REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 1323/2016

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

8/8/17
DATE SIGNATURE

In the matter between:

BUTTON NEIL DAVID N.O & THREE OTHERS **PLAINTIFF**

AND

PHAKATHI PROPERTIES (PTY) LTD **RESPONDENT**

JUDGMENT

MULLER J:

[1] The applicants, who are the duly appointed liquidators of Leiru Commodities CC (in liquidation), seek the recovery of an amount of R 3 214

190. 64 together with interest and costs. They also seek an order that a fixed property described as:

"Portion 109 (a Portion of Portion 3) of the Farm Hamawasha 557, Registration Division Limpopo Province and held under Deed of Title T088856/2010"

(hereinafter called "the property") be declared specifically executable.

[2] The claim arose from a settlement agreement which was entered into on 10 June 2015 between Leiru Commodities CC (in liquidation), as the creditor duly presented by the liquidators) and Phakathi Milling (Pty) Ltd, the debtor, duly represented by Pieter Andries Gouws (snr). The debtor in terms of the settlement agreement, acknowledged that it was indebted to the creditor in the amount of R3 211 997.03, consisting of the capital amount of R2 871 437.14 together with interest of R540 559.89 in respect of goods delivered to the debtor by the creditor.

[3] The settlement agreement makes provision for the indebtedness to be satisfied by payment of the debt in several instalments. Clause 4.1 contains an acceleration clause which provides that the debt becomes immediately due and payable if the debtor defaults in respect of any of its obligations in terms of the settlement agreement. There is no dispute that the debtor is in default of its obligations in terms of the settlement agreement.

[4] I pause for a moment to observe that the debtor was first known as Central High Trading CC which conducted business under the name Phakathi Milling. Central High Trading CC changed its name in 2012 to Phakathi Milling. The close corporation was later converted to a company with the name of Phakathi Milling (Pty) Ltd. Phakathi Milling (Pty) Ltd is currently under business rescue.[1] The applicants lodged an unsecured claim in the business rescue proceedings based on the acknowledgment of debt embodied in the settlement agreement.

[5] The respondent, which was known as Smokey Mountain Trading 314 (Pty) Ltd, changed its name to Phakathi Properties (Pty) Ltd on 31 October 2011. It purchased the property on 15 December 2011 and caused a mortgage bond to be registered over the property on 10 February 2012 in favour of the fourth applicant, as the creditor of Phakathi Milling (Pty) Ltd.[2]

[6] The relevant provisions of the mortgage bond read:

[1] Business rescue proceedings commenced on 26 October 2016. The business rescue plan was finally adopted on 12 August 2016.
[2] The property was transferred into the name of the respondent on 15 December 2011under its previous name despite the name change. The mortgage bond is also registered in the name of Smokey Mountain Trading 314 (Pty) Ltd.

"En die genoemde Komparant verklaar dat haar genoemde Prinipaal, aan en ten behoewe van

LEIRU COMMODITIES TRADING CLOSE CORPORATION

Registrasienommer: 1999/032109/23

(hierinlater genoem "die Verbandhouer") waarlik en wettiglik verskuldig is, en gebonde gehou is vir die som van R 3 000 000,00 (DRIE MILJOEN RAND)

(hierinlater genoem "die Hoofsom"); wat voortspruit en ontstaan uit lewering van kommoditeite aan Central High Trading, Regsitrasienommer: 2002/101780/23 handeldrywende as Phakathi Milling an betaalbaar in geld.

Derhalwe doen sy, die komparant, namens haar voornoemde prinsipaal hiermee afstand van alle voordele wat voortspruit uit die wetlike eksepsie/s non causa debiti, errore calculi, hersiening van van rekening, geen waarde ontvang met die krag en betekenis waarvan sy verklaar dat haar prinsipaal ten volle bekend is; en alle ander eksepsies wat geneem mag word teen betaling van die Hoofsom, en beloof en onderneem die komparant hiermee, namens haar voornoemde prinsipaal om die Verbandhouer of ander wettige houer/s van hierdie verband, sy order, efgename, administrateurs of regsverkrygendes te betaal of te laat betaal die Hoofsom, welke betaling hy toegelaat sal word en ook verplig sal wees om te maak as volg:

Die totale bedrag van R3 000 000,00 (DRIE MILJOEN RAND) 18 (AGTIEN) maande vanaf datum van registrasie van hierdie verband oor gemelde eiendom ten gunste van die verbandhouer.

EN as sekuriteit vir die behoorlike en stiptelike betaling van die Hoofsom of enige deel daarvan, en alle ander geldbedrae wat te eniger tyd aan die Verbandhouer/s of ander wettige houer/s van hierdie verband verskuldig en betaalbaar mag word, uit enige oorsaak *hoe ookal in terme hiervan, en vir die behoorlike nakoming deur haar prinsipaal van almal en ieder van die terme en voorwaardes van hierdie verband, bind die komparament hiermee onder EERSTE verband naamlik:*

....

VII Indien haar prinsipaal in gebreke bly of versuim om enige som of somme verskuldig en betaalbaar onder hierdie verband stiptlik te betaal op die respektiewe vervaldae, of om enige van die ander voorwaardes en stipulasies van hierdie verband na te kom sal die Hoofsom en alle ander bedrae hieronder verskuldig onmiddelik verskuldig en betaalbaar word sonder enige kennisgewing (nieteenstaande enige teenstrydige voorwaarde hierin vervat)."[3]

[7] It is the case of applicants that the respondent bound itself, in terms of the provisions of the mortgage bond, as surety and co-principal debtor in respect of the debt due to the fourth applicant by Phakathi Milling (Pty) Ltd, as reflected in the settlement agreement.

[8] Counsel for the respondent contended, on the one hand, that the applicants have failed to prove that the registration of the mortgage bond was authorised by the respondent or that the respondent entered into a suretyship agreement. And on the other, it asserted that the applicants, as a creditor, had

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[3] The mortgage bond comprises of the three parts. See *Zietsman v Allied Building Society* 1989 (3) SA 166 (O) at 168E-F; *Thienhaus V Metje & Ziegler* Ltd 1965 (3) SA 25 (AD) at 31D.

taken part in the development of a business rescue plan in respect of Phakathi Milling (Pty) (Ltd) after the commencement of business rescue proceedings and proved a claim based on the acknowledgment of debt per the settlement agreement. That fact, so the argument went, precluded the applicants from recovering the principal debt from the respondent.

[9] I indicated to both counsel during argument that I have reservations whether the mortgage bond embodies a suretyship and afforded counsel the opportunity to file supplementary heads of argument. I am indebted to both counsel who availed themselves of the opportunity to do so.

[10] I will deal first with the principal debt and then with the wording adopted in the mortgage bond. The purpose of the settlement agreement was to consolidate and acknowledge the original indebtedness of the debtor (Phakathi Milling (Pty) Ltd) towards the creditor (Leiru Commodities CC (in liquidation)). The parties, furthermore, agreed that the acknowledged debt which was due and owing to the fourth respondent for goods sold and delivered, will be paid in specific instalments. The acknowledgment of debt contains an express undertaking to pay. It created a new obligation to pay the

original indebtedness by means of instalments. In *Adams v SA Motor Industry Employers Association*[4] it was held that:

"*There can be little doubt that a new obligation arose in accordance with the intention of the parties. And it is equally plain that they intended the rights under the deed of sale (the settlement agreement) to remain alive and thus the original obligation to pay the purchase price. Once it is accepted that there is no legal obstacle to two obligations co-existing in respect of the same performance or common debt, it follows that in this respect also effect must be given to the intention of the parties.*" [5]

[10] A proper construction of the mortgage bond is to be undertaken which must be interpreted in accordance with the established principles of interpretation.[6] The respondent, who is not a party to the settlement agreement, undertook the obligation in the mortgage bond to pay the debt of R3 000 000, 00 in respect of commodities delivered to the debtor Phakathi Milling (Pty) Ltd by the creditor. There is little doubt that the debt for commodities delivered has reference to the principal debt referred to in the settlement agreement. The obligation embodied in the mortgage bond is not in the nature of a suretyship. I say this for the following reason:

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[4] 1981 (3) SA 1189 (A).
[5] At 1199B-C.
[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) par 12.

"the undertaking of the surety is accessory to the main contract, the liability under which he does not disturb, but it is an undertaking that the obligation of the principal debtor will be discharged, and, if not that the creditor will be indemnified."[7]

[11] The mortgage bond does not say, nor is it suggested, that the respondent will perform the obligation of Phakathi Milling (Pty) Ltd towards the creditor if it fails to pay its indebtedness towards the creditor. The accessory undertaking to discharge the debt if the debtors fails to do so, or failing that, to indemnify the creditor, is a core ingredient for a valid suretyship.[8] It is accessory in the sense that there must be in existence a principal obligation between the debtor and creditor. That meaning cannot simply be implied from the words used in the mortgage bond.[9] The respondent acknowledged that it is indebted to the creditor in the amount of R3 000 000,00 and undertook to pay the stipulated amount within eighteen months of the registration of the bond.

[12] In my view the respondent took it upon itself, as principal debtor, an obligation to pay the debt of Phakathi Milling (Pty) Ltd to the creditor. The

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[7] *Corrans and Another v Transvaal Government and Coull's Trustee* 1909 TS 605 at 612; *Trust Bank of Africa v Frysch* 1977 (3) SA 562 (A) at 584F; *Saperstein and Others v Anglo Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 11A; *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 473I; *Hutchingson v Hylton Holdings and Another* 1993 (2) SA 405 (T) at 410G-I.

[8] *Union Government v van der Merwe* 1921 TPD 318 at 321; Forsyth C.F. & Pretorius J.T. *Caney's The Law of Suretyship* 6th Ed Juta Claremont (2010) at 27-30.

[9] There is no mention made in the mortgage bond that respondent is a surety nor is there any reference to the word "borg" or "skadeloosstel". See also Nel H.S. *Jones Conveyancing in South Africa* 4th Ed Juta Claremont (2010) 461.

respondent acknowledged its indebteness to the creditor in the amount of R3 000 000,00 (in respect of commodities delivered to Phakathi Milling (Pty) Ltd), and undertook the obligation to satisfy the indebtedness within eighteen months after registration of the bond (clause VII). The amount became due and payable on 10 February 2012.

[11] The respondent is, therefore, a principal debtor upon the document in that it promised to pay the amount of R3000 000.00 within eighteen months of the registration of the bond.

[12] In *Schoeman v Moller*[10] the debtor, Moller Snr, undertook certain obligations. The defendant interposed and bound himself as surety for the fulfilment of all the terms and conditions of the agreement between Moller Snr and the creditor. He, in addition, undertook to furnish the creditor with additional security for his claim against Moller Snr in the form of a second collateral mortgage bond over certain property and cession of certain deeds of sale. He, however, in an additional yet different written undertaking undertook to pay the creditor in reduction of the second mortgage bond for £2000 an amount of £50 per month which shall be applied firstly towards payment of the interest due and then in reduction of any capital sum of the bond for £2000 to

[10] 1951 (1) SA 456 (OFS).

be passed by Moller Snr.[11] It was held that the latter undertaking is a solidary undertaking (*pactum constitutum debiti alieni*) which "*would constitute a covenant by defendant to pay a sum of money to plaintiff on certain days with an obligation on plaintiff to apply the instalments so received in a particular manner. It differs from suretyship, stricto sensu in that the liability to pay does not depend upon any prior default on the part of the principal debtor......and inasmuch as defendant's obligation to pay is operative when, as yet, no immediate right of recourse against Moller Snr is available, defendant's undertaking may be said to be more onerous than that Moller Snr. On the other hand the undertaking necessarily falls to be described as an intercessio because the defendant took upon himself the obligation to liquidate in part a debt which originally was not due or payable by him but which was exclusively a debt of his father, Moller Snr.*"[12]

[13] The undertaking by the respondent in the mortgage bond to pay is an act of *intercessio* discussed in *Schoeman v Moller supra.*[13] A *pactum constitutum debiti alieni* in the Roman law is an accessory pact in terms whereof the obligation of another is undertaken, but the principal debtor, notwithstanding, continues to be obligated.[14] The court accepted Pothier's exposition that a *pactum constitutum* is not simply accessory to the principal obligation, like a surertyship, but that it is an obligation which exists by virtue of its own merits and sometimes even continues after the principal obligation has ceased to

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[11] At 466C-G.
[12] At 466H-467B.
[13] At 470E-472G.
[14] At 470G-H.

exist. A payment of what is owed either under the principal obligation or under the *pactum* extinguishes the other also, and that this applies not only in respect of an actual payment but also in respect of set off, novation and even waiver.[15]

[14] The applicants are entitled to recover the indebtedness of R3 000 000.00 in terms of the obligation undertaken by the respondent as principal debtor in terms of the mortgage bond, if the debt is due and payable. "*If, therefore, the principal debt has not been terminated by payment or satisfaction of the creditor in the sense that the original debt has ceased to subsist, then it must follow that the accessory pactum has not been discharged.*"[16]

[15] The undertaking by the respondent, as indicated, is accessory in the sense that there has to be in existence, a principal obligation due to the creditor by the debtor. Counsel for the respondent argued with reliance on *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* [17] and *New Port Finance Company (Pty) Ltd v Nedbank Ltd*[18] that the debt which is reflected in the mortgage bond emanated from the settlement agreement and because the applicants lodged a unsecured claim in the business rescue

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[15] At 471H.
[16] At 472A.
[17] 2014 (4) SA 521 (WCC).
[18] 2016 (5) SA 503 (SCA). At par 14 doubt is expressed as to the correctness of the conclusions reached in *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another supra*.

proceedings based on the settlement agreement, any compromise in terms of the adopted rescue plan would impact on the indebtedness of the respondent.

[16] Reliance on those cases is misplaced. Those cases are distinguishable. Firstly, the respondent, in my judgment, is not a surety. Secondly, there is no evidence, on the papers, that the principal debt has been satisfied or compromised in terms of the rescue plan or has ceased to exist. The debt of the debtor is still unsatisfied. The mere acceptance of the business plan did not satisfy or extinguish the debt. I pause here to add that the respondent filed a progress report on affidavit by the business rescue practitioner.[19] There is certainly no evidence to be gleaned from that report that the indebtedness of the debtor has been extinguished by payment or even that the debt has been compromised in terms of the rescue plan.

[17] Section 154 of the Companies Act[20] finds no application. I am of the view that section 154(1) deals with the enforceability of claims against a company under business rescue and not with the existence of a debt.[21] The applicants, in any event, are not seeking to enforce a claim against Phakathi Milling (Pty) Ltd nor do they seek a judgment against the company under business rescue.

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[19] The progress report was filed with the supplementary heads of argument.
[20] Act 71 0f 2008.
[21] *Newport Finance Company (Pty) Ltd v Nedbank Ltd supra* par 14.

They seek a judgment against the respondent in terms of an undertaking embodied in the mortgage bond.

[18] I now turn to determine the important question whether the mortgage bond was properly authorised and duly registered. Counsel for the respondent reiterated in his supplementary heads of argument that the respondent is not bound by the mortgage bond.

[19] The respondent averred in the opposing affidavit that registration of the mortgage bond (annexure FA 21) attached to the founding affidavit had not been authorised and that the respondent is not a surety and co-principal debtor as alleged. The denial is based on the purported failure by the applicants to produce a deed of suretyship. Consequently, the validity of the mortgage bond was put in issue. It is contended that the property secured in terms of the mortgage bond is earmarked to be sold and that the proceeds of the sale will be utilized in the implementation of the business plan.

[20] The applicants successfully applied to supplement their papers. In a supplementary affidavit the applicants explained that a copy of the relevant power of attorney signed by the deponent to the opposing affidavit was

obtained.[22] The conveyancer responsible for the drafting and signing of the power of attorney confirmed that the registration of the mortgage bond (annexure FA21) was duly authorised in terms of the power of attorney given to her by the Respondent.

[21] The draft mortgage bond (of which page 5, 6 and 7 are missing) is attached to the power of attorney (annexure RA2) and are attached to the replying affidavit. The draft reads:

"(hierinlater genoem "die Verbandhouer") waarlik en wetting verskuldig is, en gebonde gehou is vir die som van R3 000,000, 00 (hiereinlater genoem "die Hoofsom") wat voortspruit en onstaan uit lewering van kommoditeite aan Smokey Mountain Trading 314 (Edms) Bpk"

The registered mortgage bond reads:

(hierinlater genoem "die Verbandhouer") waarlik en wettig verskuldig is, en gebonde gehou is vir die som van R 3000 000,00 (DRIE MILJOEN RAND) hierinlater genoem "die Hoofsom"; wat voortspruit en ontstaan uit lewering van kommoditeite aan Central High Trading, Regsitrasienommer: 2002/101780/23 handeldrywende as Phakathi Milling en betaalbaar in geld."

[22] It is explained that the power of attorney and the draft mortgage bond documents were forwarded to the respondent for signature by the

[22] Confirmatory affidavits were filed by the conveyancer and the attorney acting on behalf of the applicants.

conveyancer who handed the documents in at the Deeds office for the registration after she received them back from the respondent. However, the deponent to the opposing affidavit (P.A. Gouws) phoned the conveyancer prior to registration of the bond and advised her that the terms of the bond needed to be amended. The relevant page was removed from the draft bond. It was amended and the amended page was inserted in its place. The "amended" bond (annexure FA21) was duly registered in accordance with the power of attorney.

[23] The applicant also attached to the supplementary affidavit the draft financial statements of Phakathi Milling (Pty) Ltd submitted by email from the deponent dated 14 March 2014. At page 11 the following note appears under the heading:

"Verbande en Lenings

Lening: Leiru Commodities R2 871 437, 14.

Die lening aan Leiru Commodities is terugbetaalbaar in maandelikse paaiement van R150, 000, 00 teen heersende verbandkoerse. Die lening is verseker deur 'n eerste verband oor die vaste eiendom van Phakathi Properties (Pty) Ltd."

[24] On 30 July 2014 the Respondent in an email addressed to Stowell attorneys referred to the mortgage over the property of Phakathi Properties

(Pty) Ltd which has been put up as security in favour of Leiru Commodities CC and in which respondent requested a meeting with the attorneys to discuss the way forward.

[25] The indebtedness of the debtor to the creditor was also confirmed in the amount of R3 778 839, 71 in an email received by the attorneys of the applicants from the bookkeepers of the respondent.

[26] These factual allegations were met by bare denials from the Respondent. The *dictum* in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [23] is applicable with regard to the bare denials on the papers. The emails and the financial statements are clear evidence that the Respondent was well aware of the registration, purpose and the contents of the bond. A real and bona fide dispute of fact can only arise if the party who purports to raise the dispute has seriously and unambiguously addressed the fact which is disputed.[24]

[27] Counsel who appeared on behalf of the respondent when asked during argument whether the bare denials are sufficient to establish a *bona fide*

[23] 2008 (3) SA 371 (SCA).
[24] At para 12-13.

dispute on the papers in the light of those documents merely stated that the allegations are denied.

[28] In my judgment the reason for the discrepancy with regard to the difference in the wording between annexure FA 21 and annexure RA 2 is fully explained by the applicants. There is no suggestion by the respondent that the registration of the bond in respect of the debt of Smokey Mountain 314 (Pty) Ltd was indeed authorised, but that the mortgage bond in respect of the indebtedness of Central High Trading CC was not. Nor is it said that no authorisation was given at all to the conveyancer to register any of them at the time. It is therefore strange that reference is made to the registered bond in the documents attached to the papers without demur, if that was the case. These facts are within the knowledge of the deponent, Gouws. He is eminently in the position to provide an answer instead of a bare denial.

[29] It seems to me rather that the denial put up by the respondent is an attempt to capitalize on an error in the documentation attached to the papers, of which the respondent is well aware that the documents had been duly rectified as explained. It is evident that the bare denials in the face of the emails and financial statements cannot be sustained nor can they be taken

seriously. To my mind these documents clearly show that the respondent was well aware of the correct position. I therefore reject as false, the denial that registration of the mortgage bond in its current form was not authorized by the respondent.

[30] The question whether the mortgage bond is a liquid document[25] embodying an unconditional promise to pay a specific amount has been raised in the heads of argument of the respondent on the basis that extrinsic evidence was needed to prove the amount of the principal debt referred to in the settlement agreement. As I have mentioned, that is not what is being sought by the applicants.

[31] The applicants moved for judgment on the basis of the undertaking in the mortgage bond for the amount of R3 000 000. 00 together with interest from 1 November 2015.

In the result there is judgment for the applicants for:

(1) The amount of R3 000 000.00;

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[25] *Edgcombe v Maunsell* 1911 CPD 521 at 524; *Inglestone v Pereira* 1939 WLD at 64-5; *Union Share Agency Investment Ltd v Spain* 1928 AD 74 at 79; *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754H.

(2) Interest *a tempore morae* on the abovementioned amount at a rate of 9,5% per annum from 1 November 2015;

(3) The property known as: Portion 109 (a portion of portion 3) of the farm Hamawasha 557 Registration Division Limpopo Province held under deed of transfer T088856/2010 is declared specifically executable.

(4) The costs of the application.

MULLER J

JUDGE OF THE HIGH COURT POLOKWANE

APPEARANCES

1. For Applicants: Adv W B Pye
2. For Respondent: Adv L K Van der Merwe
3. Attorneys for Applicants: Pratt Luyt & De Lange Attorneys
4. Attorneys for Respondent: Smith & Maree Attorneys

Date to be heard:27 June 2017

Date of judgment:11 August 2017