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

Case Number: 120770/2023

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

|                                                     |
|-----------------------------------------------------|
| <b>19 Aug. 24</b> _____                             |
| DATE                                      SIGNATURE |

In the matter between:

**EMERALD CAPITAL PROPRIETARY LIMITED**

Applicant

Registration Number: 2018/335182/07

AND

**SATHIASELAN GOVATHASAN PATHER**

Respondent

*This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 19 August 2024.*

*Key words: Claim sounding in money-no dispute of facts-guaranteed indebtedness*

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**JUDGMENT**

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MUDAU, J

[1] The applicant, Emerald Capital, seeks judgment against the respondent, Mr Pather for payment of money on the basis that the respondent guaranteed the indebtedness of Polymeric Africa (Pty) Limited ("Polymeric") to the applicant and the debt is due and payable but remains unpaid.

[2] In the notice of motion, the relief sought is couched in relevant parts as follows:

“1. Payment of the sum of—

1.1 in respect of the First Facility — R17 772 508.89 together with interest thereon at the prime lending rate (currently 11.75%) plus 6% (a total of 17.75%) from 10 November 2023 to date of payment, both days inclusive.

1.2 in respect of the Second Facility — R7 059 882.44 together with interest thereon at the prime lending rate (currently 11.75%) plus 6% (a total of 17.75%) from 10 November 2023 to date of payment, both days inclusive.

1.3 in respect of the Third Facility —R4147616.99 together with interest thereon at the prime lending rate (currently 11.75%) plus 6% (a total of 17.75%) from 10 November 2023 to date of payment, both days inclusive.

2 Costs on the attorney and own client scale.”

[3] After hearing submissions by counsel and having considered the matter, I granted the relief sought. The application is opposed on various grounds. However, from the heads of argument the respondent has abandoned all defences except one. The remaining issues are accordingly as follows; Firstly, whether the effect of the Repayment Plan Letter is to negate the principal debtor's status as being in default. Secondly, whether the applicant is entitled to demand repayment of the full outstanding balance or whether, as contended by the respondent, the application is "premature".

### *Background Facts*

[4] The background facts are largely uncontroverted. The circumstances surrounding the principal debts are as follows. On 14 June 2021, 9 December 2021 and 13 December 2022 respectively Emerald Capital and Polymeric Africa (Pty) Limited ((Polymeric) concluded a written Master Trade Credit Agreement (“MTCA”) pursuant thereto, in terms of which Emerald Capital would advance money to Polymeric for purposes of trade finance. Mr Pather guaranteed the fulfilment of Polymeric's obligations to the applicant by concluding a written guarantee agreement in favour of the applicant on 14 December 2022. There is no disputing that, Mr Pather guaranteed a debt owing to Emerald Capital by Polymeric in respect of trade finance lent and advanced by Emerald capital to Polymeric. Mr Pather undertook liability irrevocably and unconditionally as a principal obligation. Polymeric has defaulted on its repayment obligations and Emerald Capital has demanded immediate repayment of the entire outstanding amount, as it is entitled to do, both from Polymeric itself and from Mr Pather as guarantor.

[5] The First and Second Facility Letters stipulate that the due date for repayment of advances is either within 120 days or by the end of the term of the applicable facility, whichever comes first. The MTCA makes provision that a failure to make payment of any amount by its due date is an “Event of Default”; and that upon the happening of an Event of default Emerald Capital may terminate the MTCA and demand immediate repayment of each outstanding balance, all of which are then immediately due and payable.

[6] Some of the Events of Default were by way of example, Polymeric being in breach or default of or committing or permitting a breach of any other of the terms, obligations, undertakings, commitments, or conditions of the Agreement [clause 11.1.3]. Also, “any of Polymeric’s Directors or equivalent officers being found guilty of any crime involving dishonesty, bribery or corruption, or otherwise being guilty of conduct which, in the reasonable opinion of the applicant brings, or is reasonably likely to bring, the Applicant into disrepute”.

[7] In time, Polymeric defaulted to repay the various advances by their due dates. Unsurprisingly, in a letter to Polymeric dated 10 November 2023, Emerald Capital exercised its right to terminate the MTCA and claim immediate repayment of all

outstanding amounts (clause 12.1 of the MTCA). That letter included a demand for repayment addressed to Mr Pather as guarantor. Emerald Capital avers that it discovered that Mr Pather the de facto director and the person in sole control of the operation of Polymerics' business, had been convicted of an offence involving dishonesty and sentenced to a custodial sentence by a full court of the Kwazulu-Natal Division of the High Court of South Africa as an additional ground upon which it was entitled to cancel the MTCA, over and above other substantive grounds.

[8] Also, the two credit insurers referred to in the facility letters, namely CGIC and Hollard, withdrew or limited the extent of the credit insurance cover afforded to Polymeric. Polymeric's failure to repay timeously together with the withdrawal of credit insurance cover constituted further grounds upon which the applicant was entitled to cancel the facilities. As per their agreement, Emerald Capital relies on the quantum of its claim by way of a certificate of balance in accordance with the provisions of the MTCA (clause 8.2).

[9] Subsequently, Polymeric, represented by Pather, proposed to the applicant that an associated entity, being Royal Prime Trading Proprietary Limited ("Royal Prime") which owns a property, namely Portion 5 of Erf 1[...] Z[...] S[...], could sell the Property and that the proceeds could be used to make a significant contribution towards the payment of the outstanding balance to the applicant under the Agreement.

[10] Consequently, on 8 September 2023, the applicant and Mr Pather, signed a Repayment Plan Letter, which is annexure in this matter "FA12" ("Repayment Plan Letter"). The Repayment Plan Letter included the following material terms:

"... this letter intends to evidence the agreement we have reached. Namely, without prejudice to any of your other obligations in any of the Trade Credit Agreements:

a. conditional upon:

i. your countersignature of this letter;

ii. your compliance with the other provisions of this letter at the time and in the manner envisaged therefor (and, in addition, if you provide us with item b.i. instead of item b.ii, the confirmation in this paragraph a shall not take effect

until we have received prepayment of your outstandings in an amount equal to 50% of the sales proceeds);

iii. the accuracy of the representations and warranties in paragraph 4; and iv. our being satisfied that you are continuing diligently to work to comply with the conditions set out in this letter, we confirm that any Event of Default otherwise constituted by the Credit Insurer Events shall not of itself constitute an Event of Default;

b. by no later than 15 September 2023, you shall provide us, in form and substance satisfactory to us, with either:

i. a signed offer to purchase on Portion Number 5 of ERF Number 1[...], Z[...] S[...] and evidence of arrangements that ensure that, no later than a date acceptable to us, an amount equal to 50% of the sales proceeds will be paid to us promptly upon payment by the buyer, to be applied against amounts owed by you to us; or

ii. a duly perfected mortgage bond over Portion Number 5 of ERF Number 1[...], Z[...] South in form and substance acceptable to us (including, without limitation as to the indebtedness secured thereby);

ii. a duly perfected mortgage bond over Portion Number 5 of ERF Number 1[...], Z[...] S[...] in form and substance acceptable to us (including, without limitation as to the indebtedness secured thereby); c. you shall provide us promptly upon request with such financial information as we may consider necessary, including income statements, cashflow forecasts and or bank account statements and, on the basis of which, we shall (to the extent we consider practicable) consult with you in relation to the fixing of a principal repayment under the FLs for each calendar month, starting with August 2023, it being further understood by you that:

i. the sizing of the instalments is ultimately at our discretion;

ii. we will inform you of the amount for such calendar month and how it is to be applied no later than the 20th of the calendar month;

iii. if we so request, you shall promptly transfer to us amounts equal to the proceeds of any particular debtor payments identified for earmarking by us and/or, if we so request, request individual debtors to make payment directly to such account as we may specify for such purpose;

iv. any instalment specified by us for a given calendar month shall then be payable no later than the last Business Day in that calendar month; and v. we will review such arrangements with you during October 2023 with no inference to be made that we will extend such arrangement beyond the end of October 2023)." *My emphasis*

[11] On 14 September 2023 Polymeric furnished the applicant with a deed of sale ("Deed of Sale" ) entered into between Royal Prime as seller and a Mr Saravan Deveraj Govender as purchaser, which was concluded on 14 September 2023, in respect of portion 5 of erf 1[...] Z[...] S[...] Registration Division FU, Province of KwaZulu-Natal, in extent 2651 meters ("the Property" ) for a purchase price of R25 000 000.00, payable in five instalments of R5 000 000.00 commencing on 31 October 2023. However, it makes no reference to any payment to the applicant of the sale proceeds and accordingly fell short of the express provisions of the Repayment Plan.

[12] Consequently, the proposed sale did not amount to a satisfactory arrangement to ensure payment to the applicant as contemplated in paragraph 3 (b)(i) of the Repayment Plan Letter and has not resulted in any payment to the applicant as contemplated. In a separate affidavit, the attorney, Mr Kisten, confirmed in an affidavit filed in the applicant's application to wind up Polymeric that he, as a conveyancing attorney, will not be entitled to pay out any amounts to the applicant before having received the full purchase price.

[13] Applicant demanded immediate repayment of the full amount owing from Polymeric, by way of a letter dated 10 November 2023 "annexure FA15", together with proof of delivery to the respondent's addresses in terms of of the Guarantee. However, the respondent has failed to make payment and is in default of its payment obligation under clause 4.12 of the guarantee agreement.

[14] Mr Pather contends that Polymeric duly complied with clause 3(b)(i) of the Repayment Plan, by providing a signed offer to purchase the property. He contends that, the acceptability of the payment arrangement was contingent upon the applicant communicating to Polymeric whether such arrangements were acceptable,

which the applicant failed to do. He contends that, the application is premature, having regard to the Repayment Plan and falls to be dismissed.

[15] However, as counsel for the applicant was at pains to point out, the terms of the Repayment Plan Letter makes plain that it was an attempt to regulate the terms upon which Emerald Capital would not immediately exercise its rights following Polymeric's default, and that no terms would have any effect after October 2023, which is a commercially sensible construction see *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>1</sup>, given the contract's factual matrix against the backdrop of the respondent's defaults. The respondent's contention in this regard clearly overlooks para 3 (a) (ii) of the repayment agreement which clearly indicates the applicant had to receive 50% of the sale proceeds which event never occurred for the reasons indicated in paragraph 11 above. It accordingly follows that the respondent has no valid defence to the applicant's claim. It is for the above reasons that the order was granted in favour of the applicant.

#### *Order*

[15] The order is confirmed.

**TP MUDAU**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, JOHANNESBURG**

Date of Hearing: 12 August 2024

Date of Judgment: 19 August 2024

#### **APPEARANCES**

Counsel for the Applicant: Adv. A Lamplough SC

Instructed by: Cox Yeats

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<sup>1</sup> [2012] ZASCA 13; 2012 (4) SA 593 (SCA)

Counsel for Respondent: (no appearance) the attorneys of record withdrew