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

Case number: 1076/2014

In the matter between:

STANDARD CHARTERED BANK	**Applicant**
and	
BAREND CHRISTIAAN GREYLING GROBLER	**Respondent**

CORAM:	**NAIDOO, J**
HEARD ON:	**25 JUNE 2015**
JUDGMENT BY:	**NAIDOO, J**
DELIVERED ON:	**12 NOVEMBER 2015**

[1] The applicant seeks an order against the respondent for payment of the sum of (Fifty Million Three Hundred and Forty Eight Thousand and Thirty Six Rand and Thirty Nine Cents (R50 348 036.39), together with interest thereon, and costs. The applicant was represented by Mr KW Luderitz and the respondent was represented by Mr AJR Van Rhyn in this court.

[2] The applicant and an entity known as Zesto Grondbone CC (Zesto) entered into a loan facility agreement on 11 September

2009, in order to fund Zesto's business activities, which essentially involved the purchase and disposal of groundnuts. The loan facility enabled Zesto to draw loans from time to time to purchase groundnuts and required that Zesto repay each such loan within 270 days. The intention was to allow Zesto sufficient time to purchase and dispose of the groundnuts so that the loan could be repaid from the proceeds of the sale. Zesto drew loans against the facility in 2009 and 2010, but at some stage defaulted in the repayments. Thereafter the parties entered into a further agreement in January 2012, which has been referred to in the papers as a "term loan". For convenience, I will do the same. The purpose of the term loan was to reschedule the amounts that were due by Zesto, but which were unpaid in terms of the loan facility agreement. The term loan was subject to a number of terms and conditions. The applicant obtained additional security for Zesto's debt by way of a personal guarantee from the respondent, which was signed by the respondent on 11 January 2012, which I will deal with later.

[3] Ultimately Zesto defaulted in repayments in respect of the term loan as well and the applicant, by way of a written notice, accelerated the loan under the Facility Agreement as well as the Term Loan, and declared the full amount in respect of both loans immediately due and payable. The total amount due to the applicant in respect of both loans as at 31 August 2013 was Fifty Million Three Hundred and Forty Eight Thousand and Thirty Six Rand and Thirty Nine Cents (R50 348 036.39).The applicant at some stage also brought an application for the liquidation of Zesto, which was finally liquidated in April 2013.

[4] After the respondent failed to respond to the applicant's written demand for payment, the applicant launched this application. The respondent raised a number of defences in his answering affidavit, upon which he based his assertion that the applicant was not entitled to the relief it seeks. He indicates that Zesto issued summons against the applicant for damages it suffered as a result of its stock of groundnuts and maize being damaged by water. The allegation is that there was an oral agreement between Zesto and the applicant, in terms of which the latter was to insure such stock against such damage while the stock was stored at Zesto's premises, which it failed to do. The insurer repudiated the claim resulting in the damages which Zesto suffered. The respondent alleges that if the amount of Zesto's damages and the penalty interest claimed by the applicant are deducted from its claim, then Zesto would only owe the applicant an amount of Thirty Nine Million One Hundred and Ninety Nine Thousand Four Hundred and Sixty Seven Rand (R39 199 467.00).

[5] The respondent also alleges that Zesto entered into a collateral management agreement with the applicant and Global Inspection Collateral Control (GICC), an entity conducting business as an independent warehouseman who provided collateral management services in respect of stock/goods stored at Zesto's premises which stock/goods were pledged to the applicant. The respondent alleges that GICC failed to secure its premises, contrary to instructions, resulting in a shortfall in its stock of groundnuts, destined for Zesto's customers, and further financial loss to Zesto. There are a number of other aspects raised by the respondent, but I mention two of those. Firstly the respondent

asserts that Zesto was finally liquidated on 25 April 2013 but ceased trading in July 2013. The applicant should have lodged its claim against Zesto with the liquidators and proved its claim and, I understand him to say, that only thereafter proceed against the respondent for those amounts or, alternatively, for those amounts which cannot be recovered from Zesto. The second aspect is the respondent's assertion that while a special notarial bond was registered the applicant failed to register a second covering mortgage bond for Twenty Million Rand (R20 million) over a property described as "Billersbekhoek" in the Facility Letter relating to the Term Loan under the heading "Limited Terms and Conditions". If the applicant had done so, his liability as guarantor would have been diminished by that amount.

[6] The applicant, in Reply, denied that it was liable for any damages suffered by Zesto as a result of the water damage to its stock. The applicant agreed that there was a collateral management agreement with GICC but asserts that Zesto retained control, management and disposal of stock. In addition to the collateral management agreement, the applicant and Zesto concluded a custody agreement (which was attached to the Replying Affidavit) in terms of which Zesto was required to procure the storage of the stock (Relevant Commodities) "without any damage to or loss of the Relevant Commodity" The applicant also dealt with the valuation of the Zesto's peanut factory and equipment over which it held a notarial bond as well as the disposition of stock by (presumably) the respondent, thus diminishing the applicant's security. With regard to the second covering mortgage bond, the appellant asserts that it was thwarted in the registration of the bond by the non-co-operation of the respondent in furnishing it with the relevant information and documentation for the registration of the

bond. The applicant also points out that the guarantee signed by the respondent in any event binds him as a principal debtor, and it is not open to him to contend that the applicant must first prove a claim and recover monies from the insolvent estate of Zesto before proceeding against him. It is common cause that payments in respect of the two loans continued until June 2013.

[7] In his Heads of Argument, Mr Van Rhyn, on behalf of the respondent, takes the point that the registration of a second covering bond over the farm Billersbekhoek was a condition precedent to the operation of the contract. The non-registration of the bond therefore meant that a condition precedent was not fulfilled and had the consequence that no agreement came into being between Zesto and the applicant, thus suspending the obligation of the surety. He further alleged that even though the respondent bound himself to a fixed amount, it is necessary to ascertain the amount of the principal debtor's indebtedness. The creditor bears the onus to establish the debt he claims and in this case the applicant has failed to do so. It was also Mr Van Rhyn's argument that the applicant ought to have issued summons against the respondent and not have proceeded by way of motion proceedings. There are factual disputes in this matter which call for the court to exercise its discretion and dismiss the application with costs.

[8] It is common cause that the respondent signed the Personal Guarantee in which he bound himself, inter alia, as a co-principal debtor with Zesto. The respondent guaranteed, irrevocably and unconditionally, as the principal obligor, the due and punctual performance of the Borrower's (Zesto's) obligations to the applicant as they fell due. In terms of clause 2 of the Guarantee,

the respondent's obligation as guarantor was a principal obligation and not an accessory obligation only. In order to properly contexualise the matter it is useful at this stage to set out the provisions of Clauses 3.3 and 3.4 of the Personal Guarantee:

"3.3 Waiver of defences

The Guarantor's obligations and the Bank's rights under this Guarantee will not be affected by an act or omission which, would reduce, release or prejudice any of the Guarantor's obligations under this Guarantee (whether or not known to the Guarantor or the Bank). These include:

(a) the existence of any claim of set-off or other rights which the Guarantor may have against the Borrower, the Bank or any other person or which the Borrower may have at any time against the Bank;

(b) the Bank's grant to the Borrower of any other credit facilities or the withdrawal or the restriction by the Bank of any credit facilities or the failure to notify the Guarantor of any such granting, withdrawal or restriction;

(c) any time, waiver or consent granted to, or composition with, the Borrower or any other person;

(d) the taking, amendment, compromise, exchange, renewal or release of, or failure to perfect, take up or enforce any rights against or security over assets of, the Borrower or any other person or any non-presentation or non-observance of any formality or other requirements in respect of any instrument or any failure to realise the full value of any security;

(e) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of the Borrower or any other person;

(f) any amendment (however fundamental), increase in, waiver, release or replacement of any agreement, document or security;

(g) any unenforceability, illegality or invalidity of any obligation of any person under any agreement, document or security;

(h) any insolvency or reorganisation or similar proceedings of the Borrower;

(i) any variation, renewal, increase, extension, compromise, discharge, dealing with, exchange or renewal of any right or remedy which the Bank may have now or after the date of this Guarantee against the

Borrower or any other person; or

(j) any change in the constitution (whether by amalgamation, merger, reconstruction or otherwise) or ownership of the Borrower or the bank or any other person.

3.4 Immediate Recourse

The Guarantor waives any right it may have of first requiring the Bank (or any trustee or agent on its behalf) to:

(a) proceed against any person;

(b) enforce any other rights or security; or

(c) claim any payment from any person,

before claiming from the Guarantor under this Guarantee"

[9] The respondent admits in his answering affidavit that Zesto is indebted to the applicant, in an amount, according to him, of R47 667 723. Apart from asserting that if the applicant had registered the second covering mortgage bond referred to earlier, his liability to the applicant would have been reduced by R20 000 000.00, the respondent does not attack, in the papers, the validity of the agreements entered into between the applicant and Zesto. This attack comes rather belatedly in the respondent's Heads of Argument, and was not part of the case to which the applicant had to reply. It is instructive to note that the First Schedule to the Facility Letter (in respect of the term loan) is headed "Conditions Precedent" and lists a number of conditions therein but makes no mention of the second covering mortgage bond. The Second Schedule to the Facility Letter is headed "Approved Security" and therein is listed the registration of the second covering mortgage bond over the farm Billersbekhoek. The Fifth Schedule, under the heading "Limit Terms and Conditions", item 4 (there is no item 2 under this heading) also lists the second covering mortgage bond

mentioned in Second Schedule. Neither the Second nor the Fifth Schedule specifies a time by which the said bond was to be registered nor is registration of the bond listed as a condition precedent, given that the First Schedule specifically provides for conditions precedent.

[10] Neither counsel indicated how the listing in the Fifth Schedule is to be interpreted. Mr Luderitz did however deal, in his Supplementary Heads of Argument, with Mr Van Rhyn's contention that registration of the second covering mortgage bond is a condition precedent, the failure to register which prevented the coming into operation of the contract between the applicant and Zesto. I agree with Mr Luderitz's submission that a proper reading of clause 3.1 of the Facility letter in respect of the term loan does not lend itself to the interpretation that registration of the second covering bond is a condition precedent to the operation of the agreement. In my view, it could very well be interpreted to be a term of the agreement, which should have been complied with, but non-compliance of which did not affect the validity of the contract. I am unable, therefore, to agree with the respondent's reasoning that the registration of the covering bond was a condition precedent. This argument appears to be an afterthought and cannot be sustained. At best, the applicant may be said to have been remiss in not pursuing the registration of its security with a little more vigour, after it was faced with the dilatory conduct, on the respondent's part, that it complains of. In my view, this does not create a factual dispute which affects the liability of the respondent to pay the debt, as undertaken by him.

[11] The respondent also raises, only in his Heads of Argument, the issue of the late filing of the Replying Affidavit, leaving the

applicant with no case, on the papers, to respond to in this regard. The applicant's attorney, therefore, saw fit to file an affidavit regarding the acceptance by the respondent's attorney of the replying affidavit, without any challenge to the fact that it was filed out of the time allowed in the Rules of Court. This is a most unsatisfactory way to conduct litigation and is akin to litigation by ambush. In any event, to the extent necessary, I condone such late filing of the Replying Affidavit.

[12] As alluded to, the respondent bound himself as a "principal obligor", in other words as a surety and co-principal debtor for the performance of Zesto's obligations to the applicant. A person who has bound himself as surety and co-principal debtor incurs equal obligations to that of the principal debtor and is liable with him jointly and severally. The obligation of the surety and co-principal debtor is enforceable at the same time as that of the principal debtor. In **Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978(1) SA 463 (A)**, the Appellate Division held that generally the only consequence that flows from the surety also undertaking liability as a co-principal debtor is that vis-à-vis the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division. (See also **Caney's "The Law of Suretyship p56-57**). Clauses 3.3 and 3.4 of the Personal Guarantee, which I have set out above exclude each of the defences that the respondent now seeks to raise. In my view such aspects as he purports to raise as factual disputes are not material to the claim of the applicant.

[12] In addition, the respondent agreed to be bound by the production of a certificate of balance as prima facie proof of the amount owed by him. The applicant did in fact furnish such a certificate of

balance, signed by a functionary of the applicant who was authorised to do so. The argument that the applicant must prove its claim and show how the amount of its claim is made up will not avail the respondent.

ORDER

[13] In the circumstances, I make the following order:

13.1 The respondent is ordered to pay to the applicant the amount of Fifty Million Three Hundred and Forty Eight Thousand and Thirty Six Rand and Thirty Nine Cents (R50 348 036,39);

13,2 Interest thereon from 31 August 2013 to date of payment;

13.3 Costs of suit, such costs to include the costs of Senior Counsel.

NAIDOO, J

On behalf of Applicant:	Adv KW Luderitz SC
Instructed by:	Norton Rose Fullbright
	C/O Webbers Attorneys
	96 Charles Street
	BLOEMFONTEIN
	(Ref: Mr Koller)

On behalf of Defendant :	Adv Van Rhyn SC
Instructed by:	Matsepes Incorporated
	26/28 Aliwal Street
	BLOEMFONTEIN
	(Ref: Senekal/ja/GRO80/0001)