IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 4759/2014

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	**APPLICANT**
and	
KELVIN PILLAY (Identity Number: [...])	**FIRST RESPONDENT**
DASHIELL PILLAY (Identity Number: [...])	**SECOND RESPONDENT**
TRANSNAUTICA LOGISTICS CC	**THIRD RESPONDENT**
LANDSTAR TRANSPORT CC	**FOURTH RESPONDENT**
KELVIN PILLAY N.O.	**FIFTH RESPONDENT**
DASHIELL PILLAY N.O.	**SIXTH RESPONDENT**
ANAND RAMDHIN N.O.	**SEVENTH RESPONDENT**

J U D G M E N T

Delivered on: TUESDAY, 20 MARCH 2018

OLSEN J

[1] The applicant, Standard Bank of South Africa Limited, seeks an order provisionally sequestrating the joint estate created by the marriage between the first and second respondents. In the original founding papers the applicant based its case on the proposition that the first respondent had

committed an act of insolvency, and stated that in the alternative it relied upon the proposition that the estate is insolvent. In argument before me the proposition that an act of insolvency had been established was not pressed. In view of the conclusion I have come to concerning the question as to whether the estate is insolvent there is no need for me to consider the alleged act of insolvency any further.

[2] Counsel for the respondents concede that the only issue which need be decided at this stage is the question as to whether the estate is insolvent. The respondents concede that all other requirements for the grant of a provisional order are met. In particular it is conceded that it is established on the papers that the respondents are indebted to the applicant as sureties for an overdraft in an amount of some R200 000.00, which gives the applicant standing under s 9(1) of the Insolvency Act, No. 24 of 1936.

[3] The applicant must at this stage establish a *prima facie* case. The court must have regard to all the affidavits delivered in order to determine whether a *prima facie* case for the insolvency of the estate has been established on a balance of probabilities. (See s 10 of the Insolvency Act, and *Kalil v Decotex (Pty) Limited and Another* 1988 (1) SA 943 (A) at 976 to 978.)

[4] Counsel for the respondents have submitted, correctly in my view, that the answer to the question as to whether the insolvency of the joint estate has been established turns on one issue only. That issue is the enforceability of an unlimited deed of suretyship signed by the first respondent on 4 January 2008 for the payment of all amounts which might be owing to the applicant by Transnautica Logistics Close Corporation, which I shall refer to as "Transnautica". (Transnautica, as well as certain other parties, have been joined in the sequestration proceedings. They have not participated in them. In the papers it is contended that the joinder was improper, but the issue was not argued before me, and the resolution of it is not necessary at this time. For the sake of convenience I will call the first and second respondents the "respondents".) Transnautica is indebted to the applicant in a considerable sum. The applicant relies on the unlimited deed of suretyship to hold the respondents liable for the amount. If the debt is added to the respondents'

other liabilities they are insolvent by a wide margin. If it is excluded from their liabilities then, in my view, these papers do not establish the insolvency of the joint estate.

[5] An account of the facts is necessary in order to examine the basis upon which it has been argued that the unlimited deed of suretyship is not enforceable. These facts are to be gleaned from what are in effect two sets of papers. For reasons which need not be canvassed in full at this time this application has progressed rather too slowly. In the result the papers comprise the customary three sets of affidavits, and then supplementary founding, answering and replying affidavits.

[6] In the founding affidavit the deponent made the allegations necessary to establish the quantum of the principal debt owed by Transnautica. The amount owing at that time (and now) had its immediate origins in Transnautica’s failure to meet its obligations in terms of a series of credit agreements concluded in 2011 for the purchase of trucks and associated equipment used in its logistics business. The founding affidavit was signed in April 2014. One of the annexures to it was a summons which the applicant disclosed it had issued against Transnautica and its sureties in June 2013, which reveals that there were also at that time outstanding amounts due in terms of similar credit agreements concluded between Transnautica and the bank during the period 4 March 2008 to 6 August 2008.

[7] The fact that all these credit agreements were concluded between Transnautica and the applicant was not disputed by the respondents in their answering papers.

[8] The founding affidavit recorded that the written deed of suretyship in terms of which the first respondent bound himself on an unlimited basis was executed on 4 January 2008. With rather less attention to detail and accuracy than this matter required, the deponent to the founding affidavit went on in the next paragraph to assert that a second deed of suretyship signed by the first respondent on 23 February 2008 (i.e. some seven weeks after the first one) had also been provided in favour of the applicant for payment of “any sums of

money" which Transnautica may owe to the applicant. This description of the suretyship is, to say the least, inaccurate. A perusal of the document shows that it was a limited suretyship under which the first respondent's liability for capital did not extend beyond R250 000.00.

[9] In the answering papers the first respondent admitted that he had signed both deeds of suretyship. Having done that, he drew attention to the fact that in terms of the second deed his liability was limited to R250 000.00. In subsequent paragraphs of his lengthy affidavit, and with little by of an explanation for the assertion, he claimed that whatever the position might be as between the applicant and Transnautica, his liability as a surety for Transnautica did not extend beyond R250 000.00.

[10] In reply, and perhaps distracted by a host of other immaterial (or presently immaterial) disputes and contentions and counter-contentions, and perhaps distracted further by the obscurity which characterised the manner in which the first respondent had asserted that his liability was restricted to R250 000.00, the deponent to the applicant's affidavit simply made the observation that whilst the second deed of suretyship was indeed limited, the first was not.

[11] The further prosecution of the present application was interrupted, apparently without any objection, principally to accommodate necessary processes which followed the cancellation of the credit agreements between Transnautica and the applicant. In January 2016 the applicant launched an application to deliver a supplementary founding affidavit. This was not opposed. The affidavit gave an account of what had transpired with regard to its claim against Transnautica and certain other matters. Concerning the issue to be decided at this time, the deponent to the applicant's affidavit recorded that the applicant's then understanding of what had been said in the earlier papers by the respondents, was that the later deed of suretyship had "somehow amended the earlier unlimited suretyship" despite the fact that the requirements for the variation of the earlier document had not been complied with.

[12] It was only in their supplementary answering affidavit that the respondents stated clearly the basis upon which they repudiated unlimited liability under the earlier deed of suretyship.

[13] The defence raised in the affidavit may be summarised as follows.

(a) When the first respondent and his co-member of Transnautica signed the second deed of suretyship they bound themselves, "jointly and severally to a maximum amount of R250 000.00 …, plus interest, fees and charges, as sureties for the payment when due of all present and future debts of any kind …" owed by Transnautica to the applicant.

(b) The applicant is the "author and generator" of the second deed of suretyship and it was at the instance of the applicant that it was signed in the presence of bank representatives.

(c) The two suretyships cannot co-exist. Legal effect must be given to the later one "which clearly, intentionally and deliberately contain[ed] a restriction/limitation of our liability, as sureties, towards the applicant".

(d) The later deed of suretyship "simply and legally novated/replaced" the earlier one.

[14] The deponent to the applicant's supplementary replying affidavit, a Ms Johanna M Greyling, is employed as a manager in the applicant's Business Support & Recoveries, Personal and Business Banking Credit sections. She does not claim to have been personally involved in the set of circumstances and agreements of which the first and second suretyships form a part. The facts stated in the affidavit had come to her knowledge in her capacity as an employee of the applicant. In dealing with the defence now clearly stated by the respondents she had regard to certain documents forming part of the applicant's bank records. She had access to the relevant documents from different divisions of the applicant which deal with different forms of finance. Her reply to the defence of novation goes along the following lines.

(a) The first deed of suretyship was obtained by the applicant's vehicle and asset finance division in order to secure the debt relating to anticipated instalment sale agreements. The first of these agreements was, like the deed of suretyship, dated 4 January 2008. She provided a copy of that document.

(b) She provided a copy of a form proposing the approval of further finance by the vehicle division which was dated 7 July 2008, and which records that four instalment sale transactions following the original approval of the credit line had by then been concluded. (This fact accords with the information concerning the 2008 credit agreements reflected in the summons.) The document records that a "general guarantee of members is held" and proposes the approval of an extension of the credit line. One sees from the summons that four further credit agreements, one dated 17 July 2008 and three dated 6 August 2008 were concluded following this review.

(c) The second deed of suretyship was obtained by the bank's branch which granted an overdraft facility to Transnautica. The deed of suretyship records that the branch concerned is the applicant's one at Prospecton. The deponent puts up a request for authority emanating from the Prospecton branch to keep the then overdraft limit of R90 000.00 in place for another two months. This is dated 24 July 2008 and records that the bank held a suretyship limited to R250 000.00. The deponent offers the observation that it is probable that the person who secured the second deed for the bank did not know of the existence of the first deed.

(d) A triangular stamp bearing the date 22 April 2008 appears above the heading of the second deed of suretyship. In their supplementary answering affidavit the respondents referred to the signature as an "endorsement" of the second suretyship by the applicant. The deponent to the replying affidavit pointed out that the word "endorsement" is inappropriate. It is merely a signature and it could have been affixed by any unidentified employee at any stage, such as when filing the document away. Over the stamp the number of the overdraft account appears.

(e) Finally the deponent states that it is improbable that the parties to the instalment sale agreements proceeded upon the assumption that the only suretyship in operation was one limited to R250 000.00, given that the bank's vehicle and asset finance division allowed the exposure to Transnautica to run up as high as some R8 million.

[15] The two deeds of suretyship are very different documents. The first one under which the liability of the sureties is unlimited runs to seven pages. The second one, limited to R250 000.00, is a single page document. One has the impression that it constitutes an attempt by the applicant to simplify the statement of a surety's obligations where the principal debt is the product of a simple money lending transaction. Both of them are standard form documents. There are clauses in the earlier unlimited deed of suretyship which have a bearing upon the respondents' contention that its operation was terminated by novation.

(a) Clause 10.1 provides that the earlier suretyship is "in addition to any other suretyship or security, which the bank holds <u>at any time</u> for any of the Debts". (My emphasis.) The word "Debts" is a defined concept, being "all the present and future debts of any kind" owed by Transnautica to the applicant.

(b) Clause 11 deals with termination and cancellation of the obligations under the deed. It allows the sureties to limit their liability by written notice to the applicant. The notice brings about that the liability is fixed at that time.

(c) Such notice aside, Clause 11 is to the effect that liability for the "Debts" will only end when all of them have been extinguished; or when the bank gives a written release from liability under the deed of suretyship; or when the bank cancels the suretyship in writing. The clause goes on to provide that the suretyship may "only be terminated, cancelled or otherwise brought to an end in the way provided for in this suretyship."

[16] In an apparent attempt to avoid the rigours of our law of novation, in oral argument counsel for the respondents attempted to shift the respondents' ground from the "novation/replacement" pleaded in the supplementary answering affidavit, to the proposition that the second deed should be regarded as an amendment of the first. (There was a tentative suggestion that this might be legitimate in the supplementary answering affidavit.) I will deal with that argument after examining the pleaded defence of novation.

[17] The argument for novation rests on the words chosen to express the contingent obligation in the second deed of suretyship, and its apparent inconsistency with the continuance of the unlimited liability imposed by the earlier deed. As I understand the argument it is developed as follows.

(a) Amongst the debts of Transnautica owed to the applicant at the time of conclusion of the second deed were amounts owing in terms of a credit agreement concluded with the vehicle and asset finance division of the applicant.

(b) The second deed of suretyship therefore expresses a limitation of liability on the part of the sureties for vehicle and asset debt (together with any other debts) of R250 000.00. The deed covers "all present and future debts of any kind".

(c) The second deed of suretyship was accepted by the applicant through the agency of its division which secured it.

(d) The continued existence of unlimited liability amounts to a contradiction of the express terms of the second deed. There cannot at once be a limited liability and unlimited liability in respect of the same debts.

(e) The only inference to be drawn is that the second deed of suretyship novated and terminated the first.

[18] In *National Health Laboratory Service v Lloyd-Jansen Van Vuuren* 2015 (5) SA 426 (SCA) at paragraph 16 the Supreme Court of Appeal endorsed the proposition stated in *Electric Process Engraving and Stereo Co*

v Irwin 1940 AD 220 at 226 – 227, that our law on the subject of novation was clearly stated as far back as 1880 in the case of *Ewers v The Resident Magistrate of Oudtshoorn and The Trustee of the Insolvent Estate of Roberts* (Foord 32). A consideration of the facts of the last-mentioned case, which established the principle which continues to be applied in our law, seems to me to be of assistance in dealing with the argument put up by the respondents. The applicant in *Ewers* sought to prove a claim in the insolvent estate of Roberts upon the basis that it was secured by a bond which had been passed in favour of the applicant to secure performance under a promissory note for £412. The bond provided that if the promissor "properly took up the note with interest, costs and charges" then the bond would become null and void, but would otherwise remain in full force and effect. On the due date for payment the insolvent paid the costs, charges and interest then due, but issued two new promissory notes payable at later dates for the capital. The original promissory note was endorsed with words which recorded that it was settled by the new notes. De Villiers CJ held that, the particular wording of the bond aside, the question was whether the effect of the issue of the subsequent notes was to bring about that the debt reflected in the original promissory note – the one secured by the mortgage bond – had been extinguished by novation. The principle the learned Judge enunciated was therefore stated in a context in which, *prima facie*, the obligation evidenced by the original promissory note could not continue to exist if the obligations evidenced by the two new ones were enforceable, as they obviously were. The continued existence of the earlier obligation was, on the face of it, incompatible with the liabilities established by the later notes.

[19] After examining the authorities the learned Judge held the following at page 35.

> "The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist, except by way of necessary inference from all the circumstances of the case. Now the mere fact that a debtor has given his own promissory note to his creditor for the amount of the debt certainly does not lead to the necessary inference that the parties intended to substitute the note for the debt."

The learned Judge concluded that the original debt had not been novated, with the result that the security given for the original promissory note was still good. I can see no reason to distinguish the present case merely because it concerns contingent liabilities. In both cases the question is whether the earlier obligation is extinguished by the later one, and in both cases the answer lies in the enquiry into whether that was actually intended by the parties. Where there is no express declaration of novation, all the circumstances of the case must be examined in order to establish whether it is necessary to infer that a novation was intended. Apparent contradictions between the later and earlier contracts do not inevitably render it necessary to infer an intention to novate.

[20] Counsel for the respondent accepted that the onus of proving the alleged novation rests upon the respondents. (See *Barclays National Bank Limited v Smith* 1975 (4) SA 675 (D) at 683 B-E where the principles are neatly summarised.) The second deed of suretyship contains no reference to the first, let alone a statement that it replaces the first. Counsel argued that the intention that it should replace the first can be derived from the contents of the second deed of suretyship, along the lines set out above.

[21] The intention required is that of the parties, not one of them. Suretyship is a bilateral juristic act. (See *African Life Property Holdings (Pty) Limited v Score Food Holdings Limited* 1995 (2) SA 230 (A) at 239.) The respondents' answering affidavit contains no statement that the first respondent or his co-signatory (his co-holder of the interests in Transnautica) personally intended the second deed of suretyship to novate the first. There is no statement that the representative of the bank who solicited the second deed of suretyship even knew of the existence of the earlier one, let alone that he or she intended by requesting the second deed to novate the obligations under the earlier one. Given the silence of the second deed on the subject of novation, if an intention to extinguish the obligations under the earlier deed existed, then it must have been discussed between the parties who attended to the execution and acceptance of the second deed. There is no evidence of any such discussion. The respondents' argument is confined to the words employed in the second deed.

[22] Counsel for the respondents have argued that an inference from the second deed of suretyship that a novation of the first was intended may safely be drawn because, at the time it was executed, only the first of the credit agreements between Transnautica and the applicant had been concluded, and that its existence is not incompatible with a limited liability of R250 000.00. They argue that the credit agreements which followed in 2008 (the first one following only 10 days after the second deed of suretyship was signed) should be ignored because the debts incurred by Transnautica as a result of those did not exist when the second deed of suretyship was signed. There is no merit in that argument. Such transactions do not spring out of nowhere on the spur of the moment. It is overwhelmingly probable that they were contemplated when the first deed of suretyship was signed, and continued to be so contemplated by the vehicle and asset finance division at the time when the second deed was signed.

[23] As already pointed out, the first deed of suretyship expressed both

(a) its ability to live side by side with any subsequent deed of suretyship obtained in favour of the applicant, and

(b) the manner in which the obligations under it could be brought to an end.

The second deed of suretyship expresses neither a release from liability under the earlier one, nor a cancellation of the earlier one.

[24] In addition to the aforegoing I take the view that the respondents' contention that the two deeds of suretyship cannot co-exist is erroneous. The second deed of suretyship did not contain a declaration that the undertaking made therein was the only one which bound its signatories in favour of the applicant. The undertakings in each of the deeds of suretyship are intended to express the liability of the sureties under the particular instrument. Deeds of suretyship are instruments of debt, despite the fact that the liability they express is contingent. There is no reason to suppose that the cancellation of the one instrument would automatically bring about the cancellation of the other. They can co-exist as instruments of debt. Of course, if the applicant sued its sureties under the second deed the claim would have to be limited to

R250 000.00. It would be necessary to invoke the first deed of suretyship in order to get more than that.

[25] Counsel for the respondents have criticised the applicant for failing to produce an affidavit attested to by the person who represented it in obtaining the second deed of suretyship. The criticism is not entirely unwarranted because the deponent to the applicant's papers was confined to the observation that it was inconceivable that the person involved could have intended to cancel the first deed of suretyship, basing that statement of overwhelming probability on the facts of which an account has been given earlier. The papers contain no explanation for the failure of the applicant to provide such an affidavit. However I consider the criticism to be of no assistance to the respondent's case. There is no statement made in the respondents' papers to the effect that the person concerned actually intended the novation of the earlier deed; nor any statement that he or she was aware of the existence of the earlier deed, and the purpose it was intended to fulfil in Transnautica's logistics business. On the respondents' papers there is no case which the person concerned had to answer.

[26] In my view the oral argument made by counsel for respondents, that the second deed of suretyship should be regarded as an amendment of the first, fails for reasons not dissimilar to those which warrant the rejection of the claim of novation. There is no statement in the second deed of suretyship that it is intended as an amending document. In particular the second deed of suretyship contains no statement that it is intended to constitute a declaration that the contingent liabilities of its signatories to the applicant under any other instrument are limited to the sum of R250 000.00. All that is expressed in the second deed is that the undertaking made in it is limited to R250 000.00.

[27] I conclude that the applicant has made out the requisite case for the insolvency of the respondents and that a provisional order must follow.

I accordingly make the following order.

1. **A Rule Nisi issues calling upon the first and second respondents and all other interested parties to show cause, if any, before this court on the 30 April 2018 at 09h30 or so soon thereafter as the matter may be heard, why the joint estate of the first respondent (ID No. [...]) and the second respondent (ID No. [...]) should not be placed under final sequestration.**

2. **This order operates with immediate effect as a provisional order for the sequestration in the hands of the Master of this court of the joint estate of the first and second respondents.**

3. **This order shall be served personally on the first and second respondents, and shall be served also on the South African Revenue Service and the Master.**

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OLSEN J

Date of Hearing:	WEDNESDAY, 31 JANUARY 2018
Date of Judgment: :	TUESDAY, 20 MARCH 2018
For the Applicant:	Mr R M Van Rooyen
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