IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 2614/2013

In the matter between:

TRADEQUICK 74 CC t/a EAST COAST MVELO AIR **Applicant**

and

GEARWISE PROPERTIES CC **First Respondent**

HARESH OUDERAJH **Second Respondent**

Order:

(a) Judgment is granted against the first and second respondents, jointly and severally,for payment of the sum of R1 379 034 together with interest thereon at the rate of 15,5% per annum from 10November 2012 to the date of payment.

(b) The respondents are ordered,jointly and severally, to pay the costs of the application.

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JUDGMENT

Delivered on:14 November 2013

PLOOS VAN AMSTEL J

[1] This is an application for judgment pursuant to a written settlement agreementand a suretyship. The settlement agreement records that the applicant had launched an application for the winding up of the first respondent, that the parties had agreed to settle the dispute between them and that the debt owing by the first respondent to the applicant in the agreed sum of R5 224034.94 would be settled as recorded therein.

[2] The agreement provides for the transfer to the applicant of six sectional title units, which would reduce the debt by an amount of R2 799500, payment to the applicant of the sum of R500 000 from the proceeds of the sale of a property owned by the first respondent, and 19 monthly instalments of R100 000 each. Clause 8.1provides that in the event of any one payment not being made on due date the balance then outstanding would become due and payable immediately.

[3] The second respondent, who signed the settlement agreement on behalf of the first respondent, bound himself in terms of the agreement as surety and co-principal debtor *in solidum* with the first respondent for the due and proper fulfilment by it of all the terms and conditions of the agreement.

[4] The sectional title units were transferred to the applicant and the sum of R500 000 was paid to it. The first four post-dated cheques where duly honoured but a cheque dated 10 November 2012 was dishonoured, as was the next one, dated 10 December 2012. Thereafter, during December 2012, the second respondent made a cash payment of R100 000 into the applicant's bank account, which left the first respondent in arrears by R100 000.In early January 2013the second respondentcontacted Mr Mallet, who deposed to the applicant's founding affidavit, and asked him not to deposit the cheque which was dated 10 January 2013. He said he would make a cash payment of R50 000, which he did.

[5] It is the applicant's case that in consequence of the failure to pay the November instalment when it was due the full outstanding balance became dueand payable immediately. The balance claimed by the applicant is the sum of R1 379 034. It contends that *mora* interest should run from 10 November 2012, which was the date on which the first cheque was dishonoured.

[6] The respondents raised a number of defences. The first was a challenge to Mr Mallet's authority to represent the applicant in the bringing of the application and to depose to the founding affidavit.

[7] Mr Mallet said in the founding affidavit that he is the sole member of the applicant and duly authorised to depose to the affidavit on its behalf. This is disputed in the respondents' answering affidavit on the basis that the deponent had no knowledge of this. At the commencement of the hearing Mr Potgieter SC, for the respondents, made an application for a supplementary affidavit by the second respondent to be handed in. This was opposed by Ms Mills for the applicant, on the basis that the affidavit was tendered at a late stage and that the contents thereof were in any event irrelevant. In the supplementary affidavit the second respondent says that it came to his knowledge `during or about 23 October 2013' that Mr Mallet is not a member of the applicant close corporation. He sayshe caused a close corporation search to be done on 24 October 2013(which was the day before the hearing) and established that the sole member of the applicant is the Mallet Family Trust, of which Mr Mallet and Yvonne Mallet are co-trustees.

[8] There was no explanation as to why the close corporation search was only done on the day before the hearing. There is also no evidence in the affidavit to suggest that the applicant's attorneys did not have the required authority to launch the application. It mayof course be said that it could not be expected of the respondents to put up such evidence as it is not within their knowledge. Uniform Rule 7(1) however provides the remedy. In terms of the rule the authority of anyone acting on behalf of a party may be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act. *In Ganes and Another v Telecom Namibia Ltd* 2004(3) SA 615 (SCA) Streicher JA said at 624:

`In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the

party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf on behalf of the respondent.'

In Eskom v Soweto City Council 1992(2) SA 703 (WLD) Flemming DJP said at 705:

> `The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If an attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved, especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's authority should be proved, the rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions'.

[9] As appears from the notice of motion the application was brought by a firm of attorneys in Durban, purporting to act on behalf of the applicant. The respondents did not challenge the attorneys' authority in terms of rule7(1), with the result that their authority to bring the application is not in issue. The deponent to the founding affidavit is a witness, who does not need to be authorised to give evidence. I accordingly refused leave for the supplementary affidavit to be received, firstly because it was tendered so late, without any explanation, and secondlybecause its contents appeared to me to be irrelevant. If the respondents wanted to challenge the authority of the attorneys they should have employed the provisions of rule7(1).

[10] Mr Potgieter'snext point was that the applicant is precluded from recovering the balance owing in terms of the settlement agreement as a result of its failure to pay the levies in respect of the sectional title units referred to in clause 2 of the agreement. This point is without substance. The sectional title units were transferred to the applicant by Hixton Investments and the levies were payable to the body corporate. There is nothing in the agreement to suggest that payment by the first

respondent to the applicant in terms of the settlement agreement and payment by the applicant of the levies were reciprocal obligations. The parties are not the same, and there is no link between these different obligations. In any event, the outstanding levies to which the second respondent refers related to a period before the units were transferred to the applicant. The basis on which the second respondent says that the applicant should have paid the levies is that the applicant was in occupation of the units during the relevant time. That is not a basis for importing a tacit term into the settlement agreement. Payment of the levies maybe regulated by agreement in more than one way. The parties may eg agree that the purchaser will pay occupational interest and the levies, or they may agree that he will pay occupational interest in an amount which will enable the seller to pay the levies. There is no evidence before me on which I can find that there was a tacit term in terms of which the applicant was obliged to pay the levies during the time it was in occupation before transfer of the units to it. I should add that Mr Mallett says there was never any agreement or suggestion that the applicant would have to pay for its occupation of the units. He says he was given to understand that the applicant was given occupation in order to demonstrate that the offer of the units was a genuine one, and also as a goodwill gesture because the applicant had had to wait so long for payment of what was due to it by the first respondent, which is a close corporation related to Hixton Investments. He points out that no levy statements were issued to the applicant by either the body corporate or Hixton Investments.

[11] The next point raised by the respondents was that the settlement agreement had been varied orally and that the applicant is not entitled to any further payment. The second respondent says he met with Mr Mallet in January 2013 and they agreed that the arrear levies be written off and that the balance of the debt in terms of the settlement agreement would be paid by way of a cash payment of R50 000 and the transfer to the applicant of two sectional title units in the complex Sun & Surf, one of which still had to be built. He says this resulted in a net amount of R50 000 owing to the first respondent by the applicant, which the applicant would pay upon occupation or transfer of the two bedroom unit. He says they expressly agreed that the non-variation clause would not be binding on the respondents. Mr Mallet disputes that such an agreement was reached.He says that given the history between him and the second respondent and between the applicant and the first respondent, there was no

trust between them and he would not have agreed to anything without having reduced it to writing.

[12] Ms Mills argued that any such agreement would in any event be hit by clause 11 of the agreement which provides that no variation,alteration oramendment would be binding upon the parties unless reduced to writing and signed by both parties. She referred to *SA Sentrale Ko-Op Graanmaatskappy BPK v Shifren en Andere* 1964(4) SA 760 (A) in which a stipulation in a written contract provided that `any variations in the terms of this contract as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect'. It was held that the contract could not be altered verbally. Mr Potgieter sought to overcome this argument by submitting that clause 11 itself could be varied and in support of this he referred to *Kovacs Investment 724 Pty Ltd v Marais* 2009 (6) SA 560 (SCA) where Mpati P said in paragraph 16:

> "The principle that emerges from these decisions, and others not mentioned here, including decisions of this court, is that provided the obligations under a written agreement are to be complied within full, performance of one of the obligations in a manner different from that stipulated in the written agreement, and accepted by the other party, would be considered as sufficient, or substantial, compliance and the obligation as having been discharged. And where the different manner of the performance was at the request of one party, and orally (or tacitly) agreed to by the other, the fact of such performance, ie that the obligation has been discharged, may be proved by extrinsic evidence. The agreement for a different manner of performance does not have to be in writing".

[13] *Kovacs* is no authority for the proposition that the written agreement could be varied orally so as to alter the obligations of one of the parties, which have not yet been performed. The *Shifren* principle applies and the respondents cannot rely on the alleged oral variation.

[14] Two further defences, relating to waiver andestoppel, were raised in the papers, but Mr Potgieter accepted in argument that they stand or fall with the alleged oral variation.

[15] The final arrow in counsel's quiver was a submission that the failure to join Hixton Investments as an interested party constitutes a material non-joinder. There is also no substance in this point. Hixton Investments transferred the units referred to in clause 2 of the agreement to the applicant and complied with all its obligations in this regard. No relief is sought against it in this application. Its only interest in the matter relates to clause 6 of the agreement, in terms of which it undertook to pledge to the applicant five ervens in the scheme Sun & Surf as security for the payment of the balance of R2 429 034. It was recorded in this clause that for every sum of R500 000 paid by the first respondent towards the balance of the debt one erf would be released from the pledge, and in the event of Hixton selling any of the ervens before the settlement of the debt, it would pay to the applicant a sum of R500 000 from the sale of each erven towards the reduction of the balance owing.

[16] It is not sufficient for Hixton to have a financial interest in the outcome of these proceedings. In order for it to be a necessary party it must have a direct and substantial interest. If counsel's argument were correct then every surety will have to be joined as a necessary party in proceedings against the principal debtor.

[17] It follows that the respondents do not have a valid defence to the applicant's claim. The order which I make is as follows:

(a) Judgment is granted against the first and second respondents, jointly and severally,for payment of the sum of R1 379 034 together with interest thereon at the rate of 15,5 % per annum from 10 November 2012 to the date of payment.
(b) The respondents are ordered,jointly and severally, to pay the costs of the application.

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Ploos van Amstel J

Appearances:

For the Applicant	**:**	Adv.L.M. Mills
Instructed by	**:**	Johnston & Partners Durban
For the Respondent	**:**	Adv. A.E. Potgieter / Adv. M. Manikum
Instructed by	**:**	NirvanKuwelsar& Company c/oBeekan& Company Durban
Date of Hearing	**:**	25 October 2013
Date of Judgment	**:**	14 November 2013