REPUBLIC OF SOUTH AFRICA

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

10/01/2012

CASE NO: 49027/2010

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

2011-12-15
DATE

SIGNATURE

In the matter between:

SLIP KNOT INVESTMENTS 777 (PTY) LTD	**APPLICANT**
and	
AUTUMN STAR TRADING 739 (PTY) LTD	**1ST RESPONDENT**
DAWID CORNELIUS MAREE	**2ND RESPONDENT**
BAREND GABRIEL MEYER	**3RD RESPONDENT**
NEW CENTURY HOMES (PTY) LTD	**4TH RESPONDENT**

J U D G M E N T

HIEMSTRA AJ

[1] The applicant seeks an order against the respondents, jointly and severally, for payment of certain sums of money together with interest and costs pursuant to a loan agreement concluded between the applicant and the first respondent on 25 June 2007, secured by a deed of suretyship signed by the second, third and fourth respondents.

[2] After this application was launched, the first respondent was provisionally liquidated. In terms of s 359 of the Companies Act, 61 of 1973, all civil proceedings by or against the company are suspended until the appointment of a liquidator. It has been held that, despite the definition of "liquidator" in s 1 of the Act, which includes a provisional liquidator, that in the context of s 359 "liquidator" means a finally appointed liquidator. Since the first respondent has not yet been finally liquidated, the proceedings remain suspended. This was acknowledged by counsel for the applicant and he proceeded against the second, third and fourth respondents only, and asks that the proceedings against he first respondent be postpone *sine die*.

[3] The suspension of the proceedings against the first respondent has no effect on the proceedings against the sureties. S 359 has been enacted for the benefit of the liquidator and only the liquidator can raise the operation of the section as a defence. The surety has no locus standi to do so.[1]

[4] The liability of the sureties depends on validity of the claim against the first respondent as the principal debtor. It is therefore necessary to determine whether the first respondent is liable. The liability of the first respondent is disputed.

[5] The first respondent required the loan as bridging finance in respect of various phases of the development of Wena Ka Mina, namely Portion 39 (a portion of portion 22) of the farm Witfontein No 31, Registrations Division JR, Province of Gauteng. The phases of the development are the following:

1 First phase: The development of the first 138 units of the development.

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[1] *Barlows Tractor Co (Pty) Ltd v Townsend* 1996 (2) SA 869 (A) at 884F-G, *Nedcor Bank Ltd v Samuel* 2005 (2) SA 439 (W) at 441; *Millman N.O. v Koetter* 1993 (2) SA 749 (C)

2 Second phase: The development of a further 189 units of the development;

3 Third phase: The development of a further 150 units of the development.

[6] Advances on the loan are scheduled in clause 3 as follows:

1 An amount equivalent to the amount required to cancel an existing mortgage bond in favour of ABSA Bank Ltd, which amount may not exceed R5 050 000.00;

2 An amount equivalent to the amount required to cancel an existing loan to the first respondent from Mettle Secured Property Finance (Pty) Ltd, which amount may not exceed R1 900 000;

3 An amount of R2 500 000.00, or a portion thereof within 60 days of the settlement of the loan of Mettle, referred to in 2 above.

The advance of the sums set out above, are subject to various conditions set out in the agreement.

[7] Clause 5 of the loan agreement provides that the borrower (first respondent) shall pay the full outstanding capital sum, in respect of each amount advanced, without deduction or set-off of any nature in case by the payment date. "Payment date" is defined in the loan agreement as within a period of 9 months calculated from the draw down date.

[8] Clause 11 provides that in the event of the first respondent failing to make any payment of any amount owing on due date, the full amount of all the capital sums outstanding, whether due or not, shall become payable.

[9] In terms of a Certificate of Indebtedness, issued in terms of clause 13.1 of the loan agreement, the first respondent is indebted to the applicant in the following amounts:

1 In respect of the first draw down of R4 100 311.63, an amount of R6 106 535.53, as at 28 March 2008, being 9 months from the date of draw down, together with interest thereon at the rate of 1.5% per week from 28 March 2008 to date of final payment;

2 In respect of the second draw down of R500 000.00 an amount of R779 084.82 as at 10 April 2008, being 9 months from the date of draw down together with interest thereon at the rate of 1.5% per week from 10 April 2008 to date of final payment;

3 In respect of the third draw down of R5 050 000.00 an amount of R7 529 910.71 as at 19 April 2008, being 9 months from the date of draw down together with interest thereon at the rate of 1.5% per week from 19 April 2008 to date of final payment.

The total indebtedness is therefore R9 650 311.63.

[10] The respondents do not dispute that the applicant had complied with its obligaions in terms of the loan agreement and that all the conditions precedent have been met.

[11] The applicant alleges that the first respondent breached the loan agreement by failing to pay the amounts advanced together with interest thereon when the repayment of the first advance became due on 27 March 2008, or on any other date thereafter. The respondents do no assert that the first respondent had made any such payments, but claim that the amounts are not due.

[12] The second respondent, Mr Dawid Cornelius Maree, deposing on behalf of the respondents, contends that it was the "parties' express understanding" that the loan finance would only be repaid after the conclusion of the second phase of the development. He says that he is "flabbergasted" by the applicant's suggestion that the amount are already due and payable. He says the "simple reason" why the amounts are only due upon completion of the second phase is that Imperial

Bank (now Nedbank) was the main financier of the development and held a first mortgage bond over the property. He says that "obviously" the proceeds of the first phase would be utilised to extinguish the first respondent's indebtedness of Imperial Bank.

[13] Mr Maree says that the current status of the development is the following:

1 Township approval has been obtained;

2 The township has been duly registered with the Dees Office on 2 September 2010;

3 The township is ready to be proclaimed by advertising the proclamation in the Government Gazette;

4 All section 7(6) approvals have been issued in respect of the building plans and "simply need not be reinstated".

[14] Mr Maree says that it appears from the above that the first respondent is "on the verge of procuring and commencing with the second phase of the development." It is not clear from the above whether it refers to the status of the whole development or only that of the second phase. It is, however, clear that the second phase, which involves the development of 189 residential units, is very far from completion. It has not even started. Mr Maree continues to set out various problems that the first respondent experienced with the development of the first phase, and it seems that not even the first phase has been completed.

[15] To argue that the repayment date of the loan is other than what has expressly been set out in the loan agreement itself is rather audacious. It is not necessary to repeat the trite legal principles relating to status of a written agreement. It is the sole memorial of the agreement between the parties and they are bound by the terms thereof. If a party contends that the agreement does not reflect the intention of the parties, he/she must apply for rectification of the agreement. No such application has been made or is even envisaged in the papers. There is no

legal basis upon which a court can interpret the agreement in a manner that is completely at odds with its expressed wording.

[16] Mr Viloen argued that there are serious factual disputes between the parties that can only be resolved on trial. He suggested that these factual disputes relate to the question whether the agreement stands to be rectified. However, there is no application for rectification that can be referred for oral evidence or trial.

[17] I therefore find that the first respondent is liable for the amount claimed.

[18] This brings me to the claim against the sureties, the second, third and fourth respondents.

[19] Mr Viljoen argued that the suretyship falls foul of the provisions of the General Law Amendment Act, 50 of 1956. I have dealt with this same submission in a related matter under case number 49040/2010. In that matter the fourth respondent was the first respondent and the principal debtor in terms of a similar loan agreement. The second and third respondents were sureties.

[20] My judgment on this issue was the following:

"*S 6 of the General Law Amendment Act, 50 of 1956 reads as follows:*

"No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer or an aval under the laws relating negotiable instruments."

[6] I fail to understand this submission. There are two essential elements that must be embodied in the agreement:

1. *the identity of the creditor, the surety and the principal debtor; and*

2. *the identification of the principal debt.*

[7] The first of the two essential elements appears from the suretyship agreement.

[8] Although the amount of the principal debt is not contained in the agreement, it may be established by supplementary extrinsic evidence, such as a certificate as stipulated in clause 3.7.[2]

[9] I therefore find that the deed of suretyship complies with s 6 of Act 50 of 1956."

[21] I stand by that finding.

[22] Mr Pretorius for the applicant has prepared a draft order. I incorporate that draft order as my order in this matter. It is marked "X".

J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	2 December 2011
Date of judgment	14 December 2011
Counsel for the applicant:	Adv. J.F. Pretorius
Attorney for the applicant:	Sim & Botsi Attorneys, c/o Gross Papadopulo & Ass.
Counsel for the respondents	Adv. J.C. Viljoen
Attorney for the respondents	Le Roux & Du Plessis Attorneys

[2] *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) and the cases cited therein; *Du Toit v Barclays Nasionale Bank Beperk* 1985 (1) SA 563 (A); Harms, *Amler's Precedents of Pleading* 7th ed at p 367