IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case number: 34107/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

28/8/2013

DATE SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
JUDGE'S SECRETARY
2013 -08- 28
REGTERS KLERK
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

FIRSTRANDBANK LTD t/a RMB PRIVATE BANK	**PLAINTIFF**

and

ALBERT MARTHINUS VAN ZIJL	**1ST DEFENDANT**
STEYN POTGIETER	**2ND DEFENDANT**
JACOBUS DANIEL PIENAAR	**3RD DEFENDANT**
EDWARD CHURCHILL ORSMOND	**4TH DEFENDANT**
MARTHINUS JOHANNES MILLARD	**5TH DEFENDANT**
JACOBUS HENDRIK DE JAGER	**6TH DEFENDANT**
WILLEM CALVYN BOTHA	**7TH DEFENDANT**
BLUEVEST (PTY) LTD	**8TH DEFENDANT**

Date heard: 26 August 2013

Date of judgment: 28 August 2013

JUDGMENT

VAN NIEKERK J

[1] The plaintiff seeks summary judgment against the first and third to eighth defendants ('the defendants'), jointly and severally, for payment in the amount of R 7 319 149.31 plus interest at 10.50% from 3 April 2013 until date of payment. The plaintiff's claim against the defendants is based on deeds of suretyship that the plaintiff avers were provided by the defendants in favour of the plaintiff to secure the indebtedness of Amber Falcon Properties 127 (Pty) Ltd ('the principal debtor').

[2] The plaintiff's cause of action is set out in the simple summons in terms of which it initiated proceedings against the defendants on 31 May 2013. The summons makes reference to a 'single credit facility agreement' entered into between the plaintiff and the principal debtor, signed on 10 September 2010. A copy of the agreement is annexed to the summons. The plaintiff avers that the defendants are liable by virtue of the single credit facility agreement, suretyship agreements signed by each of the defendants and certificates of indebtedness, also annexed to the summons.

[3] Each of the defendants signed, as an integral part of the agreement concluded between the plaintiff and the principal debtor on 10 September 2010, what is termed a 'surety consent'. The consent, contained in an unnumbered paragraph at the foot of the agreement, reads as follows:

> 'We, the undersigned, being duly authorised, hereby acknowledge and agree that our obligations in terms of the suretyship agreement dated 7 August 2008, 6

> August 2008, 6 August 2008, 7 August 2008, 6 August 2008, 12 August 2008, 6 September 2008, 6 September 2008 and 6 August 2008 respectively shall extend to this RMB Private Bank Single Facility.
>
> This acknowledgment shall not be construed as substituting, varying or novating any of our existing obligations in terms of the suretyship agreement save as provided for in this letter.'

[4] The deeds of suretyship annexed to the summons are cast in identical terms; all of them signed in mid-April 2010. In each case, the defendant concerned binds himself as surety for the principal debtor, in favour of the plaintiff. The suretyship is not unlimited. Clause 24 of each deed of suretyship reads as follows:

> 'Our liability in terms of the Suretyship shall be limited to the payment of all sums due or to become due to RMB Private Bank by the Debtor in terms of or arising out of the RMB Private Bank Single Credit Facility dated 12 April 2010 notwithstanding anything to the contrary contained in this suretyship.'

[5] In the present proceedings, the plaintiff relies specifically on clause 4.1 of the agreement signed on 10 September 2010. The clause reads as follows:

> 'We confirm that all security provided to us for the Single Credit Facility (Mortgage Redemption) accepted by Amber Falcon Properties 127 (Pty) on 15 April 2010, as well as all variations to such security, shall continue to remain in force as continuing covering security for this facility.'

[6] Summary judgment is a remedy that lies within the discretion of the court. At issue in the present instance is whether the extent of any liability that the defendants might have incurred is reasonably capable of being inferred from the summons. *Ex facie* the summons, the plaintiff's cause of action is based on the single credit facility agreement signed on 10 September 2010 and the suretyship agreements signed by the defendants in April 2010. The 'single credit facility (mortgage redemption) agreement' referred to in clause 4.1 of the 10 September 2010 agreement is not before the court. No such description (in the form of a 'single credit facility (mortgage redemption)' appears in any of the deeds of

suretyship signed by the defendants. The reference in clause 1.1 of each of the suretyship agreements is to a 'single credit facility loan' entered into or about to be entered into between the plaintiff and the principal debtor. In the certificates of indebtedness (contended to be *prima facie* evidence of the amounts alleged to be owing by the defendants) no mention is made of the 'single credit facility agreement' pleaded by the plaintiff – the certificate refers to a 'loan agreement' accepted by the principal debtor as well as a 'subsequent variation agreement accepted on 10 September 2010'.

[7] The deeds of suretyship signed by the defendants in April 2010 were specifically limited to all sums due by the principal debtor arising out of a single credit facility agreement dated 12 April 2010. This is clearly not the agreement on which the plaintiff relies in its claim against the principal debtor. It is not apparent from the papers before me whether the agreement even came into existence. In these circumstances, the defendants (as sureties) would never have become indebted to the plaintiff.

[8] In so far as the plaintiff relies primarily on clause 4.1 of the 10 September 2010 agreement to establish the defendants' liability, the wording of the consent concerned refers to the security provided for the single credit facility (mortgage redemption) accepted by the principal debtor on 15 April 2010, 'as well as all variations to *such* security...' (own emphasis). There is also no reference to any variation to that security in the papers before me, nor are the terms of any variation referred to or annexed.

[9] In short: the relevant credit facility for which the defendants may be liable as sureties is that dated 12 April 2010. The terms of the suretyship agreements signed at that time expressly limited the liability of the defendants to sums due to the plaintiff by the principal debtor in terms of that facility. The plaintiff does not now seek to hold the principal debtor liable in terms of any agreement concluded in April 2010. The principal agreement on which the plaintiff relies is that concluded between the plaintiff and the principal debtor on 10 September 2010. To the extent that the plaintiff relies on the latter agreement to hold the

defendants liable as sureties for the principal debtor, clause 4.1 of the agreement limits the defendants' liability to security provided for a credit facility accepted by the principal debtor on 15 April 2010 and variations to that security. The plaintiff has failed for present purposes to establish the existence of that agreement or of any security or any variations to any security provided in respect of that agreement.

[10] In my view, given particularly that it is not clear which credit facility, which suretyship and what limitation is applicable, there is a reasonable possibility that an injustice may be done if summary judgment were to be granted.

I make the following order:

1. The first and third to eighth defendants are granted leave to defend the plaintiff's action.

2. The costs of the application for summary judgment are costs in the cause of the action.

ANDRÉ VAN NIEKERK

ACTING JUDGE OF THE HIGH COURT

NORTH GAUTENG DIVISION