IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 328/2015

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Plaintiff

And

JAKOBIE ALBERTINA HERSELMAN Defendant

HEARD ON: 9th, 10th and 18 FEBRUARY 2016

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 3 MARCH 2016

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[1] The plaintiff instituted action against the defendant on the basis of a Deed of Suretyship (Annexure A to the Summons) in terms of which she guaranteed payment, when due, of all present and future debts of whatever kind owing by her husband, Jacobus Nicolaas Herselman (the principal debtor) to the plaintiff Bank.

[2] In its summons the plaintiff claimed payment of R6 961, 138.07 interest and costs on the attorney and scale arising out of the non-payment of various loan amounts granted to her husband, comprising, *inter alia*, vehicle asset finance, overdraft facilities and mortgage loans. In support of its claim, the plaintiff annexed

certificates of balance as annexures B1 – B9 to the summons, which reflected the sum due on the various accounts as at date of the institution of the action.

[3] The certificates were annexed pursuant to the plaintiff's reliance on clause 13 of the Deed of Suretyship which provides:

> "A certificate signed by one of the Banks Managers, will on its mere production be sufficient proof of any amount due … unless the contrary is proved."

[4] As its only witness the plaintiff called Johanna Magrieta Greyling, in her capacity as manager: Business Support Rescue and Recoveries, Personal and Business Banking Credit, a division of The Standard Bank of South Africa, who signed the certificates of balance annexed to the summons. She testified that, as at 8 February 2016 the outstanding balance due to the plaintiff by the principal debtor, was R1770 806.67 because the plaintiff had written off the shortfall on the vehicle asset finance accounts and had received dividends from the trustees of the insolvent estate of the principal debtor on proof of the plaintiff's claims against the insolvent estate. She handed in a certificate of balance confirming the amount due, as well as a letter from the trustees confirming that no further dividends would be paid to the plaintiff from the insolvent estate.

[5] In its plea, the defendant placed the validity of the Deed of Suretyship in issue, alleging a misrepresentation by the plaintiff that the defendant's liability as surety would be limited to two term loans granted to the principal debtor for the purchase of 2 farms. In addition the defendant raised a special plea that plaintiff had granted credit recklessly, without first ascertaining whether the defendant had the financial means to honour her indebtedness in terms of the suretyship agreement, if called upon to do so, in compliance with section 80 of the National Credit Act 34/2005.

[6] Although Mr. Marais, who appeared on behalf of the defendant, challenged the evidence of the amount due to the plaintiff in cross examination of Ms Greyling, no contrary evidence was placed before court by the defendant when she testified, to seriously dispute Ms. Greylings testimony. It was also not disputed by the defendant that she had received notice in terms of section 129 of the National Credit Act 34/2005 of the principal debtor's failure to pay and plaintiff's demand that she honour the suretyship undertaking.

[7] When she testified the defendant admitted having signed the Deed of Suretyship but alleged that she was under the impression that she was guaranteeing payment only in respect of the two medium term loans which plaintiff had granted to her husband for the purchase of 2 farms. She told the court the farms were to be purchased from her sister for R2 million. She testified that at the time she signed the Deed of Suretyship she was unemployed.

She also admitted having signed a form entitled “Financial Assessment for Sureties” which she said was handed to her for signature by a Bank employee, one Cathy, who placed both the Deed of Suretyship as well as the Financial Assessment Form (handed in at the trial as Exh “E”) before her. She conceded under cross examination by Mr Zietsman, for the plaintiff, that she had furnished to the Bank the details on Exhib E relating to her assets and liabilities. Exhibit E reflects that the defendant had assets totalling R1, 938.70 and no liabilities. It also contains the following declaration:

> “I hereby confirm that the information provided is accurate and a true reflection of my financial position. I am not under, nor have I applied to be placed under, administration order, sequestration or Debt Review, as at the date of signature of this document by me.”

At no stage did the defendant challenge in evidence any aspect of this declaration. All she did do was to emphasize to the court that the form was just placed before her without any explanation and that she was requested to sign it.

[8] Under cross examination by Mr. Zietsman, the defendant admitted that the Deed of Suretyship in clause 16 conveyed that the Bank had explained its contents to her, that her liability in terms thereof was predetermined whether or not the suretyship was limited or unlimited, and in the full knowledge of its terms she had signed as surety. She insisted, however, that despite the

clear and unambiguous language of the terms recorded in the Deed of Suretyship, she was, in fact, unaware, of its precise terms because the contents of the document had not in fact been explained to her. The document was merely placed before her for signature and she signed it.

[9] Mr Marais, in leading the defendant, attempted to place on record evidence from the defendant of the alleged misrepresentation relating to the ambit of the liability covered by the Deed of Suretyship but was met with an objection from Mr. Zietsman that such conflicting evidence could not be led because the defendant had failed to plead a rectification of the Deed of Suretyship and had failed to counter claim for such rectification in the specific fashion defendant alleges the terms of the suretyship had been agreed between herself and the plaintiff. That being the case, he argued, the defendant was prevented from placing evidence of a different contract before the court by the combined effect of the parol evidence rule and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract.

[10] In view of the fact that rectification is essential before a version of an agreement directly contradictory to that embodied in a written document, is admitted as evidencing the true version of the contract agreed between the parties, the objection was sustained. The defendant sought to attack the validity of the Deed of Suretyship without properly pleading its illegality and the grounds upon which such illegality was based preparatory to seeking a

claim for the rectification of the suretyship agreement. This the defendant is not entitled to do. The upshot of all of this is simply that, in the absence of a rectification of the suretyship agreement, the unrectified contract stands as evidence of the true agreement between the parties. The onus is on the defendant as the party attacking the validity of the contract, to plead and prove that the said suretyship contract inaccurately represents the agreement between the parties as the basis for that invalidity. The defendant has not done so and consequently her defence relating to being bound as surety only to the extent of monies due to the Bank in respect of loans advanced for the purchase of the 2 farms must fail and the parties must be held to have agreed on an unlimited suretyship undertaking by the defendant in favour of the Plaintiff Bank:

See: Christie The Law of Contract in South Africa 6th Edition page 343 et sequor.

[11] I turn now to deal with the defendant's defence that reckless credit was granted by the plaintiff. It was accepted by both parties that a surety must, from his/her own financial resources, be in a position to repay the indebtedness of the principal debtor. It was also accepted by both parties that the surety only comes into the picture when the principal debtor fails to honour his obligations and that in this sense the surety's obligations/indebtedness to the Bank is accessory in nature. I have also accepted that, at the time of negotiating the contract of suretyship it was in the contemplation of both plaintiff and

defendant that the defendant was not undertaking a primary obligation as the Bank would first look to the principal debtor for payment. It was thus common cause between the parties that the defendant was being sued in this matter as a credit guarantor and that a Deed of Suretyship falls into that category of credit agreement described as a credit guarantee within the meaning of the provisions of section 8 (5) of the National Credit Act 34/2005. It was also not disputed that the defendant, as a surety in terms of a credit guarantee fell within the definition of a consumer in section 1 of that Act and that a creditor, in this case the plaintiff, must comply with the affordability assessment criteria laid down in the National Credit Act 34/2005 and the regulations framed thereunder prior to determining whether to grant credit to a consumer. The plaintiff was thus obliged to conduct an affordability assessment in the case of the defendant to establish her ability to honour the suretyship undertaking.

[12] In terms of section 82 of the National Credit Act 34/2005, the plaintiff was entitled to choose its own evaluative mechanisms and procedures to be used in carrying out the assessment provided such mechanisms resulted in a fair and objective assessment of the defendant's affordability. I have difficulty in accepting Mr. Marai's submission that Exh E (the financial assessment form for sureties) failed this litmus test. From Exh E the plaintiff was able to determine the following information as to the defendant's financial position:

(a) She had no debt

(b) She owned assets valued at approx. R2 million

(c) She had no credit agreements history, having not applied for any credit in her name in the past;

(d) She had never been sequestrated, or placed under administration order or debt review.

(e) From this credit record she appeared to be a person who would honour her obligations as surety for the principal debtor, having furnished all the relevant information requested by the Bank.

(f) As at the date of the signature of the Deed of Suretyship, i.e. 1 October 2010, the principal debtor's debt consisted in the loans granted for the purchase of the 2 farms for R2 million and the value of the defendant's assets covered this loan amount.

[13] When one adds to this list of favourable factors the absence of any gainsaying evidence from the defendant that she understood the risk she was undertaking in signing as a guarantor for her husband's debts with the Bank, only one conclusion is possible and that is, that having objectively and fairly assessed the defendant to be a person of sound credit worthiness and capable of honouring her husband's indebtedness to the plaintiff, if called upon to do so, the Bank awarded the credit after obtaining the signed Deed of Suretyship from the defendant. I find therefore that the defendant's defence of reckless credit is without substance and merit. There will accordingly be judgment for the plaintiff as follows:

(1) Payment in the amount of R1,770 806.67

(2) Interest on the aforesaid amount at the rate of 13,5% per annum calculated from 1 February 2016 to date of payment, both days inclusive;

(3) Costs of suit on the scale of attorney and own client in accordance with clause 6.2 of the Deed of Suretyship.

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S. EBRAHIM, J

On behalf of plaintiff:	P. Zietsmn S.C. Instructed by: Matsepes Inc. Bloemfontein
On behalf of defendant:	Mr. A.S. Marais Instructed by: HW Smith & Marais Attorneys c/o Eugene Venter Attorneys Bloemfontein

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