IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 1150/00

In the matter between:

NEDBANK LIMITED Plaintiff

and

JULIANA ANTONIOU Defendant

JUDGMENT

REVELAS J

Introduction

[1] The plaintiff *("the bank")* instituted an action against the defendant claiming various amounts from her, arising from the fact that she had on 21 July 1998, signed a suretyship agreement as co-principal debtor with her son Nicholas Antoniou *("Antoniou")*, for the payment of the latter's unpaid debts to the bank. The bank claims three amounts in respect of three separate loan accounts (or credit agreements) as set out below.

[2] Antoniou had concluded a loan agreement on 10 December 1996 with the bank for the payment of his home loan, which was secured by a mortgage bond registered over his residential property in Jeffreys Bay *("the loan account")*. Antoniou further owed the bank money in respect of an overdraft facility on his cheque account (on which the limit was R75,000.00 but altered from time to time) and an amount owed on his credit card account which was opened for him in October 1997 *("the card account").*

[3] The amount claimed in respect of the loan account was the sum of R162,867.05 plus interest. The amount claimed on the overdraft cheque account was the sum of R4,466,314.45 together with interest. The claim in respect of the credit card account amounted to R149,863.18 plus interest.

[4] Mr Perie Kemp of the bank, testified about the takeover by the bank of its predecessor's assets and the factual position of Antoniou's accounts which fell under the bank's collections. Kemp also handed in a certificate in terms of the provisions of Section 15(4) of the Electronic Communications and Transactions Act 25 of 2002, relating to the details and extent of Antoniou's indebtedness in respect of his cheque, card and loan accounts. These details were contained in the

annexures attached to the certificate. Thus the bank relied on two certificates of balance. The defendant disputed the correctness of the amounts reflected on the certificates and claimed by the bank in her pleadings. However, during cross-examination of the defendant, she conceded their correctness on the basis that she had no knowledge of how they were computed.

[5] Mr Frank Smith *("Smith")*, the bank's regional manager, also signed the certificates of balance as contemplated in the suretyship agreement. It was not disputed that Smith was a competent official as foreseen in the deed of surety.

[6] Antoniou was finally sequestrated on 20 January 1999. The bank allocated certain dividends (R238,356.16) received from the insolvent estate to certain of the accounts. The bank pleaded that it was entitled to do so in terms of the suretyship. In the alternative, the bank pleaded that if it ought not to have made the aforesaid allocations, it was entitled to recalculate the accounts by appropriating the dividends in terms of the common law principles, i.e. firstly to the interest and thereafter to the most onerous debts. The defendant did not challenge the allocations during the trial. The aforesaid principles are in any event applicable as between creditor and debtor, and a

surety may not rely on them. The bank's alternative claims, premised on the eventuality of a finding that the bank was not entitled to appropriate the dividends aforementioned, are therefore irrelevant. Accordingly only the main claims are considered for purposes of determining this matter.

[7] A further development had an impact on the amounts claimed from the defendant. Smith handed in new certificates in respect of the defendant's indebtedness, for lesser amounts following the decision in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd*[1]. In terms of this decision, the prevailing legal position (as it then was) that interest accruing after summons had been issued, was not affected by the *in duplum* rule, is no longer applicable. Accordingly, the reduced amounts claimed by the bank are at present: On the cheque account: R308,624.67; on the loan account: R35,984.86; and on the card account: R18,699.27 plus accrued interest on the aforesaid amounts compounded until these interest amounts reached the amounts of the capital.

[8] At the time when the three aforesaid credit agreements between the bank and Antoniou were concluded, the bank was known as NBS

[1] 2015 (3) SA 479 (CC).

Boland Bank and thus the original creditor. The latter became BOE Bank and in 2005, the plaintiff bank eventually took over the assets from BOE Bank. The bank also changed its name a few times and at the relevant time the bank was also known as Boland PKS Bank. The present litigation commenced in this court in June 2000. The bank successfully applied to substitute the aforementioned entities with the bank as plaintiff. The defendant disputed that Antoniou's debts formed part of the assets that were transferred by the original creditor to its successors in title, in her pleadings.

[9] Smith, who was concerned with claims and collections in Port Elizabeth at the relevant time, gave evidence about the history of the business transfers of the bank. These included Antoniou's debt. Cross-examination did not alter his testimony that the bank, as part of the assets, took over Boland Bank's claim against Mr Antoniou. During the trial the defendant did not take issue with the aforesaid history of the bank and the bank's *locus standi* to sue was therefore not in issue.

The Defences to the Bank's Claims

[10] Of the several defenes pleaded, the defendant's main defence was a challenge to the validity of the suretyship agreement which she

contends she only signed because of several misrepresentations were made to her by Mr Neil Hull, the bank's Jeffreys Bay Branch Manager *("Hull")*. According to the defendant, she signed a blank document which was completed at a later stage by someone other than herself.

[11] A further defence raised by the defendant was that Antoniou and the bank had concluded an oral agreement relating to an overdraft account Antoniou had with First National Bank *("FNB")*. According to the defendant, Antoniou's debt to the aforesaid bank would first have had to be discharged with funds advanced by the bank in respect of Antoniou's loan, before she would become liable as a surety. The defendant pleaded that in terms of the agreement, certain credit preconditions were set, but had not been fulfilled by the bank, and when she signed the agreement she was unaware that the surety agreement contained provisions contrary to the alleged oral agreement. Accordingly, she never intended to be bound by it, and she was persuaded to sign the surety agreement by misrepresentations made to her by the bank (Hull).

[12] The defendant also disputed that the surety signed by her was for an unlimited amount. She maintained that it was a limited amount of R500,000.00.

[13] In her plea, the defendant contended that she ought to be discharged of her obligations in terms of the suretyship, because the prejudicial and onerous terms of her surety agreement were against public policy.

Background

[14] The undisputed evidence was that Antoniou's core business during 1996 was that of a fresh produce merchant. At the time he was a client of FNB in Joubertina. Antoniou wished to expand his business activities to Jeffreys Bay and open a retail store. To this end he approached the original creditor, Boland PKS Bank in Jeffreys Bay to apply for the necessary credit. He dealt with the bank's collections manager, Hull. Antoniou, at that stage, owed a substantial amount of money to FNB in terms of an overdraft facility as referred to above. He told Hull that he owed FNB R300,000.00. I must pause here to point out that the defendant had also stood surety for her son in respect of his obligations to FNB and signed two sureties on 20 January 1995 and 5 July 1995 for the amounts of R130,000.00 and R150,000.00 respectively. Antoniou had approached Hull with a view to close his account with FNB and to obtain credit facilities for his

business through the plaintiff bank. Hull testified that he found it difficult to assess Antoniou's real financial status while he was a client of both banks. It was decided to consolidate Antoniou's debts at one bank.

The Evidence

[15] Detailed evidence was led by the bank as to the amounts owed by Antoniou to the bank on various dates. Since Antoniou was not called to testify, the evidence about the balance of the principal debtor's three accounts which formed the basis of his indebtedness was not successfully challenged and the figures reflected in the latest certificates handed in by Smith ought to be accepted. During cross-examination of the defendant, it transpired that the extent of her son's indebtedness, as alleged by the bank, was not in dispute as far as she was concerned. As to what transpired on 21 July 1998, the day on which the defendant signed the deed of surety and allegedly, the other ancillary documents, Hull and the defendant gave mutually destructive versions.

Hull's Testimony

[16] Hull's testimony about his dealings with Antoniou could not be disputed as Antoniou did not testify. Hull testified that the first transaction between the bank and Antoniou was the granting of the home loan. Thereafter the business cheque account and a credit card accounts were opened. To consolidate Antoniou's debts at one bank, he was to be granted a credit facility of R700,00.00: R600,000.00 (an overdraft facility) plus R100,000.00 (an additional facility) to be appropriated and utilized firstly, to settle Antoniou's debt to FNB in the amount of R300,000.00. The balance of R400,000.00 was to be appropriated as working capital. Antoniou's application for this credit facility was approved by the bank, subject to certain conditions relating to security for repayment. It was recommended by the bank that security for Antoniou's indebtedness was to be provided in the form of an unlimited surety provided by the defendant, supported by the registration of a covering mortgage bond in the amount of R500,000.00 over three properties in Joubertina, owned by the defendant. Antoniou's life insurance policy with Commercial Union was to be ceded to the bank.

[17] Hull testified that to give effect to the aforesaid, a formal appointment was made (through Antoniou) to meet with the defendant for purposes of her signing of the relevant documentation on 21 July 1998. These documents consisted of the deed of surety (to be signed by the defendant) a power of attorney to register the covering bond over her three properties (also to be signed by the defendant) and the documents relating to the cession of insurance to be signed by both Antoniou and the defendant.

[18] When Antoniou and the defendant arrived at the appointed time, all the documentation had been prepared in advance by Hull's secretary (which she confirmed when she gave evidence) and all the necessary details were filled in on the deed of surety, such as the defendant's name and identity number and the date and place of signature. The bank had these details on record since the time Antoniou had applied for a credit facility before, but which he did not take up but instead, took up the facility with the R75,000.00 limit. The defendant's address was filled in later because it was not to hand at the time.

[19] Hull testified that he explained to the defendant what the purpose of the surety was and also, for what debts of Antoniou she

stood surety for, with reference to Antoniou's increased credit facilities. According to Hull, the defendant was made aware of the fact that the surety was for an unlimited amount. She had also placed her initials below the word *"onbeperk"* (unlimited) on the deed of surety in acknowledgment that this aspect was explained to her. The defendant also signed the cession document and the power of attorney, and initialed each page of the substantial draft bond document annexed thereto. The defendant further signed a document (drafted in *pro forma* form by the bank), acknowledging that she had signed a surety and what it was for. On the same say, presumably on the same occasion, Antoniou signed a letter, also prepared by the bank, for transfer of his account with FNB, and the balance thereon, to Boland PKS.

[20] On the strength of the anticipated securities provided by the defendant, Antoniou was advanced the facilities in question. However, when the covering bond was to be registered over the defendant's properties, the attorneys for the bank received a letter dated 23 July 1998 from Mr Mattheus, the attorney tasked with cancellation of Antoniou's bond in favour of FNB. It transpired that Antoniou did not owe FNB the amount of R300,000.00 as he had represented to Hull,

but in fact owed FNB a much more substantial amount, namely R534,171.88.

[21] The facilities approved on the strength of the anticipated security provided by his mother, the defendant, were clearly insufficient to pay FNB the aforesaid amount. In addition, Antoniou made no payments in respect of his debts. On 20 August 1998 the bank requested him to return his cheque book and credit cards. By September 1998, Antoniou's account was overdrawn by R229,256.23 and he was placed on terms to repay this amount by 25 September 1998, failing which he would be held liable for his entire debt which would then become due and owing. Antoniou did not respond. His account was then closed and four months later he was sequestrated and the defendant found herself in the unenviable position of being a surety for her son's substantial debts at two different banks.

The Defendant's Testimony

[22] The defendant testified that on 21 July 1998 she visited her son at Mondplaas and he asked her to accompany him to Jeffreys Bay where he wished to introduce her to Hull. She was apparently not told why this introduction was necessary. On arrival at the bank she

was introduced to Hull who thereafter spoke to her son alone, while she sat in a chair waiting for them to finish their discussion. She said that thereafter, when they left, as they were walking out, Hull called her back and asked her to quickly sign a document. She stated that she was in a hurry to get home before it was dark and she did not read what she was signing, but believed it was a written consent form to enable her son's account and debts at FNB, to be transferred to the Boland PKS. She was adamant that she would never have agreed to stand surety for her son in favour of the bank, unless his debt to FNB had been extinguished with the funds advanced by the bank. During cross-examination she stated that she only signed one document, and that was the *"consent".* According to her, the signatures on the cession documentation, power of attorney, draft bond and letter of acknowledgement were all falsified.

[23] Mr Theron, an attorney from Stellenbosch (formerly from Joubertina) represented the defendant throughout these proceedings. The main thrust of Mr Theron's cross-examination of Hull was that he (Hull) was neglectful of his duties as a bank manager by allowing Antoniou to make withdrawals from his business account far in excess of the R75,000.00 limit on his overdraft being well over R200,000.00. As a result, Hull needed to rescue his own position*, vis-à-vis* the bank,

and he decided to reel the defendant in as a surety, so that the bank could lay claim to all her properties to compensate for Hull's negligence and keep himself out of trouble with his superiors *("om sy eie bas te red")*.

[24] The aforesaid proposition was not pleaded. Since Antoniou did not testify, the bank's position (as pleaded), namely that the overdraft limit on that account was R75,000.00, but was altered from time to time, stands undisputed.

[25] Hull should perhaps have been more meticulous in establishing Antoniou's creditworthiness and the extent of Antoniou's debt with FNB much sooner. As I understood his evidence, Hull conceded as much under cross-examination. The aforesaid does, however, not amount to a *bona fide* defence and does not assist the defendant, particularly if one has regard to the defences pleaded and the defendant's own testimony in court. It must also be borne in mind, in this regard, that Antoniou was a businessman and had misled Hull as to the extent of his debts with FNB.

Analysis

[26] The defendant's evidence in chief, that she believed that she was signing a consent form that her son's account may be transferred from FNB to the Boland PKS is simply disingenuous. The defendant was, on her own version, an astute businesswoman who could hardly have been so naïve as to believe that her adult son, himself a businessman, required her consent to transfer bank accounts. Moreover, during cross-examination she testified that she did in fact see the word *"Borgakte"* (deed of surety) at the top of the one page document she had in fact signed, according to her.

[27] Her testimony that she signed a blank document does not bear close scrutiny. Firstly, she said she did not read the document except for its heading. It is therefore difficult to apprehend how she could have noticed all the alleged blank spaces she referred to. Secondly, her initials below the part of the document dealing with the unlimited surety, tends to exclude that version. It was also common cause during the trial, that she had signed at least two deeds of surety prior to 21 July 1998. She therefore must have known what the import of signing a deed of surety was. She was no strnger to this type of transaction.

[28] Her testimony that she accompanied her son to the bank, merely so that he could introduce her to Hull, is farfetched. According to the defendant, she knew absolutely nothing about her son's debts, he had never asked her to stand surety for him, and they had no formal appointment with Hull to sign documents. In this scenario (where she went to the bank only for a short introduction and knew nothing of any other purpose for the visit) it is hardly likely that Hull would have called her back (after her departure) to quickly sign a blank surety deed which he pretended, was a consent form. That suggests fraud on a most serious scale on the part of Hull. This proposition is so preposterous that it ought to be rejected out of hand. There is no basis to rely on this evidence, particularly in the absence of any testimony by Antoniou regarding the visit to the bank. It also seems rather curious that a person would take his mother to a bank to whom he owed large sums of money, simply to introduce his mother to his bank manager. Even more curious is that when she leaves the bank, having been introduced, the mother has become the surety for his debts. If the defendant was misled by anyone, it was by her son.

[29] The defendant accused the bank of fraud with regard to her signature on the cession document, the power of attorney and other

documents. Such a case was never pleaded, as one would have expected if this indeed was the case. This version never formed part of the defendant's case and was never put to Hull. This version only illustrates the lengths to which the defendant would go to avoid liability under the surety. Her version is simply false and ought to be rejected.

[30] As to the alleged misrepresentations made by Hull, the defendant's version must also be rejected. It directly conflicts with her own version that she had no discussion with Hull about her son's debts and who, on her way out of the bank, asked her simply to sign a blank document.

[31] As illustrated above, the defendant gave self-contradictory evidence. On numerous occasions during her evidence when counsel for the plaintiff pointed out flaws in her testimony, and on other occasions, she would refer to God as being her witness in very emotional tones. She was also prone to bursting into tears and to shouting, to the point that I eventually had occasion to call her to order.

[32] The defence of an oral agreement to the effect that the surety was conditional on FNB being paid by the bank first, also does not bear close scrutiny either. Antoniou was the only witness who could testify about such an agreement and he did not. Apart from the fact that this version flies in the face of her version about events of the bank on 21 July 1998, it is also highly unlikely. Few banks would risk extinguishing a client's debt with a different entity, without any security being in place. It would surely be a most unwise business practice for any bank to follow.

[33] Broadly speaking, the defendant's defences collectively amount to a mistake on her part in signing the deed of surety in question. In order to succeed in the defence of *iustus error,* the defendant is obliged to show that she was misled as to the nature of the deed, or as to the terms it contained, or by some act or omission on the part of the bank (or Hull) if there was a duty on him to inform her of the consequences of signing the surety, such a duty would only arise where the document departed from prior representations as to the nature of contents thereof[2].

[2] *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) at 175F-H.

[34] In *Slip Knot Investments 777 (Pty) Ltd v Du Toit*[3] the Supreme Court of Appeal recognized the principle that a party is permitted to rely on his or her own mistake in certain circumstances, except where the other party has not made misrepresentations.

[35] In *Langeveld v Union Finance Holdings (Pty) Ltd*[4] the court applied the *'praesumptio hominis'* (popular presumption) in holding that there was a strong presumption that anyone who has signed a document had the intention to enter into the transaction contained in it, and the surety is burdened with the onus of convincing the court that he or she had not intended to enter into the contract, and if the defendant fails to do so, the maxim *'caveat supscriptor'* then trumps the defence of *'iustus error'*[5].

[36] FirstRand Bank also (successfully) instituted an action against the defendant as surety[6]. In that matter she also raised the defence that she did not appreciate the nature of the document she had signed and signed only as a result of misrepresentations made to her. In his

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[3] 2011 (4) SA 72 (SCA) at 76D-F.
[4] 2007 (4) SA 572 (W), see also *Roomer v Wedge Steel (Pty) Ltd* 1998 (1) SA 538 (N).
[5] See also *ABSA Bank Ltd v Trzebiatowsky and Others* 2012 (5) SA 134 (ECP) at paragraph [25].
[6] Under case number 2498/02

judgment in favour of FirstRand Bank, Erasmus J stated[7] that a person who voluntarily places her signature on a deed of suretyship is generally hard pressed to avoid liability under the document.

[37] Since the defendant's version of events is to be rejected as false, I accept that the defendant, as a literate astute businesswoman knew exactly what kind of document she was signing, and that she indeed intended to stand surety, as co-principal debtor for her son's obligations to the bank. She just did not want to be liable if he defaulted, a common regret felt by those who stand surety for defaulting debtors.

[38] In the circumstances, the defendant is liable as co-principal debtor for payment of the three capital amounts as claimed, plus interest thereon at the legal rate, and the plaintiff's cost of suit on a scale as between attorney and client.

Costs

[39] There are several examples of how Mr Theron delayed the outcome of this matter: The first time this matter came before me was

[7] At page 8

on 4 February 2013 (thirteen years after summons was issued), it stood down for four days. On 8 February 2013 it was postponed *sine die* and on 18 November 2013 it was postponed to 4 May 2015, when the trial finally commenced. It was during this period that Mr Theron asked for days off during the allocated trial period, to consult with his client and to prepare for trial. Several court hours were lost thereby. This was a relatively simple matter, which Mr Theron attempted to complicate and prolong at every opportunity. For example, there where many documents in this matter which became evidence by consent. When Mr Theron lead the evidence of the defendant, he insisted, despite my rulings to the contrary, that the defendant read the contents of the document into the record, an exercise which was bound to take up more time.

[40] Another example of this type of conduct became evident when the evidence in this matter was completed more than a year ago. Counsel for the plaintiff bank and Mr Theron both presented their arguments on that same day. Before I could reserve judgment, Mr Theron requested an opportunity to obtain the record of the proceedings and file written heads of argument (as counsel for the plaintiff had done). He gave an undertaking that he would file his heads of argument within thirty days of receipt of the record. No

heads were forthcoming. Further extensions were sought based on Mr. Theron's health, supported by medical certificates. I was advised of that Mr Theron was suffering from severe stress. Most unfortunately, Mr Theron was also injured during an assault. Further extensions were sought and granted on the basis of his slow recovery. Mr Theron is elderly and appeared to be frail. Therefore I had sympathy for him. However, I ran out of sympathy during the previous term because it appeared to me after a while, that the extensions were sought for opportunistic considerations and I then in February 2016, wrote a sternly worded letter to Mr Furstenberg, who, on Mr Theron's behalf, had requested all the extensions. In the letter I made it clear that Mr Theron had one last opportunity to file heads. The response thereto, which arrived in March this year, was that no heads of argument would be filed by Mr Theron, after all. Thereafter there were telephonic pleas by Mr Theron, asking for a yet further postponement. On 29 June 2016, the day before judgment was to be delivered, a written request by Mr Furstenberg for a postponement until the end of July was received and refused on 30 June 2016 in writing.

[41] The plaintiff argued that Mr Theron should be ordered pay 15% of the costs of this trial *de bonis propriis* by virtue of the fact that Mr

Theron wasted court time on preparation and consultations with his client, matters that he ought to have seen to before the trial commenced, and over weekends. It is correct that Mr Theron wasted time and that was in keeping with the general manner in which he conducted himself throughout these proceedings. The record abounds with examples thereof. I formed a strong view, during the trial, that Mr Theron had no desire to finalize this case by attempting to string matters out for as long as possible and to obfuscate issues for purposes of delaying the outcome. These observations were fortified by his conduct before, during and after the trial.

[42] The figure of 15% proposed by counsel for the bank strikes me as arbitrary, and even within the discretion I have with regards to costs, it would be difficult to justify such a costs order. In any event, Mr Theron's client associated herself with his conduct and she is therefore liable for the plaintiff's costs of suit on a scale as between attorney and client.

[43] In the circumstances, I find for the plaintiff and the following orders are made with regards to the defendant's liability as surety:

1. Cheque Account

   The defendant is ordered to pay the plaintiff the amount of R308,624.67 plus interest on the aforesaid amount as from 20 May 1999 at the rate of 22% per annum, calculated daily and compounded, monthly in arrears until 1 July 2002 when it equaled the capital amount.

2. Loan Account

   The defendant is ordered to pay the plaintiff the amount of R35,984.86 plus interest on the aforesaid amount at the rate of 14,50% per annum, calculated daily and compounded, monthly in arrears until 3 September 2005 when it equaled the capital amount.

3. Card Account

   The defendant is ordered to pay the plaintiff the amount of R18,699.27 plus interest on the aforesaid amount at the rate of 17% per annum, calculated daily and compounded, monthly until 3 November 2004 when it equaled the capital amount.

4. Costs

   The defendant is ordered to pay the plaintiff's costs of suit, on a scale as between attorney and client.

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E REVELAS
Judge of the High Court

Appearances:

For the plaintiff, Adv A B Beyleveld SC instructed by BLC Attorneys, Port Elizabeth

For the defendant, Mr P J Theron (Snr) of Theron & Partners, Stellenbosch

Date heard:	05 May 2015	(Evidence completed)
	01 March 2016	(Judgment Reserved)
Date delivered:	01 July 2016	