IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 4129/2016

In the matter between:

GARAGESURE CONSULTANTS AND ACCEPTANCESS (PTY) LTD Plaintiff

and

SHAMAH FILLING STATION t/a TOTAL ORANJESIG 1st Defendant
CAROL BALINDIWE MOTAKE 2nd Defendant

HEARD ON: 13 & 14 MARCH 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 19 JUNE 2018

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[1] The plaintiff, Garagesure Consultants and Acceptances (Pty) Ltd, a company registered in accordance with the company laws of the Republic, instituted an action against the defendants, Shamah Filling Station trading as Total Oranjesig and Carol Balindiwe

Motake, claiming payment of an amount of R500 000.00 owing in terms of a written suretyship agreement.

[2] The parties agreed at a Rule 37(4) proceedings that the adjudication of the merits and quantum be dealt with simultaneously.

[3] The plaintiff called one witness and the defendants closed their case without leading oral evidence. Leslie Francis Mitchell testified that he is the Managing Director of the plaintiff and in his scope of employment he has full knowledge of contracts entered into with service providers as well as other business associates.

[4] He explained how an application for a fuel guarantee is normally concluded. The retailer/dealer will normally approach the plaintiff requesting that a guarantee facility be made on their behalf to the Oil Company. Once the application has been approved, a guarantee will be issued to the Oil Company on behalf of the retailer/dealer. He referred to a document titled “Fuel Insurance Policy” attached to a bundle named Supplementary Index to Pleadings on page 10 to 17 as the written agreement between the parties. The document forms the basis of the agreement between the plaintiff and in this case Total South Africa as the Oil Company that was doing business with the defendants.

[5] On the issue as to how the claim is dealt with, he explained that the dealer will receive fuel from Total South Africa. In the event of non-payment by the dealer, payment will be demanded from the

dealer by Total South Africa. If the payment is not made then the guarantee will be called in by the latter from the plaintiff.

[6] He spent some time dealing with the application forms specifically the requirements for the application to be processed and in particular surety to be signed by the operator of the dealership. Once these requirements have been met then the plaintiff issues a guarantee. He pointed out that the plaintiff's name is stated on page 15 because they are the agents of Compass Insurance and they are the entity issuing the guarantee, collecting the premiums, paying the claims and finally do the recoveries.

[7] He testified that the surety documents were completed by the second defendant. The second defendant acknowledged the terms and conditions of the agreement as well as providing the necessary information. She furnished the bank account number from which the premiums should be deducted.

[8] The value of the guarantee is determined by the Oil Company and the dealer. The plaintiff is appointed as the underwriting manager acting under mandate from the insurance company namely Compass Insurance. It is on this basis that a guarantee was issued by the plaintiff in favour of Total South Africa on 13 December 2012 as recorded on page 20 of the Supplementary Index to Pleadings.

[9] It appears that the parties entered into a Suretyship Agreement signed on the same date the guarantee was issued. The document is attached to the same bundle from page 21 to 24. The purpose of the suretyship agreement was that it will come into play in the event of the default by the first defendant. The second defendant

agreed to pay the plaintiff the amount due that has been paid to the Oil Company.

[10] In terms of clause 3.1 and 3.3 the second defendant bound herself to the plaintiff in the event of a default. The parties also agreed that the plaintiff under mandate will institute a recovery of the debt due. The relevant clauses read as follows:-

> **"3.1 The Operator hereby binds himself as surety and co-principle debtor with the Dealership in favour of Garagesure for the due and punctual fulfilment and performance by the Dealership of all its obligations arising out of or in connection with the Guarantee, including, without limitation, all variations of the Guarantee entered into in the future."** and
>
> "**3.3 The suretyship shall only terminate once the Dealership has fulfilled all of its obligations in terms of the Guarantee and there are no amounts of any nature whatsoever owing or due by the Dealership to the Supplier in terms of the Guarantee."**

[11] The plaintiff did receive a letter of demand from Total South Africa and duly settled the claim. Payment was made on the strength of certificate of balance as well as documentation showing when numerous deliveries of products were made to the defendants. The payment was effected from the account of Compass Insurance where the plaintiff had a mandate to pay the claims and receive the recoveries.

[12] According to him the defendants could have obtained security from any financier. Perhaps they were the easy option because they did

not require any collateral. The Schedule of Insurance was concluded between the parties as stated on page 41 of the Index of Documents bundle.

[13] Under cross-examination he confirmed that the plaintiff was mandated by Compass Insurance to do certain things and that the plaintiff was an underwriting agent. Further in the event of success in this litigation, money will be paid to the bank account of Compass Insurance to which they have rights.

[14] In terms of the suretyship agreement the second defendant bound herself to pay in the event of the failure to pay by the first defendant. He denied that the first defendant was a primary debtor and a surety at the same time. According to him the plaintiff was entitled to claim payment from the defendants in the event of failure by the latter to make payment to the Oil Company.

[15] At the conclusion of his oral evidence, the case for the plaintiff was closed. Counsel for the defendants applied for absolution from the instance. The parties agreed to submit the Heads of Argument and that the matter should be decided on the papers without oral argument. The application was refused and I now turn to deal with this aspect.

[16] The correct approach to an application for absolution at the end of the plaintiff's case was succinctly stated in **Claude Neon Lights (SA) Ltd v Daniel.** Milner AJA said:-

> **"It is so that the question that I now turn, bearing in mind that, when absolution from the instance is sought at the close of plaintiff's**

> **case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."**[1] (Footnote omitted).

This approach has been confirmed and applied consistently by the courts throughout the country.[2]

[17] In order to survive a application of this nature, the plaintiff has to make out a *prima facie* case. There must be evidence relating to all elements of the claim. Importantly without such evidence the court will not find for the plaintiff. In applying this test the court should not be concerned with what someone else might think but with its own judgement and not that of another "reasonable" person or court.

[18] In this matter the second defendant operated a filing station with Total South Africa as the fuel supplier. It would appear that before the latter could supply fuel products to both the first and second defendant, there had to be a fuel guarantee in place. The first defendant applied for such a guarantee from the plaintiff which was duly issued and premiums paid for from their coffers. In addition and in the course of doing business with each other, the second defendant signed a Suretyship Agreement binding herself as surety and co-principal debtor with the first defendant. This is common cause from the parties and it is not a point of contention as it is clearly admitted in the pleadings.

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[1] **1976 (4) SA 403 (A) at 409 G-H**

[2] **Gordon Lloyd Page & Associates v Rivera and another 2001 (1) SA 88 (SCA) at 92 E – 93 A; De Klerk v Absa Bank Ltd and others 2003 (4) SA 315 (SCA) at 323 C-G.**

[19] According to the second defendant the issuing of the guarantee was not a condition before Total South Africa could supply then with fuel products. Further denies any breach of the agreement between the latter and themselves. In fact it is pleaded that it is Total South Africa that breached the agreement although the details of the breach are not sufficiently stated in the plea. However this matter does not turn on this peripheral issues.

[20] The uncontested evidence is that Total South Africa delivered fuel products to the defendants in the amount of R2 193 176.36 as at 2 September 2014. The Debtor's Account and Certificate of Balance dated 31 August 2014 are part of the record. Total South Africa issued a letter of demand addressed to the second defendant demanding payment of the aforesaid amount. The first and/or second defendant did not comply.

[21] Further, on 29 September 2014 Total South Africa demanded payment of R500 000.00 from the plaintiff in terms of the signed guarantee which payment was made on 29 September 2014. This was made on the basis of the certificate of balance and debtors reconciliation account from Total South Africa. The issue of payment is denied by the defendants and there is overwhelming evidence that indeed it was made.

[22] The alternative argument is that if payment was made, such was made on the basis of the terms and conditions prevailing between the plaintiff's principal and Total South Africa. It is unclear what those terms are as alleged by the defendants. The relevant parts

of the contractual relationship between the plaintiff and the defendants are clauses 3.1 and 3.3 referred to in paragraph 10.

[23] This agreement is not disputed at all. In terms of the surety agreement it states that any damages or other compensation to which the plaintiff may be entitled out of the Guarantee, then the surety agreement will be applicable. This is clear that it was the intention of the parties as at all relevant thus they dealt with each other. On this basis I concluded that a *prima facie* case been made out requiring the defendant to rebut the evidence of the plaintiff.

[24] As mentioned in the preceding paragraphs no evidence in rebuttal was led. The parties filed supplementary heads of argument and I am indebted to them for the assistance.

[25] I have already made a finding that a *prima facie* case has been made out by the plaintiff with all the elements to sustain a claim in this regard. In the circumstances, there has been no rebuttal and as such the plaintiff has conclusively proved his case and discharged the necessary onus of proof.[3] It was contended that the plaintiff does not have *locus standi* in this matter. The parties to the Surety Agreement are clearly identified with rights and duties *vis-a-vis* each other. As a result there can be no talk of lack of *locus standi* and this argument cannot be upheld.

[26] As far as the costs are concerned, the successful party must be awarded the costs. I see no reason to deviate from the principle.

[27] Accordingly the following order is made:-

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[3] **Ex parte The Minister of Justice; In re Rex v Jacobson – Levy 1931 AD 466 at 479**

27.1 Judgement is granted in favour of the plaintiff against the defendants, the one paying the other to be absolved in the sum of R500 000.00 plus interest at the rate of 10% per annum calculated from 2 October 2014 to date of final payment.

27.2 The defendants are ordered to pay the plaintiff's costs.

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M. A. MATHEBULA, J

On behalf of the Plaintiff: Adv. D de Kock
Instructed by: Webbers Attorneys
BLOEMFONTEIN

On behalf of the Defendant : Adv. S Grobler
Instructed by: Honey Attorneys
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