IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

DATE: 7/4/2006
NOT REPORTABLE **CASE NO: 32486/2005**

In the matter between:

KAP INTERNATIONAL HOLDINGS LIMITED APPLICANT

AND

THE LAND BANK RESPONDENT

JUDGMENT

LEDWABA, J

[1] This is an application for an order directing the respondent to pay the applicant the amount of R6 309 923, 00 plus interest on the amount at the rate of 15,5% per annum a *tempore morae* from 1 April 2005 to date of final payment and costs.

[2] The respondent filed a 'Notice of Appearance to Defend' to show that it is opposing the application. Respondent did not file an opposing affidavit but filed a notice in terms of rule 6(5)(a) of the Superior court Practice wherein it stated that it intends raising question(s) of law only in opposition to the applicant's application.

[3] The respondent in the notice phrased its questions of law which are summarised as follows:

(i) The respondent's obligation to pay the amount claimed arises once a stockowner has been called upon to pay such amount to the applicant.

(ii) *Ex Facie* the applicant's founding papers. The applicant has not called upon stockowners to pay the said amount.

[4] When the application was argued, both counsel agreed that the respondents would have the duty to begin and will first argue its questions of law. Advocate Terblanche SC, on behalf of the respondent, informed me that the facts set out in the affidavits supporting the applicant's application are fairly accurate and are common cause between the parties.

[5] A brief chronology of events is as follows:

1) 25 June 1997: A written agreement is concluded in terms whereof Kolosus Food Technologies (Co-operative) Limited (Kolosus) (holding company thereof is the applicant), and CEM sell their equity in Queenstown Abattoir to Kokstad. Stock Owners, Abakor and Haigh jointly and severally guarantees payment of the purchase price by Kokstad to

Kolosus and KHL and each signs as guarantor. The deposit of R150 00,00 was payable on 1 April 1997 and has been paid. The balance was payable on 31 March 2005 and has not been paid.

2) 1 August 1998: All of Kokstad's and Queenstown Abattoir's assets are transferred to Meadow Meats, which is 50% owned by Stock Owners. As a result, Kokstad becomes dormant and has no assets.

3) 25 August 1998: Abakor disposes of its interest in Kokstad to Stock Owners and seeks to be released from its obligations to Kolosus and Kolosus Holding Limited (KHL).

4) 15 September 1999: Kolosus refuses to release Abakor from its obligations.

5) October 1999: Meadow meats are put into liquidation. Stock Owners takes over its assets and incorporates same into Stocklush (Pty) Limited.

6) 11 November 1999: Stock Owners advises Kolosus of the transfer of Kokstad's and Queenstown Abattoir's assets to

Meadow meats and that as a result thereof, Kokstad and Queenstown Abattoir are dormant.

7) 6 December 1999: A meeting takes place between representatives of Stock Owners and Nell in respect of the possible release of Abakor from its obligations in terms of the agreement.

8) 7 December 1999: Kolosus writes a letter to Stock Owners putting to paper its requirements for the release of Abakor of its obligations in terms of the agreement.

9) 21 January 2000: The Land bank provides Kolosus with a draft guarantee.

10) 21 January 2000: Nell addresses a letter to the Land Bank requesting certain amendments to the draft guarantee.

11) 21 January 2000: The Land Bank provides Kolosus with a guarantee incorporating Nell's amendments and duly signed on behalf of the Land Bank.

12) 21 January 2000: Kolosus agrees to release Abakor from its obligations as contained in the guarantee issued by the Land Bank.

13) 24 January 2000: Abakor agrees to its release from its obligations in terms of the agreement as contained in the Land Bank's guarantee.

14) January 2002: Stock Owners seeks a discount of the outstanding balance on the purchase price.

15) 21 January 2002: Kolosus agrees to grant a discount of R500 000,00 on the balance of the purchase price.

16) 22 May 2003: The Land Bank advises Kolosus that it has reduced its guarantee to R6 309 923, 00 in terms of the discount guarantee.

17) 19 April 2004: Stock Owners is provisionally liquidated.

18) 30 June 2004: Stock Owners is finally liquidated.

19) 16 August 2004: Le Grange from Hofmeyr Herbstein & Gihwala Inc write to the liquidators of Stock Owners requesting

inter alia the necessary claim forms and an update in the liquidation process.

20) 9 February 2005: Le Grange again addresses the liquidators of Stock Owners requesting *inter alia* a report on the status of the liquidation proceedings.

21) 23 February 2005: The liquidators of Stock Owners writes to Le Grange at Hofmeyr Herbstein & Gihwala Inc advising them *inter alia* that:

(1) The Land bank has lodged a claim of approximately R158 million, partly secured by certain bonds and otherwise;

(2) The Receiver of Revenue has submitted a claim in excess of R1,2 million;

(3) If the Receiver of Revenue's claim is correct, the entire free residue would be awarded to the Receiver of Revenue;

(4) The Land Bank will probably have an extensive shortfall against its security for which it will

lodge a claim against the free residue as a concurrent claim.

22) 6 July 2004: The Land bank seeks to unilaterally withdraw *from* the guarantee.

23) 25 August 2004: Le Grange disputes the Land bank's attempted withdrawal *from* its guarantee.

[6] The guarantee that was signed by the respondent upon which the applicant bases its claim reads as follows:

"*We, the undersigned, officers of the Land and Agricultural Bank of South Africa (hereinafter called the Land Bank), duly deputed thereto by the General manager in terms of Section* 17 *of the Land Bank Act* No 13 *of* 1944 *hereby on behalf of the Land Bank undertake to pay Kolosus Holdings Limited (hereinafter called Kolosus) such* an *amount or amounts not earlier than* 31 *March 2005 which in aggregate shall not exceed* R6 725 979 *(SIX MILLION SEVEN HUNDRED AND TWENTY FIVE THOUSAND NINE HUNDRED AND SEVENTY NINE RAND) which Stock Owners Co-operative Limited or its successors in title* (*hereinafter called Stock Owners) may be called upon to pay to Kolosus pursuant initially to the provisions of the guarantee contained in clause* 7.2 *of the Memorandum of Sale Agreement dated* 25 *June* 1997 *relating to the sale to Kokstad Abbatoirs (Pty) Limited of the shares in* an *loan claims*

against Queenstown Abbatoir (Pty) Limited. It is further recorded that the said amount of R6 725 979 *is the balance purchase price owed by Kokstad Abbatoir (Pty) Limited to Kolosus.*

It is distinctly understood that the Land Banks maximum liability under this guarantee is R6 725 979 *(SIX MILLION SEVEN HUNDRED AND TWENTY FIVE* THOUSAND *NINE HUNDRED AND SEVENTY NINE RAND).*

This guarantee is subject to the condition that Abakor Limited is released from the joint and several liability to Kolosus in terms of the abovementioned agreement dated 25 *June* 1997 *and that both Kolosus and Abakor Limited confirm in writing their agreement/acceptance thereto.*

This guarantee and undertaking shall remain in full force until 7 *April 2005 in respect of Stock Owner's obligations under and in terms of the aforesaid agreement from time to time and shall be irrevocable until receipt by the Land Bank of written notice from Kolosus to withdraw this guarantee and undertaking.*

This guarantee shall not be negotiable nor transferable and must be returned to the Land bank on payment effected in terms hereof and/or *cancellation of this guarantee."*

[7] Advocate Terblanche SC argued that in interpreting the document by looking at the ordinarily grammatical meaning of it, there is a pre condition that must be complied with by the applicant before the respondent can pay the applicant. The respondent's obligation to pay the guaranteed amount arises only after Stock Owners have been called upon to pay. He further argued that *ex facie* the applicant's papers, there was no demand that Stock Owners should pay.

[8] His alternative argument was that the undertaking or guarantee to pay in clause 7.2 of the memorandum of the agreement relating to the sale of shares in June 1997 is a void suretyship by virtue of non-compliance with the provisions of section 6 of the General Law Amendment act 50 of 1956.

[9] Clause 7.2 of the agreement reads as follows: *"The payment of the purchase price in terms of* 7.1 *hereof is hereby jointly and severally guaranteed by Stock Owners Co-operative Limitet, Abakor Limited and Bradley David Haigh, the latter in his personal capacity."*

[10] Applicant's counsel, advocate J,J. Brett SC, in his systematic argument articulated that calling upon Stock Owners to pay before claiming from the respondent was not a pre-condition before the respondent could pay the applicant, but just a recital or it was just descriptive. Applicant's counsel further argued that the only condition in the guarantee was

clearly set out in the third paragraph of the guarantee which reads as follows:

"This guarantee is subject to the condition that Abakor Limited is released from the joint and several liability to Kolosus in terms of the abovementioned agreement dated 25 *June* 1997 *and that both Kolosus and Abakor Limited confirm in writing their agreement/acceptance thereto."*

It is clear from the affidavits filed to support the applicants application that the condition which has been mentioned in the guarantee was complied with.

[11] I fully agree with advocate J. J. Brett SC's submission argument that the test to be applied to determine if applicant proved its case should be the one applied when an application for absolution from the instance of the plaintiff's case.

See: Valentino Globe BV v Phillips and Another 1998 (3) SA 775 (SCA).

[12] Applicant's counsel, further referred me to the unreportable case of **Mercantile Bank Limited v Industrial Development Corporation of South Africa Case number: A5044/2002 in the High Court of South Africa (WLD),** *",..It is appropriate to restate the approach that a court is required to adopt when considering an application* for absolution

at the close of a plaintiff's case and, particularly in circumstances where the issue is the interpretation of a document Schreiner JA in Gafoor v Unie Versekeringsadviseurs (Edms) Bpk 1961 (1) *SA* 335 *(A) at 340B-C, outlined the approach in these terms:*

"Where the plaintiff's evidence consists of the production of the document on which he sues and the sole question is the proper interpretation of the document, the distinction between the interpretation that a reasonable might (sic) [man) might give it, tends to disappear. Nevertheless, even in such cases the trial court should normally refuse absolution unless the proper interpretation appears to be beyond question. "

"We would also refer to the more recent judgement of Harms JA in Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) *SA* 88 *(SCA) where the court, after referring to the principle as stated in Claude Neon Lights SA Ltd v Daniel* 1976 (4) *SA 403 (A) at 409G-H stated the following:*

> *"This implies that a plaintiff has to make out a prima facie case of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine Trade Insurance* Co *Ltd v Van der Schyff* 1972 (1) *SA* 26 *(A) 37G-38A; Schmidt Bewysreg, 4th ed at* 91-2)."

As far as inferences from the evidence is concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). "

I agree with what the court held.

[13] In interpreting the guarantee signed by the respondent it is important to first look at the ordinary grammatical meaning of the words, also considering the heading thereof. There is no doubt that the document is headed "GUARANTEE".

[14] The respondent's counsel further argued that the alleged "guarantee" signed by the respondent is a suretyship. In **Swart en Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202,** Rumpff CJ stated in interpreting the word(s) in a contract word(s) must not be examined in isolation and be divorced from the context in which they are used in a contract.

[15] When I scrutinise the document upon which the applicant bases its claim and for me to decide whether the document is a guarantee or a suretyship I will consider the following:

(i) The document is headed "GUARANTEE"

(ii) The words used" *undertake to pay..."*

(iii)The words *"which Stock Owners Co-operation Limited or its successors in title (hereinafter called Stock Owners)* <u>*may (my*</u> emphasis) *be called upon to pay to Kolossus pursuant initially to the provisions of the guarantee contained in clause* 7.2

of the Memorandum of Agreement of Sale, dated 25 *June* 1997, *relating to the sale to Kokstad Abbatoir (Pty) Limited";* are just a recordal and descriptive. (In my view, it cannot be said that the only reasonable interpretation that can be made from the said words is that they should be regarded as a pre-condition before the respondent can pay).

(iv) There is no doubt that in paragraph 3 of there is a conditions recorded.

(v) In the fifth paragraph the documents contain the words *"guarantee" and "undertaking" /twice.*

(vi) The last paragraph uses the word *"guarantees"* again.

[16] As to whether the document is a guarantee or a suretyship, I fully agree with the decision of **Union and South West Africa Insurance Co Ltd v Hull and Another 1972 (4) SA 481 (D & CLD) at 486 B,** Milne J said: *"Approaching the matter on a purely linguistic basis, the words 'called upon' seem to me to be perfectly capable in their ordinary meaning of denoting something which it is the duty of the company to*

pay. Furthermore, these words must not be looked at in isolation but must be looked at in the context of the document as a whole".

In Peter Cooper & Co (previously Cooper & Ferreira) v De Vos 1998 (2) All SA 237 at 250F-252C, His Lordship Mr Justice Kroon and Nepgen had to determine whether a document was a suretyship or an undertaking to pay. At **250H** His Lordship Mr Justice Kroon held as follows: - *"In my judgment the document did not constitute a suretyship. With reference to the heading of the document where the word 'Waarborg' appears, it is true that the ordinary and usual meaning of the word 'guarantee' connotes a surety who promises to saddle himself with an obligation if the principal obligator defaults... However, as was pointed out in that case, the word has several meanings and the sense in which it is used in a particular document would depend on the contents and tenor of that document.."*

And at **251E:**

"In casu Boland bank did not, in the document, purport to bind itself in respect of the due performance by the plaintiff of his obligations to the defendant. Instead it gave an outright undertaking, subject to a suspensive condition (viz, in essence, the determination by a court of the extent of the obligations), to discharge its obligations itself. The words in the document quoted above, relied upon by the defendant do not warrant a different interpretation being placed on the document. Support

for this view is to be found in the Sassoon Confirming case *(supra) where the document at issue (addressed by the defendant to the plaintiff's attorneys) in fact went further than the one in the present case in that it referred* to *the non-fulfilment by the debtor of* a *judgment obtained against* him *by the creditor (although it* also *contained* a *provision that the defendant could* not *withdraw or revoke its undertaking* - an *aspect to which I will revert in* due *course)..."*

And at **252D** - **E,** His Lordship found as follows:

"The circumstance that the document in issue in the present matter does not *contain* an *express provision that Boland Bank is* not *entitled to withdraw or revoke the undertaking contained therein is, in my* view, *of* no *assistance to the defendant. The bank in terms undertook to bind itself to* pay *the amount stipulated on fulfilment of the suspensive conditions set. Acceptance by the defendant of that undertaking would bind the bank* and *if* and *when the conditions* are *fulfilled*, *the bank would be obliged in law* to *implement the undertaking,* and *it* would *in law* not *be entitled to withdraw its undertaking while the conditions* are *still capable of being fulfilled Of course, failure of the conditions* would *result in the bank's obligation falling away."*

[17] I therefore interpret the document to be a guarantee and not a suretyship. The only condition in the document, namely that Abakor

Limited should be released from the joint and several liabilities to Kolosus, it is common cause that it was complied with.

[18] In my view, there is no pre-condition in the guarantee that the respondent will be liable to pay the applicant only once Stock Owners has been called upon to pay the applicant. Be that as it may, the applicant did demand payment from the liquidators of Stock Owners which was in liquidation.

[19] It is therefore not necessary for me to deal with the issues raised by the respondent. Regarding the validity of the surety agreement, because I cannot interpret the document to be a suretyship.

[20] It is further worth mentioning that the guarantee states that it *"shall remain in full force until* 7 *April 2005",* the respondent has undertaken not to take a point that the guarantee lapsed on such date.

[21] This application and other relevant documents, consists of about six hundred and six pages, the amount claimed is large and some important technical legal issues had to be adjudicated upon.

[22] I have thoroughly considered the submissions made by both counsel and I am satisfied that the applicants should be granted the order prayed for in its Notice of Motion.

[23] In the premises I grant the following orders:

1. Respondent is to pay the applicant the amount of R6 309 923, 00 (six million three hundred and nine thousand and nine hundred and twenty-three rand only).

2. The respondent is to pay the applicant interest on the aforesaid amount at the rate of 15, 5% per annum a *tempore morae* from 1 April 2005 to date of final payment.

3. The respondent to pay the cost of this application on party and party scale which costs shall include costs of two counsels.

A. P. LEDWABA
JUDGE OF THE HIGH COURT