

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022-047913

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |



30/04/2024

DATE

SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

JACOBUS ARNOLDUS VAN DER MERWE

Respondent

JUDGMENT

BOKAKO AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 30 April 2024.

INTRODUCTION

1. On December 13, 2019, the Respondent executed a written suretyship in favor of the Applicant for WEC's indebtedness, limited to R14 million and interest. The Applicant seeks a money judgment against the Respondent in his capacity as surety and co-principal debtor for Wild Eagle Canyon (Pty) Ltd ("WEC") 's indebtedness for payment of R8 190 918.06, together with interest.
2. The present application was launched on 23 November 2022, and on 3 May 2023, the business rescue practitioners paid R4.5 million to the Applicant regarding WEC's indebtedness to it.

BACKGROUND FACTS

3. The Applicant (FirstRand) and WEC concluded a facility agreement and a loan agreement, and the Respondent had executed a suretyship in favor of the Applicant for WEC's indebtedness to it and that the amounts due under the agreements mentioned above have been called up.
4. The Respondent opposes the application on the basis that the terms of the agreements relied upon by the Applicant are offensive to public policy, that the Applicant's claim against him has been compromised or waived when the Applicant accepted payment in part from WEC's business rescue practitioner, and, finally, that the quantum of the debt is incorrect.

5. On 13 December 2019, the Applicant and WEC entered into a written loan agreement ("the loan agreement") in which the Applicant advanced R14 million to WEC. Advancing the WEC an amount of R14, 000,000.00. Further, a suretyship limited to the said amount was concluded by the Respondent in favor of the Applicant for the obligations of WEC was concluded.

PARTIES SUBMISSIONS

6. The Applicant contends that on 13 December 2019, the Respondent executed a written suretyship in favor of the Applicant for WEC's indebtedness, limited to R14 million and interest. The Respondent bound himself as surety in solidum for and as co-principal debtor, jointly and severally, with WEC for payment of all the latter's indebtedness to the Applicant.
7. The suretyship agreement states that the Applicant may, in its sole discretion, without the Respondent's knowledge or consent, give time, or extra time, or grant any indulgence to WEC or any surety or security provider, release or compound or make any other arrangements with any surety or WEC without in any way prejudicing or unfavorably affecting the Applicant's rights under the suretyship.
8. On 8 June 2022, Spar Group Ltd ("Spar") demanded immediate payment of R37.8 million from WEC (which operated a Spar supermarket). On 9 June 2022, Spar issued a "stop supply notice" and terminated WEC's credit facilities.
9. Subsequently, On 10 June 2022, the Applicant advised WEC that those mentioned above "stop supply notice" had a material adverse effect on

WEC's operations and demanded payment of all the outstanding amounts under the facility agreement and the loan agreement. On the 14th of June 2022, WEC launched an urgent application to compel Spar to uplift the “stop supply notice” and to “consider restoring” WEC’s credit facilities. The application was dismissed on the 24th of June 2022.

10. A resolution was passed on 29 June 2022, to commence business rescue proceedings concerning WEC. The process formally began on 4 July 2022. The Executive Summary of the Rescue plan stipulates that “R4,500,000 would be paid directly to First National Bank(Applicant) to reduce the applicant's indebtedness.”

11. The Applicant sought to hold the Respondent liable for R8, 190,918.06 together with interest solely based on the deed of suretyship signed by both parties.

12. On the 12th of May 2023, the Respondent's attorney addressed an email to the Applicant's attorney which reads as follows:

"Can you kindly confirm the outstanding amount due after the BRPs paid your client R4 500 000(four million five hundred thousand rands) and whether your client can perhaps provide a discount if Mr van der Merwe has to source another loan to settle it himself? I understand your client was willing to give SPAR a discounted amount."

13. The respondents resist the application about the monetary judgment, aver that in terms of the Working Capital facility agreement, the loan agreement, and the suretyship that the Applicant relies on for purposes of seeking to hold the Respondent liable for the alleged indebtedness is so

unconscionable that it would pervert the rule of law and be against public policy to enforce or uphold, and that the Applicant's claim against the Respondent has been compromised or waived when the Applicant was party to the acceptance of the Amended Business Rescue plan of 17 February 2023 and accepted payment of R4 500 000.00 in full and final settlement from WEC's business rescue practitioners and, finally the Applicant is unable to prove the quantum of the alleged indebtedness.

14.The Respondent contends that the Applicant has waived its claim against it by accepting R4,5 million, allegedly in full and final settlement of the indebtedness due to the Applicant by WEC. Further, the Applicant still needs to amend its claim as set out in the notice of motion after R4 5 million has reduced the debt. The Respondent challenges the Applicant's quantum.

15.Further, submitted that the Applicant ruthlessly froze WEC's Working Capital facility and demanded immediate full repayment without forewarning or prior discussions and without affording any representation opportunity despite no defaults or breaches of a loan agreement. Thus, WEC had to initiate Business Rescue proceedings to try and salvage what it could.

16.Further contending that the Agreement and the Suretyship that the Applicant relied on for justification of its manifestly oppressive conduct were indeed so unfair, unconscionably harsh, and stifling that to uphold and enforce these clauses and agreements would pervert the rule of law and undoubtedly be against the public interest.

17.The Respondent also challenged the averments in the founding affidavit on the basis that the Applicant elected to accept R 4 5 million in full and final

settlement of its claim against WEC and that the Applicant has no further right of action against WEC, which is a direct consequence of the Adopted Business Plan and its implementation, as the Applicant itself confirmed.

18. The Respondent establishes that the Applicant needs to be more truthful and accurate regarding their claim. Their Certificate of Balance, as relied upon by the Applicant in its founding affidavit, and the amount claimed must be corrected. Those of WEC's account statements "RA7" and "RA8", referred to by the Applicant in its Replying affidavit, do not reflect that any legal costs and other impermissible debts have now been credited.

LEGAL PRINCIPLES AND ANALYSIS

19. I will now turn to deal with disputes as contended by both parties. The Respondent avers that the terms of the agreements relied upon by the Applicant are offensive to public policy, that the Applicant's claim has been compromised or waived when the applicants accepted payment in part from WEC's business rescue practitioner, and finally, that the quantum of the debt is incorrect.

Contractual enforcement and public policy

20. On 13 December 2019, the Respondent concluded a suretyship in favor of the Applicant for the obligations of WEC. The Respondent bound himself in solidum for and as a co-principal debtor jointly and severally to the Applicant as surety, and the surety was limited to R14,000,000.00. The Respondent executed the agreements in question freely and voluntarily.

21. The acceleration 3.2. clause of the loan agreement states thus :

3.2. *"Upon an occurrence of an event of default or potential event of default, the bank shall in addition to and without prejudice to any other rights which it may have in terms of this Agreement or law*

including, without limitations, its rights to claim damages, have the right without further notice to :

3.2.1. accelerate or place on-demand payment of all amounts owing, whether in respect of principal, interest, or otherwise, and all such amounts shall immediately become due and payable and or,

3.2.2. decline any request by the borrower to draw down any further monies under the loan or terminate the loan forthwith, and or

3.2.3. call up and execute any security and security document that it holds and or,

3.2.4. to suspend all its obligations under the Agreement, including but not limited to the obligation to disburse the loan and or,

3.2.5. Increase the interest rate by 300 points. This provision shall survive either party's cancellation of this Agreement.

22. This Court is of the view that these contractual terms are enforceable and do not violate the values of the Constitution. Strict enforcement of the contractual terms governing surety agreements is consistent with public policy and calls for no judicial interference. It is evident that the Respondent needed to adequately explain his failure to comply with these contractual terms.

23. Based on public policy, I do not find any principle basis not to enforce these contractual terms, which calls for no judicial interference. The onus will always remain with the Respondent to adequately explain why it should avoid implementing a contractual term.

24. Therefore, im of a considered view that the enforcement of the surety agreement is consistent with public policy.

25. In a recent judgment involving Beadica and others, the Oregon Trust, Sale's Hire CC, and the National Empowerment Fund, the Constitutional Court resolved the uncertainty resulting from its 2014 decision in the Botha v Rich case. It settles the law when a contract or its enforcement is invalid or contrary to public policy. The Constitutional Court confirmed that a Court may not refuse to enforce an agreement merely because the contract or its enforcement is, in the subjective view of the Court, unfair, unreasonable, or unduly harsh. It reaffirmed that the rule of law requires that the law be apparent and ascertainable and provide reasonably predictable outcomes for contracting parties; freedom of contract is based on the constitutional values of liberty and dignity and is vital for economic development to achieve the constitutional vision of South African society.
26. It is, therefore, imperative that the Respondent who freely and voluntarily concluded this contract must honor it. In this case, there is no contrary view or indication that the Respondent did not understand or comprehend the terms and conditions of the contract. Regarding the suretyship agreement, the Respondent bound himself as surety in solidum for and as co-principal debtor, jointly and severally, with WEC for payment of all the latter's indebtedness to the Applicant. This bears reference in the Applicant's founding affidavit: para 20.4, p01-16 that "FirstRand (applicant) may in its sole discretion without the respondent's knowledge or consent, give time, or extra time, or grant any indulgence to WEC or any surety or security provider, release or compound or make any other arrangements with any surety or WEC without in any way prejudicing or unfavorably affecting FirstRand's rights under the suretyship"
27. This Court believes that the Respondent failed to discharge the onus of proving that the acceleration clause in clause 3.2 of the loan agreement is offensive to public policy.

28. In *Brisley*, the Supreme Court of Appeal laid the foundation for its approach to the proper roles of good faith, fairness, and reasonableness in the law of contract in the new constitutional era.¹ It held that good faith does not form an independent or free-floating basis upon which a court can refuse to enforce a contractual provision and that the acceptance of good faith as a self-standing ground would create an unacceptable uncertainty in our law of contract.
29. Further, the views expressed in *Brisley* were affirmed in *Afrox Healthcare*, where the Supreme Court of Appeal explained that courts do not make decisions regarding the enforcement of contractual provisions based on abstract considerations of good faith, reasonableness, and fairness but only on established legal rules.²
30. On 10 June 2022, the Respondent failed to pay under the demand, which constituted a breach of the loan agreement. It is also clear that, at the time, the WEC could not comply with its obligations. The WEC could not trade due to its credit facilities, with Spar being terminated and called up. It also became unable to source stock.
31. The facility agreement contains the usual repayable clause on demand. I see no offense to public policy. This Court may have taken note of the Respondent's argument if it had provided reasons to decide contrary to their belief; in this case, the Respondent failed to advance any reasons or bases for their contention. Payment of the amount due under the facility was demanded on

¹ *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA).

² *Afrox Healthcare Bpk v Strydom* **[2002] ZASCA 73; 2002 (6) SA 21** (SCA) (*Afrox Healthcare*) at para 32.

32. As explained by the Supreme Court of Appeal in *Barkhuizen SCA*,³ and endorsed by this Court in *Barkhuizen*,⁴ the Constitution requires that courts “employ [the Constitution and] its values to achieve a *balance* that strikes down the unacceptable excesses of 'freedom of contract' while seeking to permit individuals the dignity and autonomy of regulating their own lives⁵.”
33. I agree with the Applicant's submissions that it formed its opinion on reasonable, objective grounds that WEC could not trade because its credit facilities with Spar were terminated and called up. The natural effect of the Spar Group's notice was to immediately disrupt the company's trade relations with suppliers. Therefore, the Respondent's contention and defense stand to be dismissed.

Waiver or Compromise

34. The Respondent relies on the WEC's adopted business rescue plan. The Rescue plan in the second paragraph under the heading :

"Executive Summary" states: "This plan does not make provision for a compromise of claims." "R4,500,000 would be paid directly to First National Bank to reduce the FNB Indebtedness", "FNB Indebtedness' means the amounts owed by Wild Eagle Canyon to FNB in terms of the facility agreement" and "Notwithstanding anything contained in this Agreement, neither Spar nor FNB waive any of its/their rights in terms of the Spar Remaining Security and the FNB Remaining Security (respectively) and it is specifically acknowledged by Wild Eagle Canyon and the BRP's that the terms

³ *Napier v Barkhuizen* [2005] ZASCA 119; 2006 (4) SA 1 (SCA) (*Barkhuizen SCA*)

⁴ *arkhuizen* above n 17 at paras 70-1.

⁵ *Barkhuizen SCA* above n 173 at para 13; referring to *Brisley* above n 55.

of this Agreement will not extinguish the WEC Spar Indebtedness or any portion thereof. Spar and FNB expressly retain their rights under the Spar Remaining Security and the FNB Remaining Security .”

"FNB Remaining Security' means... the security held by FNB... in the form of – a deed of suretyship provided by Mr van der Merwe to and in favor of FNB as surety in solidum and co-principal debtor with Wild Eagle Canyon dated 13 December 2019."

35. It is trite that an inability to enforce a debt does not necessarily indicate that the debt has been discharged. If the whole or a part of the debts of a company becomes unenforceable as a result of the adoption and implementation of a business rescue plan, the Applicant may pursue the balance of their claims against sureties, who will have a right of recourse against the company, this does not negate the purpose of business rescue. Section 154(2) does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been implemented. It does not affect or extinguish the liability of a surety for the debt. The Respondent alleges waiver or compromise but still has the onus to prove it.
36. The Applicant expressly did not waive or compromise its claim against the Respondent. It reserved the right to recover under the suretyship.
37. It is also evident by the Respondent's communication with the Applicant. The respondent attorneys' email dated 12 May 2023 marked "without prejudice." The attorney did not dispute liability and did not attempt to negotiate a settlement of a dispute. Instead, he requested a discount on behalf of his client after payment of R4.5 million. This, on its own, is indicative that the Respondent remains liable for the outstanding balance.

38. In *Van Zyl v Auto Commodities (Pty) Ltd* [2021] 3 All SA 395 (SCA) on appeal, the only issue between the parties was whether Mr Van Zyl was liable under the deed of suretyship to pay the amount claimed by Auto Commodities. He contended that when BCM's business rescue was terminated, s 154(2) of the Companies Act 71 of 2008 (the Act) released BCM from any further indebtedness to Auto Commodities. He submitted that that released him from liability because suretyship is an accessory obligation. The Court emphasized that Section 154(2) only precludes creditors from pursuing claims against the company after the business rescue plan has been implemented. It does not affect or extinguish the liability of a surety for the debt. The appeal was dismissed with costs.
39. Regard was had to the text contained in Caney's *Law of Suretyship*⁶ in the case of *Nedbank v Van Zyl*,⁷ Consideration was given to defining a suretyship as follows: 'Suretyship is an accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), primarily that the principal debtor, who remains bound, will perform his obligation to the creditor and, secondarily, that if and so far as the principal debtor fails to do so, he, the surety, will perform it or, failing that, indemnify the creditor.'
40. It is trite law that a surety's liability is unaffected by the principal debtor's business rescue unless the business rescue plan explicitly provides sureties. I could not find any clause or provision in the plan that supports the Respondent's contention.
41. In *New Port Finance Co (Pty) Ltd and Another v Nedbank Ltd* 2016 (5) SA 503 (SCA), it was stated that s154 of the Act "deals only with the ability

⁶ The most recent version of this publication is CF Forsyth and JT Pretorius *Caney's The Law of Suretyship* 6 ed (2010). The third edition of this book, published in 1982, was cited in the case of *Van Zyl*. Reference is to be had to page 27 of this third publication.

⁷ 1990 2 SA 469 (A).

to sue the principal debtor and not with the existence of the debt itself." A surety's liability is unaffected by the business rescue unless the plan itself makes specific provisions for the situation of sureties.

42. More recently, in *Hitachi Construction Machinery Southern Africa Co (Pty) Ltd v Botes and Another* (205/2018) [2019] ZANCHC 7 (15 March 2019), it was found that a surety's liability is unaffected by the business rescue unless the business rescue plan itself makes specific provision for the discharge of the suretyship.
43. In this case, the Business Rescue Plan clearly states that *"Notwithstanding anything contained in this Agreement, neither Spar nor FNB waive any of its/their rights in terms of the Spar Remaining Security and the FNB Remaining Security (respectively), and Wild Eagle Canyon and the BRPs specifically acknowledge that the terms of this Agreement will not extinguish the WEC Spar Indebtedness or any portion thereof. Spar and FNB expressly retain their rights under the Spar Remaining Security and the FNB Remaining Security ."*
44. I do find that the Applicant did not compromise or waive its rights to recover the outstanding balance from the Respondent. The Respondent's contention is misplaced and stands to be dismissed.

Quantum and the Question of Amendment

45. It is not indisputable that the Applicant received payment from the business rescue practitioners on 3 May 2023 for R4.5 million. The Respondent is contending that the Applicant must amend its notice of motion because it seeks judgment in a lesser amount and also pointed out that legal costs have been erroneously debited to the loan account. The Respondent contended that the certificate of balance does not reflect the correct amount of its indebtedness.

46. The Applicant contends that they have conclusively proven their claim and that it is permissible to present a replacement certificate to claim a reduced amount in such circumstances. Such certificate constitutes prima facie evidence of the amount owed, and proof of the amount owed is inherent in the certificate itself, not in the evidence of the certificate.
47. Given what I have already stated, it was common cause at the hearing that the certificates of balance attached to the founding affidavit have incorporated legal costs. At the hearing of the matter, counsel for the Applicant contended that the Applicant obtained updated certificates of balance reflecting the amounts owed to the Applicant. The Applicant clarified that the updated balance certificates should have been filed with the Respondent promptly. Be that as it may, the Applicant has amended balance certificates in reply, and the Respondent has not sought to challenge those certificates. In its head of argument, the Applicant contends that proof of the amount owing is inherent in the certificate, annexure "RA9" Pages 10-49 to Pages 10-50 on the case line.
48. In their submission, I pause to mention that the Respondent purported to raise a dispute regarding the Applicant's calculations of the indebtedness based on the Applicant's alleged failure to account for the payments made by the Respondent and legal costs. As pointed out earlier in this judgment, the Respondent did not persist with this argument at the hearing before me.
49. In *Rossouw and another v First Rand Bank Ltd t/a FNB Home Loans (formerly First Rand Bank of SA Ltd)* [2011] 2 All SA 56 (SCA), it was held at para 47:

"...To the extent that the certificate reflects the balance due as of the hearing, it is merely an arithmetical calculation based on the facts already before the Court, which the Court would otherwise have to

perform itself. Such calculations are better performed by a qualified financial institution employee. And to the extent that such a certificate may reflect additional payments by the defendant after the issue of summons or payments not taken into account when the summons was issued, this constitutes an admission against interest by the bank, and the bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether a quo or on appeal) perform a useful function...".

50. In *Senekal v Trust Bank of Africa Ltd* [1978] 4 All SA 43 (A), 47:

"....There might be several items to which such a certificate relates, some of which may appear to be unassailable while others may either be shown to be inaccurate or appear to be of dubious reliability, or might require some modification or adjustment. I can find no reason the certificate is to be entirely disregarded in such circumstances merely because it is found or thought to be inaccurate or unreliable in certain respects. At the end of the case, when all the evidence (which includes the certificate) is in, the Court must decide whether the party upon whom the onus rests has discharged it on a proper balance of probabilities..." - (also reported in 1978 (3) SA 375 (A)).

51. A certificate of balance is an evidentiary tool provided in an agreement to facilitate proof of the amount of the indebtedness. The certificate does not in itself establish liability - *Thrupp Investment Holdings (Pty) Ltd v Goldrick* 2008 (2) SA 253 (W) at para 6.
52. Therefore in terms of the updated certificate of balance dated 1 June 2023 in respect of the indebtedness of the Respondent is certified as being in an amount of R 3 721 085.19 (THREE MILLION SEVEN HUNDRED AND TWENTY ONE THOUSAND AND EIGHTY FIVE RAND AND

NINETEEN CENTS) as 1 June 2023, together with interest at the rate of 11.75% per annum with effect from 1 June 2023, calculated daily and compounded monthly to date of payment.

53. I do find that the quantum of the debt has been established. The certificate of balance on its mere production is sufficient proof of the amount due and owing.

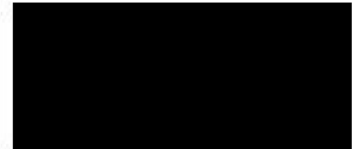
CONCLUSION

54. In summary, contractual obligations are governed by offer, acceptance, and consideration principles, while public policy considerations ensure that contracts align with societal values and interests. Parties entering into contracts should know their rights and obligations under the law and their agreements' broader public policy implications. The Respondent has not discharged the onus of proving that the agreements in question are offensive to public policy or that the Applicant had waived or compromised its claim.
55. I am afraid I have to disagree with the Respondent's submission that the Applicant was under obligation to negotiate with the Respondent. A contract is a negotiated living document between parties from different ends in different situations. Reasonable contracting parties would be expected to acclimate to their contracts' terms and conditions, depending on the nature of the contract. The Applicant is entitled to demand its claim.
56. It is essential that sureties (both natural and juristic persons) are aware of the effects and implications of the business rescue process concerning amounts owed by the company to such claims. This Court is satisfied that the quantum of the debt has been established.

ORDER

57. I accordingly grant the following order:

1. Respondent to make payment of the sum of R3,721,085.19 together with interest thereon at the rate of prime (currently 11.75%) plus 1% per annum, calculated daily and compounded monthly in arrears from 1 June 2023 to date of payment; and
2. Respondent is ordered to pay the costs of the application.



T. BOKAKO

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

APPEARANCES

Counsel for the Applicant

Adv. N.J. HORN

Counsel for the Respondent

Adv. E. WESSELS SC

Date of Hearing:

5 March 2024

Date of Judgment:

30 April 2024