

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |
| (4) | SIGNATURE |
- 23/03/2018.
DATE

CASE NO: 24939/2015

KMSA

APPLICANT

and

E D MOSS

1ST RESPONDENT

F D DE LANGE

2ND RESPONDENT

LEAVE TO APPEAL JUDGMENT

KHUMALO J

Introduction

[1] This is an application for leave to appeal by the Respondents against the judgment of the above honourable court delivered on 12 September 2017 in terms of which the Applicant's claim for payment of R3 000 000.00 (Three Million Rand), against them jointly and severally, the one paying the other to be absolved, was upheld with costs.

[2] The Respondents were sued in their capacity as sureties and co-principal debtors with Express Model Training 284 (Pty) Ltd ("EMT") (in liquidation) of which they were also directors. The amount was owed to the Applicant by EMT, in terms of a compromise that was affirmed in an arbitration award and made an order of court on 28 April 2015.

[3] I am implored to grant the application on the basis that not only are there prospects of success but also compelling reasons that the matter should be sent on appeal as envisaged in s 17 (1) (a) of the Superior Court Act 10 of 2013 that reads:

"17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

[4] In that I erred in granting the judgment against the Respondent based on the suretyship that was an annexure to the dealer agreement, by doing so effectively following on the findings and principles enunciated in *Bulsara v Jordan & Co Ltd* 1996 (1) SA 805 (A) to discern the conflicting provisions and content of the suretyship agreement and clause 17 of the Dealer Agreement and as a result :

[4.1] finding that the sureties (Respondents) were not also parties to the Dealer Agreement, as the agreement expressly provided for the sureties to be part of the agreement.

[4.2] finding that there was no room for a finding that the suretyship (annexure 4) relied upon did not form part of the Dealer Agreement as the Dealer agreement expressly provided for the suretyship to form a composite part of the Dealer Agreement.

[4.3] failing to find that a material conflict exists between the provisions and content of clause 17 of the Dealer Agreement and the suretyship.

[5] As a result should have found that the only manner in which the conflict could have been resolved was by application of the mechanism provided in the Dealer Agreement to reconcile the difference and conflict as per provisions of clause 2.1.17 of the Dealer agreement that expressly states that:

"Annexures to the agreement forms part of the agreement and will not be interpreted in a separate manner or to be separated from this agreement for construction of a different meaning."

[6] In that regard I should have held that the suretyship concerned was confined and restricted to liability that arose under the Dealer Agreement, and as the judgment debt concerned did not arise under the Dealer Agreement, accordingly that the Respondents cannot be held liable on the basis of the suretyship concerned for the judgment debt.

[7] The argument is found a bit disingenuous as the defence of the Respondents constituted a concession of the unlimited nature and extent of the suretyship agreement

(therefore common cause) that the Respondent sought to counter by an allegation that the signatory on behalf of the Applicant assured them that the provisions of the suretyship were restricted to EMT's indebtedness under the Dealer Agreement. Further that it was never intended to agree to providing a suretyship in that wide and unlimited terms as set out in the suretyship itself.

[8] In other words, the court was being implored to establish the liability of the sureties not from the terms of the suretyship agreement that they signed and which they were party to, because of its contradiction of clause 17 of the principal agreement but from the terms of the principal agreement that was concluded between the principal debtor and the creditor to which they were not part of.

[9] These contentions were substantively dealt with in my judgment. The suretyship is additional or accessory but not a composite part of the principal agreement, determining the nature and extent of the sureties' liability to the debts of the principal debtor. The two agreements therefore exist side by side not as one. As a result the nature and extent of the liability of the sureties cannot be determined by the principal agreement to which the sureties are not part of. The intentions reflected in the principal agreement are those of the creditor and principal debtor, its binding effect therefore confined to its signatories. However, whether the liability that arises therefrom can be extended to the sureties is established from the wording of the suretyship agreement itself. The notion advocated in *Bulsara*.

[10] The suretyship that was signed by the Respondents was very explicit in its nature and and exceptionally wide in extent, covering all obligations of whatsoever nature and howsoever arising in delict or in contract or any other cause whatsoever, which the debtor may presently or in the future owe to the creditor whether jointly or severally or to their successor in title or assigns, which therefore included, inter alia debts arising from the Dealer Agreement.

[11] The Respondents argument therefore as submitted by Mr that the suretyship agreement constitutes or form a composite part of the Dealer agreement and therefore the court was supposed to have looked at the terms of the Dealer agreement as superseding the suretyship agreement and determining the nature and extent of the liability of the sureties is off the mark.

[12] Under the circumstances there is no possibility of another court reaching a different conclusion on the principles applicable in establishing the nature and extent of the sureties liability as in terms of the suretyship agreement vis a vis the terms of the principal agreement

[13] The Respondents further contends that **there is no basis in fact or in law for EMT to be held liable to the Applicant for the debt arising from the sale agreement for the reason, inter alia, that:**

[13.1] The novation brought about by the judgment in respect of which the arbitration award was made an order of court, did not extinguish the original cause of action vis - a- vis the sureties.

[13.2] the sureties were not in fact bound by the compromise, the arbitration award, and or the order of Court in terms of which the arbitration ward was confirmed.

[13.3] The sureties were not barred in fact and/or in law on the basis of compromise, *res judicata* or any other or similar principle to rely on defences in respect of the original cause of action from which the *causa debiti*, ie, the judgment debt originated.

[13.4] Because the sureties never partook or got involved as parties in the arbitration and or the compromise and or application to make the arbitration award an order of court, therefore none of the above was bonding and or enforceable vis a vis the Respondents.

[13.5] Whether as a result of the settlement agreement (with EMT acknowledging liability) resolving the issues between Applicant and EMT, and made an order of court, the Respondents are precluded from raising any defences that might have been available to EMT? on the basis of the compromise or doctrine of *res judicata*.

[14] Once more, my judgment extensively dealt with the aforementioned contention in relation to the obligations of the sureties vis a vis the principal debtor that they are accessory to and dependent on a valid principal obligation. On the principal debt being extinguished or novated or compromised, the obligation of the surety is accordingly extinguished or novated or compromised, dependent again on the wording of the suretyship which *in casu* unequivocally provided for the performance on demand of all obligations of whatsoever nature and however arising (which the EMT may presently or in future owe to the creditor).

[15] The aspect of a compromise being a final settlement of either disputed or uncertain obligations have been adequately addressed by the judgment, specifically that when concluded not only does a compromise disposes of the disputes and uncertainty but results in the termination of litigation on the issues settled between the parties; see *Paramount Stores Ltd v Hendry* (2) [1957] All SA 291; 1957 (2) SA 482 (W). Any proceedings based on the original cause of action are barred, and therefore neither the principal debtor nor the sureties can go behind the compromise and raise defences to the original cause of action when sued on the compromise; see *Van Zyl v Nieman* 1964 (4) 661 (A).

[16] Based on the aforementioned findings it would be of not use to decide on the final issue raised by the Respondents reliant on the sale agreement when it has been replaced by a new cause of action.

[17] The persistence by the Respondents to rely on the lapse of the sale agreement rendered *res iudicata* in terms of the settlement agreement between EMT and the Applicant is unmerited. The defences upon which the Respondents sought to rely as they were purportedly available to EMT, were compromised by EMT by concluding a settlement agreement.

[18] Under the circumstances I find no compelling reasons or prospects of success upon which leave to appeal should be granted.

I therefore make the following order:

1. The application for leave to appeal is dismissed with costs



N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

On behalf of Applicant: H P WEST
Instructed by: MALHERBE RIGG AND RANWELL INC
C/O FRIEDLAND HART SOLOMON & NICOLSON ATTORNEYS
REF: C G STOLP/VAA/328674
TEL: 012 424 0200

On behalf of Respondents: A LIVERSAGE
Instructed by: KRUGEL HEINSEN INC
C/O MARTIN TERBLANCHE ATTORNEYS
REF: K0099
TEL: 012 342 0006