

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

REPORTABLE

Case No : 2011/2012

In the matter between :

KZN Oils (Pty) Ltd

Plaintiff

and

Shaida Banu Padayachee

Defendant

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Judgment

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Lopes J

[1] This is an application for summary judgment in which the plaintiff seeks judgment for payment of the sum of R9 381 819,60, together with interest thereon and costs.

[2] The plaintiff's claim is based upon the following :

- a) on the 9<sup>th</sup> July 2010 the defendant ceded to the plaintiff her 100% member's interest in and to Golden Rewards 1311 CC ('Golden Rewards');

- b) that cession records that :
  - (i) the plaintiff had concluded an agreement with CKT Express ('CKT') for the sale of bulk diesel fuel and lubricants;
  - (ii) the cession was provided as security for the non-payment of liabilities owed by CKT to the plaintiff;
  - (iii) the cession would only operate upon default of payment by CKT to the plaintiff;
- c) on the 9<sup>th</sup> July 2010 the defendant signed a deed of suretyship in favour of the plaintiff binding herself as surety for, and co-principal debtor with, Golden Rewards for the debts then owed, and to be owed by Golden Rewards to the plaintiff;
- d) by the 1<sup>st</sup> May 2011 CKT was indebted to the plaintiff in the sum of R9 381 819,60 which amount continued to attract interest;
- e) the plaintiff further alleges in its particulars of claim that the incorrect debtor was cited in the suretyship agreement and it should have been CKT and not Golden Rewards;
- f) accordingly, in its prayers to the particulars of claim the plaintiff seeks an order rectifying the deed of suretyship and for the money judgment which it now seeks in the summary judgment application.

[3] Mr *Naidu*, who appeared for the plaintiff submitted that it is clear from a reading of the documents annexed to the particulars of claim that Golden Rewards was not indebted to the plaintiff for any amount and the correct debtor

in the suretyship should have been reflected as CKT. Mr *Naidu* conceded that he could not seek summary judgment for an order for the rectification of the suretyship, but submitted that as it was clearly something to which the plaintiff was entitled, I should grant summary judgment for the monetary amounts sought.

[4] It is clear that the summary judgment can only be premised upon a conclusion that the rectification will be granted in favour of the plaintiff. In her affidavit opposing summary judgment the defendant emphatically denies that she intended to be bound as surety for, and co-principal debtor with, CKT for its debts to the plaintiff. She avers that she only ever intended to be bound for the debts owed to the plaintiff by Golden Rewards, and she suggests that evidence of this is the fact that she had ceded her 100% member's interest in and to Golden Rewards as part of the security.

[5] In *Malcomess Scania (Pty) Ltd v Vermaak and Another* 1984 (1) SA 294 (WLD) Coetzee J dealt with an acknowledgment of debt in favour of the plaintiff and a deed of suretyship signed by the second defendant guaranteeing all the first defendant's obligations. The plaintiff sought rectification of the acknowledgment of debt to delete the words 'money actually lent and advanced' and substituting therefor the words 'work done and materials supplied'.

[6] In the summary judgment opposing affidavit in *Malcomess* a point in limine was taken that summary judgment was not competent under the Rules of Court.

The plaintiff's counsel conceded that the first claim for rectification could not be dealt with by way of summary judgment, but pressed on with the second claim in terms of the deed of suretyship without withdrawing the first claim. Coetzee J was of the view that where a monetary claim is preceded by a claim for rectification the latter depends upon the document being rectified because, the monetary claim is based on the document so rectified. The only way in which the suretyship signed by the second defendant could operate, is if the underlying monetary claim which is based on the rectified agreement, succeeds. In those circumstances Coetzee J dismissed the summary judgment application.

[7] *Malcomess* was considered in *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) in which the plaintiff sought payment in terms of a contract which was required to be rectified. The defendant in that case did not dispute the allegations justifying rectification, and the court held that summary judgment was competent where the parties were *ad idem* as to the manner in which their written contract did not correctly reflect their agreement. Summary judgment was granted on the agreement as rectified. At page 70 H, Cloete J stated :

'I therefore with respect agree with the judgment of Coetzee J in *Malcomess Scania (Pty) Ltd v Vermaak and Another* to the extent that it holds that a plaintiff who alleges that a written contract should be rectified is confined to what the plaintiff alleges is the true agreement between the parties, and cannot (in the absence of an express indication to the contrary) rely in the alternative upon the terms of the written agreement as they stand; but I am constrained to disagree with that judgment to the extent that it suggests that summary judgment is incompetent, even where both

parties are *ad idem* as to the respects in which their written contract does not correctly reflect the agreement between them.'

[8] The present case is distinguishable from *PLC Consulting* because the defendant has emphatically stated in her summary judgment opposing affidavit that she did not give a personal surety to the plaintiff for the debts of CKT. She only admits having ceded her membership interest in Golden Rewards as security for the debts of CKT. She further states that she had no intention of ever standing surety for CKT. She regarded the cession of her membership in Golden Rewards as a full discharge for her obligations to the plaintiff.

[9] In those circumstances I agree with the views of Coetzee J in *Malcomess*. Logically, if the cause of action for summary judgment depends upon the rectification of the suretyship, the money judgment cannot operate until rectification is decided in favour of the plaintiff. As the defendant has raised a triable issue, the summary judgment application falls to be dismissed.

[10] It was necessary for the defendant to apply for condonation of the late filing of her summary judgment opposing affidavit. For the reasons set forth therein I find that a proper case has been made out for the grant of condonation and I make the following order :

1. The defendant is granted condonation for the late filing of her summary judgment opposing affidavit;
2. summary judgment is refused;

3. the defendant is given leave to defend the action;
4. in terms of Practice Directive 21 of this court, the matter shall be placed upon the expedited trial roll for hearing;
5. the costs of the application for condonation are to be paid by the defendant;
6. the costs of the application for summary judgment are reserved for determination by the trial court.

Date of hearing : 20<sup>th</sup> September 2012

Date of judgment : 27<sup>th</sup> September 2012

Counsel for the Plaintiff : K Naidu (instructed by Sigamoney Inc)

Counsel for the Defendant : A Moodley (instructed by RHM Attorneys)