



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 3788/2023

In the matter between:

The Standard Bank of South Africa Limited

First Applicant

SB Guarantee Company RF (Pty) Limited

Second Applicant

and

Mandlakomoya Trade and Projects CC

First Respondent

Nonele Mathe

Second Respondent

JUDGMENT ON COUNTER-APPLICATION

JANISCH AJ:

INTRODUCTION

[1] The first and second applicants have applied for judgment against the second

respondent in respect of monies advanced by the first applicant to the first respondent under a home loan agreement, a business revolving credit plan and an overdraft. The second respondent has bound herself, in various agreements, as a guarantor as well as a surety and co-principal debtor towards the first applicant in respect of the debts of the first respondent (of which she was the sole member). She has also bound herself as a surety and co-principal debtor towards the second applicant in respect of any indebtedness of the second applicant (as guarantor) to the first applicant under the terms of a mortgage bond arrangement.

[2] The notice of motion reflects claims against both the first and second respondents. On 24 April 2023, this Court granted orders against the first respondent in favour of the first applicant for payment of the amounts as prayed. Because it was not clear that the application papers had been properly served on the second respondent, no order was taken against her and the matter was postponed for service to occur. The application became opposed and on 15 August 2024 was postponed to the semi-urgent roll on 16 October 2024.

[3] Prior to the application for a money judgment against the respondents being launched, the second applicant (which was the mortgagee of the property under the home loan) launched an application in the KwaZulu-Natal High Court for the liquidation of the first respondent. The liquidation proceedings still were not complete when the application for the money judgment was brought. The first respondent was placed in final liquidation on 3 September 2024 (after the order of this Court had been made against it).

[4] As stated, the applicants' money claims against the second respondent on the basis of the guarantees and suretyships was set down for hearing on 16 October 2024.

[5] A month before the set-down date, the second respondent brought a counter-application, praying *inter alia* that the main proceedings against her in relation to money judgments and costs be "*temporarily stayed pending the finalisation of the liquidation proceedings of the first respondent*". She also sought an order entitling the applicants to re-enrol the main application when the liquidation proceedings had

been finalised provided that amounts were still owed to the applicants.

[6] By way of the stay application the second respondent wished this Court, in the exercise of its inherent discretion to regulate its process, to stop the applicants from pursuing their money orders against her pursuant to the guarantees and suretyships until it was known what the shortfall was after the liquidation process was complete.

[7] The application for a stay was opposed.

[8] At the commencement of the hearing of the matter on 16 October 2024, I permitted the second respondent first to move her counter-application, since if a stay was granted there would be no basis to proceed at that time with the main application.

[9] After hearing argument, I made an order dismissing the counter-application to stay the proceedings, with costs. I indicated that my reasons would follow.

[10] My reasons for making the order are as follows.

[11] This court has an inherent discretion, now entrenched in section 173 of the Constitution, to regulate its own process. This includes a power to stay proceedings in an appropriate case. But like all discretions, it must be exercised judiciously and based on proper principles.

[12] Various circumstances have been identified in which proceedings brought in this Court may be stayed. For example, a matter may be stayed where a similar or identical dispute is pending before another court and allowing them both to proceed could lead to conflicting judgments (*lis alibi pendens*), or to combat an abuse of process (such as vexatious litigation), or pending compliance with an order to provide security for costs. The list is not a closed one. However, it is clear that the power should only be exercised where there is a proper reason to delay a claimant in pursuing relief to which he or she is in principle entitled (whatever the inherent merits of the claim may be).

[13] The application for a stay in this case was not based on any of the recognised categories in which such relief has typically been granted. Although it was suggested that the present case has some similarity to *lis alibi pendens*, the circumstances are very different. The liquidation proceedings in respect of the first respondent, to which the second respondent was never a party, are complete, and no further judgment of another Court is awaited. In any event, a liquidation application is something very different from a money claim. The process of winding up the first respondent's estate is not a judicial one. In my view there is no reason why the fact that the principal debtor is in liquidation should preclude this Court from determining a separate claim against a different party based on guarantees or suretyships in relation to the principal debtor. Nothing that happens in an ordinary liquidation process can alter the creditor's independent rights to call up its security.

[14] Indeed, money claims against those who have put up security for persons or entities that have become insolvent are entertained practically every day in this Court.

[15] The crux of the Second Respondent's case for a stay was that she was hopeful that the main asset of the first respondent (the mortgaged property, which this Court had declared to be especially executable) would realise a sufficient amount in the liquidation process to settle the applicants' claims, thus reducing or even eliminating what could be claimed against her as guarantor or surety. If orders were taken against her now, the applicants may take steps to execute against her, possibly even leading to her sequestration, all of which may prove unnecessary if the applicants are settled out of the insolvent estate.

[16] It is important to note that, in the suretyships on which the claim against the second respondent is partly based, she had expressly waived the benefit of excussion. This meant that, in the ordinary course, she could not raise the dilatory plea that judgment could not be taken until the applicants had completed recovery steps against the principal debtor. She could, under the suretyship agreements voluntarily concluded, be required to pay immediately as co-principal debtor. Moreover, to the extent that she held herself out as guarantor, her obligation was a

primary one, and excussion would in any event not be available as a defence.

[17] It appeared to me that, if the main application were stayed to allow the liquidation process to run its course and for the application only to be re-enrolled if there is a shortfall, this would effectively be reinstating the Second Respondent's benefit of excussion, which she expressly waived. It would also run counter to her primary obligation as guarantor, which again she voluntarily assumed.

[18] In the face of these concerns, counsel for the Second Respondent submitted that the differentiating factor between the ordinary position of a surety or guarantor, who cannot delay judgment pending the excussion of the principal debtor, and the Second Respondent is the nature of the principal debtor (the First Respondent). As I understood the submission, the First Respondent was the source of the Second Respondent's income. Now that it has been placed in liquidation, she has lost control of it and cannot now employ it to generate income which may have assisted her in settling her obligations towards the applicants. A stay would redress that.

[19] I do not see this as a factor which would justify granting a stay. The Second Respondent would have been aware of the risks of incurring debt within her business entity (including property debt which may or may not have been associated with the business), and of the risks of putting up security for that debt in her personal capacity. The fact that she may now have lost a source of income to enable her to deal extraneously with the applicants to attempt to ward off judgment is unfortunate but is the result of defaults in payment by the very entity on which she was relying for income. This is not a factor which in my view should preclude the applicants from protecting their rights by moving for judgment in the ordinary course.

ORDER

[20] In the premises, I was not persuaded that there were proper grounds to stay the main application, and I granted the following order:

“The counter-application for a stay is dismissed with costs, such costs to include the costs of counsel on the tariff as per Scale A.”

M W JANISCH
Acting Judge of the High Court
Western Cape Division

APPEARANCES:

For the Applicants: Adv G Slingers

Instructed by:

Werksman Inc

For the Second Respondent: Adv C Fehr

Instructed by:

Attorneys Zumpt

Date of hearing: 16 October 2024

Date of judgment: 18 October 2024