



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

DATE: 30 October 2024

SIGNATURE: ...

CASE NO: A367/2023

In the matter between:

RIO RIDGE 1121 (PTY) LTD

APPELLANT

AND

SYDWELL SHABANGU PROJECTS CC

FIRST RESPONDENT

SYDWELL SHABANGU

SECOND RESPONDENT

Coram: Millar & Hassim JJ *et* Lesufi AJ

Heard on: 7 October 2024

Delivered: 30 October 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 30 October 2024.

JUDGMENT

MILLAR J (HASSIM J *et* LESUFI AJ CONCURRING)

- [1] This is an appeal against the dismissal of an application for payment brought by the appellant against the respondents in the High Court. Leave to appeal to this court was granted by the court *a quo*.
- [2] The appeal turns on a single issue – whether the suspensive conditions in a contract entered into between the appellant (Rio Ridge) and the first respondent (Sydwell Shabangu Projects) were fulfilled or not.
- [3] The facts in this appeal are largely common cause. On 13 December 2017, Rio Ridge (as the Lender) entered into a written Agreement with Sydwell

Shabangu Projects (as the Borrower). In terms of the Agreement, a loan facility of R2.5 million was made available subject to certain suspensive conditions.

[4] The suspensive conditions were the following:

"4.1 The entire Agreement is subject to the condition that simultaneously with his signature thereof on behalf of the Borrower, Sydwell Simon Shabangu of the Borrower shall:

4.1.1 complete and sign the "Suretyship Undertaking" attached hereto as Annexure "A", binding himself a surety and co-principal debtor in solidum with the borrower for any amount or amounts due and owing to the Lender under this Agreement; and

4.1.2 signs the Special Power of Attorney document attached hereto as Annexure "B" authorising the execution and registration of the Surety Mortgage Bond attached hereto as Annexure "C" ("the Mortgage Bond"); and

4.1.3 surrenders to the Lender within 72 (seventy (sic) hours) of the conclusion of this Agreement, the original Deed of Transfer for the immovable property proposed to be hypothecated in terms of the Mortgage Bond.

4.2 The conditions referred to in clause 4.1 above are to be fulfilled as is provided for therein or at such later date as the parties may agree in writing, and, are for the benefit of the Lender who may on written notice to the Borrower, waive the obligation to comply therewith."

[5] At the time that the Agreement was signed, the annexures were also signed. It is not in issue that there was compliance with clauses 4.1.2 and 4.1.3 or for that matter that the parties thereafter conducted themselves as though a valid and binding agreement had been concluded between them. Rio Ridge advanced the R2.5 million to Sydwell Shabangu Projects and over the course

of time, the sum of R1.4 million¹ was repaid by Sydwell Shabangu Projects to Rio Ridge.

- [6] Sydwell Shabangu Projects, after repaying the aforementioned R1.4 million, then failed to make any further payments. It was then that Rio Ridge brought the present proceedings to compel payment of what was outstanding. It is not disputed that if the Agreement is valid that the total amount outstanding in respect of both capital and interest is capped at R5 million in consequence of the *in duplum* rule.² None of this is contentious.
- [7] Attached to the signed Agreement and marked as Annexure "A", was a document titled "Suretyship Undertaking". This document in its terms is not the Suretyship contemplated in clause 4.1.1 but was what purported to be a Suretyship signed on behalf of Sydwell Shabangu Projects for its own obligation.³
- [8] The document attached to the Agreement, marked Annexure "A", specifically provides that it was in respect of:

"all obligations which the debtor may now and from time to time hereafter owe to the creditor arising from the Bridging Loan Agreement concluded by and between the debtor and the creditor, and to which this Suretyship Undertaking is attached as Annexure "A" ("the Bridging Loan Agreement"), up to a maximum amount of R2.5 million (two million three hundred thousand rand) (sic), together with any interest, discounting fee and/or other charges and costs. . ."

¹ The precise amount repaid in respect of both capital and interest over the period from 31 January 2018 to 10 September 2019 was R1 412 187.85.

² Save to deny that in consequence of the non-fulfilment of the suspensive condition, the respondents did not place in issue that a certificate setting out the indebtedness would be *prima facie* proof of the amount due. Additionally, the only allegation made in regard to the amount reflected in the certificate which exceeded R5 million was that the *in duplum* rule applied. This was conceded by the appellant and hence the quantum of the claim could not exceed this amount.

³ The document provided that Mr. Shabangu bound the corporation, being the principal debtor, Sydwell Shabangu Projects jointly and severally as surety and co-principal debtor in solidum with itself for the payment of its own debt. See *African Life Property Holdings (Pty) Ltd v Score Food Holdings Ltd* 1995 (2) SA 230 (A) at 238F.

[9] When the present proceedings were initiated, besides the Agreement and its annexures, Rio Ridge also attached various other documents to its papers, one of which was the second Suretyship also signed on 13 December 2017.

[10] In this regard, it was stated on behalf of Rio Ridge that:

"28. On 13 December 2017, the Second Respondent (Sydwell Shabangu) signed two suretyship documents, attached hereto as Annexures "N" and "O", in terms whereof the Second Respondent bound himself in favour of the Applicant as a surety for the obligations of the First Respondent arising from the Bridging Loan Agreement concluded, for a capital amount of R2.5 million, but together with further interest, discounting fees and other charges and costs."

[11] In answer, Sydwell Shabangu Projects and Mr. Shabangu stated:

"30. Save to admit that annexure "O" seemingly constitutes a suretyship:

30.1 It is denied that it is the surety referred to clause 4.1.1 of the Agreement of Loan (which was marked annexure "A").

30.2 The remainder of the content of this paragraph is denied."

[12] On a consideration of annexure "O", it does constitute a valid Deed of Suretyship⁴ by Mr. Shabangu personally for the obligations of Sydwell Shabangu Projects. It provides that:

"all obligations which the debtor may now and from time to time hereafter owe to the creditor arising from the Bridging Loan Agreement concluded by and between the debtor and the creditor, and to which this Suretyship Undertaking is attached as Annexure "B" ("the Bridging Loan Agreement"), up to a maximum amount of R2, 500 000.00 (two million five hundred thousand rand), together with any interest, discounting fee and/or other charges and costs. . ."

⁴ The Suretyship Undertaking stating that Mr. Sydwell Shabangu binds himself jointly and severally as surety and co-principal debtor in solidum together with Sydwell Shabangu Projects CC.

[13] The crux of the case between the parties and of this appeal is whether or not a valid Deed of Suretyship as contemplated in clause 4.1.1 was signed by Mr. Shabangu in his personal capacity in compliance with this clause.

[14] It is the case for the appellant that the subsequent valid suretyship establishes compliance with the suspensive condition in clause 4.1.1 of the Agreement. It is the case for the respondents that because clause 4.1.1 of the Agreement refers to an "Annexure A", there can only be fulfilment of the suspensive condition if the actual document that is marked as "Annexure A" is in its terms a valid suretyship.

[15] In *Mia v Verimark Holdings (Pty) Ltd*⁵ the legal position with regard to suspensive conditions was stated as follows:

"Suspensive conditions are commonly encountered in contracts for the sale of immovable property. Their legal effect is well settled. The conclusion of a contract subject to a suspensive condition creates "a very real and definite contractual relationship" between the parties. Pending the fulfilment of the suspensive conditions the exigible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms." [footnotes omitted]

[16] It is upon this basis that the respondents argue that, notwithstanding performance by Rio Ridge or any performance there may have been by Mr. Shabangu or Sydwell Shabangu Projects, that the Agreement in fact never came into being

[17] It is common cause that both the invalid "Annexure A" and the valid Suretyship were signed on the same day. Both refer to the Bridging Loan Agreement although the former is labelled as Annexure "A" and the latter as Annexure "B".

⁵ [2010] 1 ALL SA 280 (SCA) at para [1].

- [18] The issue to be considered is the intention of the parties and whether or not clause 4.1.1 of the Agreement was fulfilled. From the plain wording of clause 4.1.1, it is clear that the parties intended that Mr. Sydwell Shabangu bind himself as surety and co-principal debtor together with Sydwell Shabangu Projects in favour of Rio Ridge. It is equally clear that the document headed "Annexure "A" to the Agreement is not the deed of suretyship contemplated in clause 4.1.1.
- [19] Did the parties intend that a Deed of Suretyship be furnished and that it would only be so furnished if it was marked as "Annexure "A" in the strict sense or was it their intention that a Deed of Suretyship be furnished in fulfilment of the suspensive condition, the marking of the document being immaterial? Put differently, does clause 4.1.1 require compliance '*in forma specifica*' or would performance '*per aequipollens*' suffice?
- [20] In *Van Diggelen v De Bruin and Another*,⁶ it was held:

"In coming to a decision in this case as to whether there must be performance 'in forma specifica' or whether performance 'per aequipollens' will suffice, it seems to me that I should proceed along the following lines.

- (1) *The Court must gather from the surrounding circumstances what the parties contemplated. It must take into consideration everything which can give a clue to the intention of the parties. It must seek to find out what the parties would have wished if their minds had been specially directed to the question whether the condition was to be fulfilled 'in forma specifica' or by an equivalent act.*
- (2) *If however the circumstances afford no clue then there is a presumption that the condition must be performed 'in forma specifica'. This presumption is rebuttable by the promisor, but it cannot be rebutted where it is clear from the terms of the contract and the surrounding circumstances that performance 'in forma specifica' was stipulated in the contract.*

⁶ 1954 (1) SA 188 (SWA) at 192H-193F.

- (3) *The Court will in cases of doubt be more likely to find in favour of performance 'per aequipollens' if the manner of performing the condition is not material or also where performance 'in forma specifica' is impossible through no serious fault on the part of the promisor. Impossibility should probably be interpreted in the sense that it was interpreted in Peters Flamman & Co v Kokstad Municipality, 1919 AD 427.*
- It is clearly not sufficient for the promisor to tender performance of an equivalent act merely because performance 'in forma specifica' is difficult, inconvenient or expensive. The promisor undertakes such a risk.*
- (4) *The act or performance tendered 'per aequipollens' where such is permissible must in the first instance be an equivalent act to that mentioned in the contract or be of such a nature that it can make no material difference to the promisee. Such seems to be the position if any immaterial difference or inequality can be put right by compensating the promise in damages.*
- (5) *The Court's paramount concern is always, within the frame-work of the law, to do justice between man and man. It will be guided by the terms and circumstances of the contract under consideration. Thus in cases where the promisor has discharged the onus mentioned in (2) above, there may be circumstances falling short of impossibility, and even where there may have been some fault on the part of the promisor, and where the Court may nevertheless come to the conclusion that the promisor's performance or tendered performance amounted to substantial performance, or is of such a nature that the promise can be compensated in damages for any shortfall."*
[references omitted].

[21] In the present matter, it is clear that the parties contemplated that before the Agreement would come into force, that Mr. Shabangu would bind himself as surety and co-principal debtor in favour of Rio Ridge for the obligations of Sydwell Shabangu Projects. The document marked "Annexure "A" attached

to the Agreement is not the Suretyship contemplated in clause 4.1.1. The Suretyship signed on the same day and in which it refers to itself as being "Annexure "B" to the Agreement is in its terms the Suretyship contemplated in clause 4.1.1.

- [22] The reference to "Annexure "B" in the valid suretyship does not take the matter any further. In terms of clause 4.1.2, Annexure "B" to the Agreement was a special power of attorney to execute a surety mortgage bond and although attached, was not specifically marked as "Annexure "B".
- [23] The signature of the subsequent suretyship, although not attached to the Agreement as "Annexure "A" and notwithstanding that it refers to itself as "Annexure "B" to the Agreement, is self-evidently an equivalent and the contemplated act of performance which the parties envisaged when the Agreement was signed.
- [24] The entirety of the dispute is on whether the Suretyship was correctly marked. Since a surety is an ancillary obligation, it could never have been contemplated by the parties that performance '*per specifica*' in terms of the labelling of the document was required for the fulfilment of the condition.
- [25] The fulfilment of the condition occurred when the valid Suretyship was signed and thus, although it was not marked as "Annexure "A" – '*per specifica*' its subsequent signature although not labelled in accordance with the Agreement had the effect of fulfilment of the condition '*per aequipollens*'.
- [26] For the reasons I have set out above I find that the suspensive condition in clause 4.1.1 was fulfilled. Accordingly the Agreement is valid and binding and the appeal should be upheld.
- [27] In regard to costs, these will follow the result. Having regard to the nature and complexity of this matter, the amount involved, and its importance to Rio Ridge, I am of the view that the award of costs in the appeal should include counsels' costs on scale B. I make no such order as to scale in respect of the

costs of suit since the introduction of the scales only occurred on 12 April 2024, after the judgment of the court *a quo* had already been handed down.

[28] In the circumstances, It is ordered:

[28.1] The appeal is upheld.

[28.2] The respondents are ordered to pay the costs of the appeal on the scale as between party and party which costs are to include those of counsel on scale B.

[28.3] The order of the Court *a quo* is set aside and replaced with the following order:

[28.3.1] The first and second respondents are ordered jointly and severally, the one paying the other to be absolved to make payment to the applicant as follows:

[28.3.2] The sum of R5 000 000.00 (Five Million Rand);

[28.3.3] Interest on the aforementioned amount *a tempore morae*;

[28.3.4] Costs of suit.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE,



SK HASSIM

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I AGREE,



B LESUFI

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 07 OCTOBER 2024

JUDGMENT DELIVERED ON: 30 OCTOBER 2024

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