



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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

24 March 2017

24/3/2017

In the matter between: -

CASE NO.: 2012/72945

FIRST RAND BANK LIMITED

APPLICANT

And

CLASSCO TRADING (PTY) LTD

RESPONDENT

JUDGEMENT

TSATSAWANE AJ

Introduction

- 1 The applicant (“**the bank**”) seeks an order in terms of which the first respondent (“**Classco**”) is placed in final liquidation. Classco opposes the relief which the bank seeks against it.
- 2 There are various pending applications for leave to intervene in this application by other parties. These applications are not before me at the moment and I need not express any view in relation thereto. The parties impressed upon me that any order that I may grant in this application will not adversely affect the rights of those who seek to intervene.
- 3 There is a provisional liquidation order granted by Mabuse J which has been extended from time to time. This is a return date of that order.
- 4 This judgment only deals with the question whether the bank has *locus standi* to seek the relief which it seeks. If it does not, it follows that the provisional order cannot be extended and the application will have to be dismissed.

The facts

- 5 The bank seeks the relief which it seeks on the basis that it is Classco’s creditor. It alleges that Classco is indebted to it. If indebtedness is established, then in that event, the bank should be entitled to seek the relief which it seeks. If indebtedness is not established, then in that event, the bank will not have the necessary standing to seek the relief which it seeks.

6 In support of its case, the bank relies on a deed of suretyship and a memorandum of agreement in which the indebtedness upon which it relies was allegedly acknowledged.

7 The facts on the basis of which the bank alleges that it is Classco's creditor are complex and require some detailed examination. For this reason, and to the extent that it may be necessary, I will quote from the relevant documents placed before me to justify my conclusions.

The facility agreements

8 On 5 March 2008, the bank and Marnic Developments (Pty) Ltd ("**Marnic Developments**") concluded an agreement in terms of which the bank provided certain banking facilities to Marnic Developments ("**the facility agreement**"). In concluding the facility agreement, Marnic Developments was represented by Manuel Henrique de Sousa de Freitas ("**Freitas**"). In terms of the facility agreement, the bank provided Marnic Developments with ~

8.1 a working capital facility in the amount of R14 500 000,00 repayable on demand;

8.2 a contingent guarantee facility in the amount of R383 109,00 in terms of which individual guarantees could not exceed 12 months;

8.3 a settlement facility for the encashment of cheques in the amount of R100 000,00 repayable on demand.

- 9 The facility agreement and the aforesaid facilities were also governed by the bank's general terms and conditions applicable to facilities and accepted by Marnic Developments. These general terms are attached to the facility agreement.
- 10 The conclusion of the facility agreement and the terms applicable thereto are not in dispute. It is also not in dispute that the bank made the abovementioned facilities available to Marnic Developments and that Marnic Developments used the facilities.
- 11 In October 2010, the bank and Marnic Developments concluded another facility agreement. Nothing much seems to turn on this further facility agreement. In fact, in paragraph 13 of its founding affidavit, the bank says that the terms and conditions of this further facility agreement are identical to those of the facility agreement save that the applicable interest rate is the bank's prime rate plus 2%.

The Vaal Bricks suretyship

- 12 On 16 October 2010, Vaal Bricks (Pty) Ltd ("**Vaal Bricks**") (previously Useful Trading 16 (Pty) Ltd) executed a deed of suretyship in favour of the bank as surety for and as co-principal debtor with Marnic Developments and as security for the due payment by Marnic Developments of all monies due by it to the bank.

- 13 The conclusion of the Vaal Bricks suretyship and the terms thereof are not in dispute.

The Classco suretyship

- 14 On 3 September 2012, Classco executed a deed of suretyship in favour of the bank for Vaal Bricks' debts ("the Classco suretyship").
- 15 The conclusion of the Classco suretyship and the terms thereof are not in dispute. There is a dispute about whether it was intended to secure the debts of Vaal Bricks or those of Marnic Developments.
- 16 The Vaal Bricks debts secured by the Classco suretyship would include its debts arising from the Vaal Bricks suretyship in terms of which it secured Marnic Developments' debts owed to the bank.
- 17 Classco itself does not directly owe the bank. For the relief which it seeks against Classco, the bank relies on the Classco suretyship. Without the Classco suretyship, the bank cannot succeed with the relief which it seeks in this application. For suretyship liability to arise, there has to be a debt which is due and payable secured by a deed of suretyship. Without there being a debt secured by a deed of suretyship being due and payable, a surety cannot be liable.

The bank's complaints and alleged indebtedness

18 In its founding affidavit, the bank alleges that Freitas and others embarked on numerous fraudulent activities which resulted in Classco and its other related companies being heavily indebted to it.

19 In paragraph 34.5 of its founding affidavit, the bank says that at a meeting held on 19 July 2012, Freitas informed its representatives that “*the respondent and the other entities within the Freitas Group are unable to make payment of the amounts owed to the applicant and that the winding-up of the companies within the Freitas Group including Vaal Bricks would follow*”. Freitas denies this version and gives a different version in Classco's answering affidavit. It is necessary that I highlight the material parts of Freitas' version in this regard.

20 In paragraph 88 of Classco's answering affidavit, Freitas says that ~

“88.1 *I stated that the Marnic Group would be in a position, given reasonable time to do so, to repay the amount allegedly owing by it to the Applicant.*

88.2 *At the conclusion of this meeting I spoke to Jan van der Walt, whom I had met on a previous occasion. Van der Walt asked whether Marnic Group could furnish security to the Applicant for monies owing by the Group.*

88.3 *I informed him that Classco had sufficient assets to secure the amount owing to the Applicant.*

88.4 *He wanted to see the property. Van der Walt and I, in our individual motor vehicles, then drove to the Classco property. I explained to Van der Walt that Mercantile Bank had a First Mortgage Bond over the land in a sum of approximately R64, 000, 000-00 but that once transfers of certain sold units of the development had been affected, this amount would be reduced to approximately R15, 000, 000.*

...

88.7 *Save as aforesaid I deny these allegations.”*

- 21 The purpose and enforceability of the Classco suretyship must be considered in the context in which it was concluded. The bank says that it was executed in its favour as security for the indebtedness of Vaal Bricks. On the other hand, Classco disputes this and says that it was concluded or executed for purposes of the debts referred to in the memorandum of agreement to which I will refer below. In addition, it was contended on behalf of Classco that the reference to Vaal Bricks in the deed of suretyship is in fact incorrect and that the deed of suretyship ought to be rectified to reflect that it was executed for purposes of Marnic Developments' debts.

- 22 The bank further says that its head of fraud and disputes, Jelal, conducted an investigation into the conduct of Freitas and others, i.e. Borrageiro, Concalves, and Fernandes in relation to the conduct of the accounts of the Freitas Group of companies. This full-scale investigation revealed, so the bank says, *“that fraud was committed in respect of the accounts of Freitas Group, that R82 029 475,08 was deposited in Vaal Bricks account and that there is clearly scope for the laying of criminal charges.”*
- 23 Freitas denies that *“fraud was committed”* and says that Jelal’s report contains Jelal’s *“opinion not based on the facts set out in this affidavit.”* Freitas accepts that meetings were held between the parties *“aiming to reach a settlement.”* He, however, denies the alleged indebtedness upon which the bank relies.
- 24 Despite Jelal’s aforesaid findings which the bank says are true and correct and the alleged indebtedness, the bank was still prepared to do business with Freitas and the companies associated with him, to the extent of even considering to finance a property development project in which Classco was involved. The bank was prepared to finance the development subject to certain conditions, amongst others, that Freitas and the Freitas Group of companies *“enter into a memorandum of agreement in terms of which they acknowledged their indebtedness towards the applicant.”* The memorandum of agreement to acknowledge indebtedness was presented to Freitas for signature on 30 August 2012.

25 The bank says the following in its founding affidavit about the aforesaid memorandum of agreement which was presented to Freitas for signature¹ ~

“43 *Freitas, as a sign of his commitment in resolving the matter, signed the memorandum of agreement in his personal capacity and on behalf of the Freitas Group and delivered the signed agreement to the applicant’s offices.*

44 *From the memorandum of agreement, it is evident that Freitas and the Freitas Group acknowledged their indebtedness towards the applicant.*

45 *It is important to note that the memorandum of agreement was not signed by the applicant, as the applicant at that stage had not completed its investigation into the property development and whether to provide funding for it, nor was the applicant in a position to present the memorandum of agreement to its credit committee for consideration as there was still outstanding information required from Freitas...”* (my emphasis).

26 It is important to note that the bank does not say that it was not necessary for it to sign the memorandum of agreement for it to be legally binding upon the parties. It says that it did not sign it because it had not completed its investigation. At the bottom of the memorandum of agreement, it is stated that ~

¹ It is necessary that I highlight the material parts of the bank’s version in this regard.

“This is a legal document and will be legally binding on the parties after signature thereof.”

27 On its own terms, the document upon which the bank relies is not “*legally binding on the parties*” because it has not been signed by the bank. Furthermore, clause 6.4 thereof provides that should the agreement not be executed before 17h00 on 5 September 2012, it “*will be of no force and effect and First Rand shall be entitled to immediately institute legal proceedings for the recovery of the debt.*” Accordingly, on its own terms, the document is not legally binding upon the parties due to the fact that it was not executed by the bank before 17h00 on 5 September 2012.

28 In paragraph 49 of its founding affidavit, the bank says that Vaal Bricks is indebted to it in the amount of R82 029 475,00, Marnic Developments in the amount of R8 835 140,06. On this basis, the bank continues to say that ~

“54 *By virtue of the Classco Trading suretyship and the Vaal Bricks suretyship, the respondent is liable to the applicant for the full amount owing by Marnic Developments to the applicant in terms of the renewed facility agreement...*

55 *By virtue of the fraud and the Vaal Bricks suretyship, the respondent is also indebted to the applicant jointly and severally together with the other entities within the Freitas Group in the amount of R82 018 475.08...*” (my emphasis).

- 29 The bank also relies on the alleged “*massive fraud perpetrated by Freitas in respect of the account held by the Freitas Group with the applicant*” for its numerous conclusions on the basis of which it contends that Classco is insolvent; Classco is unable to pay its debts and that it would be just and equitable for Classco to be placed in liquidation.
- 30 It is necessary that I first deal with the question whether bank has established that Classco is liable to it on the basis of the memorandum of agreement and the Classco suretyship. In this regard, I must have regard to what the memorandum of agreement says and whether it is binding upon the parties.
- 30.1 Classco and Vaal Bricks are parties to the memorandum of agreement and are defined therein, collectively with others, as “*the Debtors*” and again as “*the sureties*”.
- 30.2 The preamble records (in clause 1.2 thereof) that the debtors have received “*certain banking facilities*” from the bank and “*have breached these facilities and are accordingly indebted*” to the bank in the amount of R89 288 264 together with interest thereon etc.
- 30.3 Clause 1.3 thereof, which is part of the preamble and background section of the memorandum of agreement records that, amongst others, Classco and Vaal Bricks acknowledge that they are indebted to the bank “*for the debt set out in paragraph 1.2 above, by virtue of unlimited deeds of suretyship either executed by them prior to the signature of this agreement*”

alternatively to be executed by them simultaneously with the signature of this agreement in favour” of the bank. The Vaal Bricks suretyship is the only one which was executed prior to the memorandum of agreement. The Classco suretyship was executed on the same day as the memorandum of agreement.

30.4 The Classco suretyship upon which the bank relies was signed on 3 September 2012 – the same date that the memorandum of agreement was signed by Freitas for and on behalf of himself and the other entities. It is the same suretyship which is referred to in clause 1.3.5 of the memorandum of agreement which memorandum of agreement the bank did not conclude. It was given to secure the debts contemplated in the memorandum of agreement.

30.5 Clause 6 of the memorandum of agreement deals with the rights of the bank in the event of its breach. It provides that in the event of a breach, the bank shall have the right to apply for liquidation of any of the debtors, including Classco. Clause 6.3 provides that it is “*recorded, by the parties*” that in the exercise of the bank’s rights in terms of clause 6, “*this agreement and certificates of balance..., shall be prima facie proof of the contents for purpose of any judgment or order.*”

31 In paragraphs 53, 54 and 55 of its founding affidavit, the bank relies on certificates of balance to prove what it says is owed to it by Classco. This is despite the fact that the bank did not conclude the memorandum of agreement

which makes provision for the use of certificates of balance to prove indebtedness.

- 32 In my view, insofar as the bank did not conclude the memorandum of agreement which makes provision for the use of certificates of balance, it follows that there is no agreement between the bank and the parties to the memorandum of agreement that the bank could rely on certificates of indebtedness signed by its managers as proof of indebtedness for purposes of the relief which it seeks in this application.
- 33 The position would obviously have been different if both parties had concluded the memorandum of agreement. The bank cannot rely on the certificates of balance or indebtedness to prove Classco's indebtedness to it due to the fact that there is no agreement to use such an instrument for such a purpose. The certificate of indebtedness contemplated in clause 19 of the Classco deed of suretyship itself can only be in relation to the debts contemplated in the memorandum of agreement which would have been proved by a certificate of balance if that agreement had been concluded by both parties.
- 34 Clause 6.3 of the memorandum of agreement provides that the memorandum of agreement would be of no force and effect if it is not executed before 17h00 on 5 September 2012. This being the case, it follows that the memorandum of agreement is of no force and effect and the contents thereof cannot be relied upon in support of the relief which the bank seeks in this application due to the fact that the bank did not conclude it.

35 In paragraph 43 of its founding affidavit, the bank says that Freitas signed the memorandum of agreement on his behalf and on behalf of the other entities “*as a sign of his commitment in resolving the matter.*” On the other hand, in its answering affidavit, Classco says the following about why it signed the memorandum of agreement ~

“36 *I signed the documents within the pack on the understanding between me and the representatives of the applicant that my signature would constitute an offer made by the various entities referred to in the memorandum of agreement (including the respondent) to the applicant in settlement of the indebtedness of the debtors (as defined in the agreement) to the bank.*

37 *I interpose to say that Classco did not have an account with the applicant... but for the proposed settlement the applicant would never have a claim against Classco.*

38 *It was the common intention of the representatives of the applicant and I that my signature on the Classco suretyship, which was furnished to the applicant simultaneously with the memorandum of agreement would constitute ~*

38.1 *an offer made by Classco to bind itself as surety for the obligations of Marnic Developments to the applicants; and*

38.2 *that the suretyship would relate to the debt recorded in the memorandum of agreement.*

...

40. *It is common cause that the applicant did not accept the offer made by the debtors to it, and accordingly no agreement was concluded between the parties. It follows that the Classco suretyship which was given for the specific purpose of the settlement, is unenforceable.*

41 *the applicant did thus not accept the Classco's offer to bind itself as surety for the debts circumscribed in the memorandum of agreement. Accordingly no deed of suretyship was concluded between the parties and/or executed by Classco in favour of the applicant.” (my emphasis).*

36 It is clear from the above that the reason for the signing of the memorandum of agreement by Freitas is not common cause between the parties. The bank says that Freitas signed the memorandum of agreement “*as a sign of his commitment in resolving the matter*” whereas Freitas himself says that he was making an offer “*to the applicant in settlement of the indebtedness*” which offer had to be accepted by the bank failing which it would fall away. It is so that clause 6.4 of the memorandum of agreement provides that it had to be executed before 17h00 on 5 September 2012 failing which “*this agreement will be of no force and effect.*”

- 37 In the premises, without the memorandum of agreement having been executed or accepted by the bank, the bank cannot rely on it in support of this application. Even if I am wrong on this issue, on both versions, neither the bank nor Freitas intended that the memorandum of agreement would constitute a legally binding agreement unless signed by both parties. The bank even considered it to be a “*sign of commitment*” which is far less than an offer of settlement which Freitas considered it to be, the acceptance of which by the bank would have resulted in a legally binding and enforceable agreement between the parties.
- 38 As far as the Classco suretyship itself is concerned, Freitas says that it was intended to secure Marnic Developments’ debts to the bank and not those of Vaal Bricks. To the extent that it refers to Vaal Bricks, Freitas says that it ought to be rectified. This means that, according to Freitas, the common intention of the parties was not correctly recorded in the Classco deed of suretyship. Freitas’ version in this regard is supported by clause 1.3.5 of the memorandum of agreement which contemplates Classco executing a deed of suretyship in favour of Marnic Developments and not in favour of Vaal Bricks. The bank denies Freitas’ version. As a result, it is not common cause that the Classco suretyship was intended to cover the Vaal Bricks debts due to the fact that Freitas says that a reference to Vaal Bricks in it is wrong and ought to be rectified. This is not a dispute which I can resolve on the papers before me. In addition, Classco does not in any event seek an order to rectify the deed of suretyship.
- 39 In addition, Freitas says that the Classco suretyship relates to the debts contemplated in the memorandum of agreement. The bank vehemently denies

this. The bank, however, has not produced any evidence to show any other basis on which or the purpose for which the Classco suretyship was executed than the debts contemplated in the memorandum of agreement.

- 40 In paragraph 59 of its replying affidavit, the bank gives a different purpose for the memorandum of agreement. It says that “*the agreement is an acknowledgement of indebtedness arising from the Marnic Developments facility and the fraudulent conduct.*” It further says that “*the September agreement serves to confirm the acknowledgement of indebtedness by Freitas on behalf of Classco.*”
- 41 Of importance, the bank denies that it would not have a claim against Classco without the memorandum of agreement. In this regard, the bank, however, does not explain as to why the first time in the chronological sequence of events reference is made to the Classco suretyship is in the September agreement and why the suretyship was executed on the very same day that the September agreement was signed by Freitas if there is no relationship between the two.
- 42 In my view, there are material disputes of fact between the parties and this is not a dispute which can be resolved on the papers before me. These proceedings, being motion proceedings, are clearly not designed to resolve disputes such as the disputes which I have outlined above.

43 In National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) the Court restated the legal position as far as motion proceedings and disputes of fact are concerned as follows ~

“[26] *Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavit, a final order can be granted only if the facts averred in the applicant’s ... affidavits, which have been admitted by the respondent..., together with the facts alleged by the latter, justify such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is culpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers. The Court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP’s version.*”

44 In further support of its contention that Classco is liable to it as a result of the alleged fraud, the bank criticizes Freitas for not explaining the role of Classco in the kite flying activities. In this regard, the bank seeks to suggest, in paragraph 60 of its replying affidavit that there was a duty upon Freitas to explain the role of Classco in the kite flying activities and the benefits that Classco had from the

fraudulent conduct. There was no such duty upon Freitas to explain the alleged role of Classco in the alleged kite flying activities. It is the bank which had to place common cause facts before the Court on the basis of which it says it is in law entitled to the relief which it seeks. It failed to do so.

The allegations of fraud

45 As I have stated above, the bank relies on allegations of fraud allegedly committed by Freitas and others for various conclusions, amongst others, that Classco is insolvent, that Classco is unable to pay its debts and that it would be just and equitable to liquidate Classco.

46 The alleged fraud upon which the bank relies is what is referred to in the founding affidavit as “*kiting*”, “*kite flying*” or “*cross firing*” allegedly perpetrated by Freitas, Borrageiro, Concalves and Fernandes. None of these people are before me in this application and a finding to the effect that they participated in “*kite flying*” would have a negative impact upon them without them having been heard.

47 The “*kite flying*” activity is described in paragraphs 22 and 32 of the bank’s founding affidavit as follows ~

“22 “*Kiting*”, “*kite flying*” or “*cross firing*” are terms used to denote a *specific type of fraud* whereby cash is recorded in more than one bank account, however, in reality the cash is either non-existent or in

transit. “Kiting”, “kite flying” or “cross firing” is committed between multiple bank accounts either within the same bank or across various banks.

...

32 *The conduct of Freitas in regard to the accounts within the Freitas Group constitutes a classic example of “kiting”, “kite flying” or “cross firing”, in terms of which false and fraudulent transactions are created for two reasons – firstly, a false increase of turnover on the relevant accounts are thereby created demonstrating active trading and flow of funds and secondly, to syphon of funds to which there is no entitlement. It effectively created false credits which could be utilised by Freitas and the entities.” (my emphasis).*

48 In paragraphs 28 to 30 of Classco’s answering affidavit, Freitas denies involvement in kite flying and alleges that he explained to the bank’s representatives in December 2011 when they raised the issue that there was possible wrongdoing on his part and on the part of the Freitas Group of Companies. In this regard, Freitas says that he explained that the entities in issue “*had loan accounts between them which necessitated movement of funds between these entities*” and that the bank’s representatives did not complain about this movement of funds until March and July 2013. Freitas therefore suggests that the bank was fully aware of the movement of funds between the relevant entities and the reason for it or purpose thereof. The bank, however,

denies this version in its replying affidavit but says the following in paragraph 32 thereof ~

“32 *I deny that any “cash management scheme” was implemented or that it was agreed to by the applicant. Booth and Scrace confirmed that they were not aware of such a scheme and certainly that such a scheme could only be implemented and operated if there was a written agreement in place...*” (my emphasis).

49 It is important to note that the bank does not say that the cash management scheme as described by Freitas is *per se* unlawful. It says that the cash management scheme as described by Freitas could only be “*implemented and operated*” if there was a written agreement in place. It is not possible to determine on the papers before me if the bank’s representatives knew about the cash management scheme or if they condoned it as suggested by Freitas. It is therefore not possible to conclude that fraud has been committed and that such justifies the conclusions which the bank seeks to draw.

50 In Gates v Gates 1939 AD 150 at 155 it was held that ~

“It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the “clearest” evidence or “clear and satisfactory” evidence or “clear and convincing” evidence or some similar phrase.”

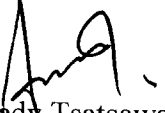
51 The contents of Jelal's report and the different versions in the papers before me do not constitute the clearest evidence of fraud having been committed by Freitas and the other individuals. I also cannot arrive at that conclusion without the alleged perpetrators being before me in this application and without them having been given an opportunity to respond to the fraud allegations made against them.

52 It was also contended on behalf of Classco that the suretyship upon which the bank relies does not comply with section 45 of the Companies Act, 2008 and that for this reason, it is unenforceable against Classco to entitle the bank to rely on it for purposes of the relief which it seeks in this application. In the view which I have taken above, it is not necessary to consider the merits of this defence.

53 In the premises, the following order is made ~

53.1 The provisional liquidation order is set aside.

53.2 The application is dismissed with costs.


Kennedy Tsatsawane

Acting Judge of the Gauteng Division of the High Court of South Africa.

For the applicant: JE Smit

Werksmans, Johannesburg c/o Serfontein Viljoen and Swart,
Pretoria.

For the respondent: AB Rossouw SC

Afzal Lahree Attorneys, Johannesburg