terms of the National Credit Act the appellant cannot give credit which exceeded the amount which the department will pay for the project. It was pointed out to the respondent that she should have instituted a counterclaim and that no such claim was instituted.

[21] The respondent testified that she had given instructions to her attorney to institute a claim. (A counterclaim, of course, would have been an exercise in futility if the CC was not joined to the proceedings. The respondent is the surety and not the debtor who entered into the credit agreement with the appellant.)

The respondent, as the surety, is not a party to the main credit agreement. A suretyship is accessory to the main credit agreement entered into between the appellant and the CC. It is an undertaking by the surety that the obligation of the principal debtor will be discharged and, if not, that the creditor will be indemnified. The surety however, could raise the same defences as the principal debtor.

[22] After conclusion of the cross-examination, the learned Judge-President directed certain questions to the respondent to clear up uncertainties. She explained that the appellant employed quantity surveyors to determine what was needed for the project which the appellant then delivered on site. When the builders on site do not utilise some of the items delivered they are returned to the appellant. The department paid the appellant as the supplier in accordance with the cession. The CC is therefore at the mercy of the supplier. The department only pays the contractor after the supplier had notified the department that they had been paid in full.

[23] The respondent confirmed that no payments had been made to the appellant after the action had been instituted. The respondent was unable to give an explanation for the difference when it was put to her that the certificate of indebtedness (exhibit A) showed that an amount of R2 731 392.35 is due and owing to the appellant but that the appellant claimed R3 520 490.45 in the summons. One can hardly think, in fairness to the respondent, that she would have been able to give an explanation, when confronted, why there is such a marked difference between the amount claimed and the amount reflected in Exhibit A, when the exhibit was handed up at the commencement of the trial.

[24] However, her evidence that no payments had been made after the summons was issued is incorrect. Annexure A and B attached to the plea clearly shows

that the following payments had been made after the summons was issued on 19 September 2013:

(i) 16 July 2014 – R290 000.00 in terms of annexure A;

(ii) 18 October 2013 - R170 000.00 in terms of annexure B;

(iii) 20 December 2013 – R6 690.00 in terms of annexure B;

(iv) 20 December 2013 – R41 895.00 in terms of annexure B;

(v) 18 February 2014 – R2 000.00 in terms of annexure B;

(vi) 2 June 2014 – R220 000.00 in terms of annexure B.

[25] I am unconvinced that the respondent was able to prove that the CC made an overpayment or that the department had made payment to the appellant of the full contract value which included the costs of the labour in the amount of R8 000.00 per RDP house erected by the CC. One expected that the respondent would have called an official from the relevant department to prove the amounts in respect of the contracts NTE 004 and 006 which were paid to the appellant in terms of the cession. The respondent cannot at the trial complain that no delivery notes were supplied to her if her legal representatives neglected or failed to obtain these documents in terms of the rules, prior to the commencement of the trial. If the respondent was of the view that she will be prejudiced at the trial an adjournment should have been sought to obtain the relevant documents. Both parties intimated that they were ready for the trial to commence.

[26] It is clear that the CC has put its trust in the appellant to determine the quantity of materials needed to complete the contracts and trusted the appellant with the contents of the contracts and the value of the project. It is no surprise that

the respondent is of the view that she cannot owe the appellant more than what the project was worth.[16]

[27] It is a ground of appeal that the court ought to have accepted the certificate of indebtedness, annexure "OZS 3, as proof of the amount claimed[17]. I cannot agree with the contention. To illustrate this point; the certificate was signed by Samantha Naidoo in her capacity as an accountant of the appellant. The claim, so the certificate says, is in respect of "goods sold and delivered" as well as "monies lent and advanced." To evaluate the contents of the certificate it is necessary to return to the wording of clause 18(e) of the deed of surety.

[28] Clause 18(e) makes no provision for a certificate of indebtedness to be issued by an accountant of the appellant. The clause requires that a certificate be issued by EM Hassim personally or be issued by a director or manager of the appellant. In addition, the certificate relates to an indebtedness for goods sold and delivered and monies lent and advanced which is not the cause of action against the principal debtor. The claim of the appellant is based on an incidental credit agreement entered into between the appellant and the CC in terms whereof goods were sold and delivered to the CC as the principal debtor. There is no suggestion or allegation, in the particulars of claim, that monies were lent and advanced to the CC by the appellant.

[29] A certificate issued in terms of clause 18(e) must strictly comply with the requirements of the said clause to be admissible as evidence. The certificate failed dismally to comply with the requirements set by the clause. The effect of

[16] The respondent is the member of the CC and negotiated all the contracts on behalf of the CC.

[17] Counsel for the appellant did not rely on any of the two certificates in argument. He relied on the plea and the evidence of the respondent.

the failure to observe the basic requirements for a valid certificate, is that the certificate has no probative value. It cannot constitute *prima facie* evidence against the respondent and must, therefore, be disregarded as proof of the indebtedness of the respondent towards the appellant.

[30] When the trial commenced another certificate, exhibit A, was handed up as a substitute for certificate annexure "OSZ 3."[18] The appellant relied on exhibit A as *prima facie* proof of the respondents' indebtedness in the amount of R 2 731 392.34. I cannot think of any other reason why Exhibit A was handed up at the trial if the appellant did not rely on it as proof of the amount due. The appellant, effectively, abandoned reliance on the first certificate when Exhibit A was handed up as *prima facie* proof of the contents for purposes of the trial. Exhibit A does not suffer from the same defects as the first certificate and covers the period up to 11 December 2017.[19] However, Exhibit A is not free from criticism.

[31] The certificate refers to "NTEMA INVESTMENT & SURETY." Clause 18(e) of the deed of suretyship states that the amount of the indebtedness of the signatory of the deed of suretyship may be proved by means of a certificate which shall be binding on the signatory. No one called "Surety" signed the deed of suretyship. The respondent signed the application as duly authorised representative of a closed corporation as well as the surety and co-principal debtor in her personal capacity. The certificate, *ex facie* the document, lacked the necessary particularity to identify the respondent as the surety to establish *prima facie* proof of the indebtedness of the respondent. Evidence was

[18] The record does not show that exhibit A was handed in. It is clear from the totality of the proceedings that the document was indeed handed in by counsel for plaintiff.
[19] *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) 382G.

necessary to establish the identity of the surety. The certificate should, at the very least, contain sufficient particulars to correctly identify the debtor(s),[20] the creditor and the amount of the indebtedness as at the date the certificate was issued. Exhibit "A" is, in my view, similarly without probative value.

[32] Very importantly, both Annexures A and B attached to the particulars of claim, covered the period 31 March 2011to 21 August 2013, whereas Annexures A and B attached to the plea, on which the respondent relies, covered the period 31 March 2011 to 16 July 2014. Summons was issued on 19 September 2013.

[33] It must be accepted that goods were sold, delivered and certain payments had been made between 22 August 2013 and July 2014 as per Annexure A and B attached to the plea.

[34] The appellant requested the court, in its notice of appeal, to grant judgment in its favour for the amount of R2 059 872.37 together with interest, costs of the action on an attorney and client scale as well as collection commission. The judgment which the appellant seeks is not based on either of two certificates of indebtedness. It is premised on the amounts reflected in Annexure A and B attached to the plea, which the respondent relied upon, as being the balance outstanding, and due and payable. The outstanding balance in respect of annexure A is reflected as R1 713 573.41 and in respect of annexure B as R346 298.96. The total amount outstanding is R2 059 872.37.

[35] In my view, the respondent has not proved, on a balance of probability, that the costs of labour had to be taken into account when the indebtedness of the respondent in respect of the goods sold and delivered to the CC is calculated.

[20] The signatories of the deed of suretyship.

And even if the labour had to be taken into account, the respondent has failed to prove that the amount in respect of the labour had been paid to the appellant by the department in terms of the cession.

[36] The deed of suretyship makes no provision for costs. Neither for costs on an attorney and client scale, nor for collection commission. The appellant is, therefore, not entitled to such costs. Counsel for the appellant did not advance any argument to the contrary when he was requested to comment.

ORDER

(1) The appeal is upheld with costs.

(2) The order of absolution of the instance, with each party to pay its own costs is set aside.

(3) The order is replaced with the following order:

(a) Judgment is granted in favour of the plaintiff against the defendant for:

(i) payment of the amount of R2 059 872.37.

(ii) interest *a tempore morae* from date of judgment to date of final payment.

(iii) costs of suit.

GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I concur

MF KGANYAGO

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I concur

TC TSHIDADA

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1. For the Appellant : NA Cassim SC
2. For the Respondent : TD Ledwaba
3. Date of hearing : 29 May 2020
4. Date Judgment delivered : 09 June 2020