REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case number: **106/2001**

In the matter between:

GEORGE STEWART MULLER First Appellant
GREGORY STEWART MULLER Second Appellant
MARIA AUGUSTA MANZONI Third Appellant

and

BOTSWANA DEVELOPMENT CORPORATION LIMITED Respondent

CORAM: **HOWIE, MPATI JJA and LEWIS AJA**

HEARD: **14 MAY 2002**

DELIVERED: **31 MAY 2002**

Summary: Principal and surety – actions against surety – summary judgment – surety raising defence that principal debtor in separate action had illiquid counterclaim against creditor for amount exceeding creditor's claim and involving set-off – opposing affidavit to comply with Uniform Rule 32(3)(b) and disclose valid counterclaim.

JUDGMENT

MPATI JA:

[1] The issue in this appeal, as formulated by counsel for the appellants at the commencement of his argument, is whether, as a matter of law, a surety is entitled to rely on an unliquidated counterclaim to be instituted by the principal debtor against the creditor to stave off a claim instituted by the creditor against the surety. If the answer is in the affirmative the further issue is whether on the facts the present was a proper case for the court *a quo*, in the exercise of its judicial discretion, to have granted summary judgment.

[2] The respondent instituted action against the appellants for payment, by each of them, of the sum of Botswana P1 500 000.00 or the Rand equivalent thereof, together with interest and costs. The claims arise from separate deeds of suretyship in terms of which the appellants individually bound themselves, up to the sum claimed, as sureties and co-principal debtors with Trans Africa Plastics (Pty) Ltd (the principal debtor), a

company of which they were directors, for the due and punctual performance by the principal debtor of all its obligations to the respondent. The principal debtor's indebtedness to the respondent is not disputed. It arose from a loan agreement entered into between the respondent and the principal debtor at Gaborone, Botswana, in terms of which the respondent lent and advanced to the principal debtor the total sum of P1 500 000.00. It appears from the particulars of claim that at the time of the institution of the action the amount of the debt, including interest, totalled P1 677 087.34.

[3] When the appellants filed a notice of intention to defend the action the respondent applied for summary judgment, which the appellants opposed. The opposing affidavit was deposed to by the first appellant on behalf of himself and the other two appellants. It is stated therein that:

> "4. As will appear from what follows the defendants deny liability to the plaintiff on the basis that the principal debtor … has a bona fide counterclaim against the plaintiff which [it] intends to institute by way of counterclaim in proceedings currently pending between

> the plaintiff and the [principal] debtor in the High Court of Botswana …. In that action the plaintiff claims payment from the [principal] debtor of the amount allegedly owing by the [principal] debtor to the plaintiff in terms of the loan agreement forming the subject matter of the present action.
>
> 5. … In my respectful submission the issue of the [principal] debtor's counterclaim ought first to be determined in the proceedings in the High Court of Botswana since should the [principal] debtor be successful in establishing its counterclaim it will in such event be entitled to set off its claim against the plaintiff and thereby extinguish the plaintiff's claim in toto …."

The appellants then allege that they "will accordingly seek an order staying the current action pending the determination of the proceedings between the [respondent] and the [principal] debtor in Botswana". In essence then, the appellants sought an opportunity to enable them, in effect, to raise a defence of set-off. They allege that should the principal debtor succeed in establishing its counterclaim it will be entitled to set off its claim against the respondent, thereby extinguishing the respondent's claim and, with it, the suretyship debt.

[4] The facts giving rise to the alleged counterclaim are the following. Firstly, it is alleged that in making funds available in terms of the loan agreement the respondent did not advance the moneys "in accordance with what was required of it"; that apart from delays in advances the respondent only provided working capital finance against suppliers' invoices. The principal debtor was accordingly unable to expend money on capital equipment, which resulted in it suffering loss of profit "by virtue of it not being able to source requisite capital equipment". Secondly, the appellants allege that the respondent obtained an order from the High Court of Botswana, *ex parte*, and on false allegations, interdicting the principal debtor from "alienating, disposing and/or otherwise removing" the principal debtor's movable assets, which, it would appear, were essential for the operation of its business. The effect of the execution of the order, so it is alleged, was to prevent the principal debtor from carrying on its business "so that it was compelled to immediately cease trading", thereby destroying the

business in its entirety, resulting in substantial loss to the principal debtor.

[5] Despite the appellants' opposition the court *a quo* (Griesel J) granted summary judgment. He subsequently granted leave to the appellants to appeal to this Court.

[6] The general rule relating to sureties is that a surety may rely on any defence which is open to the principal debtor, provided such defence arises upon the obligation (one *in rem*) and not from some personal privilege granted to the debtor (a defence *in personam*) (*Ideal Finance Corporation v Coetzer* 1970 (3) SA 1 (A) at 11G-12F). The defence of compensation or set-off is one *in rem* and is thus available against a creditor to both the principal debtor and his surety (*Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another* 1984 (2) SA 693 (C) at 696G-697H; *J R & M Moffett (Pty) Ltd v Kolbe Eiendoms Beleggings (Edms) Bpk and Another* 1974 (2) SA 426 (O) at 432 C-D).

[7] But what about an unliquidated claim for damages which the principal debtor

has against the creditor? Rose-Innes J in the *Standard Bank* case, *supra*, says the following in this regard (at 698 F-H):

> "A claim in reconvention is a cross-action. It is not a plea or answer or defence to an action. In particular, a claim for unliquidated damages is in law incapable of set-off. While a surety may avail himself of the defence that the debt of the principal debtor has been discharged by set-off against a debt owed by the creditor to the principal debtor, it does not follow that a surety may avail himself, without cession of action, of a claim which the principal debtor has for unliquidated damages against the creditor. It is quite clear that, since a counterclaim for damages cannot discharge a debt by set-off, it cannot release either the principal debtor or the surety from their liability for the debt owed to the creditor. It is only when a counterclaim is liquidated by judgment at the end of the litigation that the judgment debt for damages may be brought into compensation so as to discharge or reduce the debt due to the creditor, so releasing both the principal debtor and the surety from their liability for the debt."

It was in reliance on this passage that Griesel J held, in the present matter, that the appellants were unable "in these proceedings to rely on the alleged unliquidated counterclaim" by the principal debtor.

[8] Although the raising of an illiquid counterclaim may not in strict law be a

defence to an admitted claim in convention, since a claim for unliquidated damages is in law incapable of set-off, the common law and the practice of the courts has been to allow a defendant, at least where the counterclaim exceeds the claim in convention, to plead such counterclaim in anticipation of it becoming liquidated by judgment in the action (*Hesse and Ritter v Louw* 1930 SWA 92; *Hipkin v Nigel Engineering Works (Pty) Ltd* 1941 TPD 155; *Abbott and Another v Nolte* 1951 (2) SA 419 (C) at 424A-426A; *Du Toit v De Beer* 1955 (1) SA 469 (T) at 472A-474C). The purpose of the practice is obvious; it is "to avoid a multiplicity of consecutive actions … and, where possible and just, to dispose of all issues, claims and counterclaims between the same litigants in one and the same trial in order that there should be an end to litigation" (*Standard Bank v SA Fire Equipment*, *supra*, at 699B-C). The practice has been entrenched by Rule 22(4) of the Uniform Rules of Court, in terms of which the courts have a discretion whether or not to allow it. And where it has been allowed, the effect

thereof is not that the plea now amounts to a defence to the admitted claim, but merely to allow a dilatory plea that a defence of set-off will arise when judgment is ultimately given in the case in which both the claims in convention and reconvention are being adjudicated upon.

[9] There are conflicting decisions on the issue whether the procedure, as enshrined in Uniform Rule 22(4), is available to a surety who does not rely on a counterclaim of his own against the creditor. In the *Standard Bank* case Rose-Innes J held that it is, while Erasmus J in the *J R & M Moffett* case held a contrary view. The conclusion of Erasmus J was arrived at through a consideration of the introductory words in the English and Afrikaans versions of the Rule. Both he and Rose-Innes J (in the *Standard Bank* case) are at one that the English version is wider than its Afrikaans equivalent. The English version (the introductory words) reads:

> "*If by reason of any claim in reconvention*, the defendant claims that on

> the giving of judgment on such claim the plaintiff's claim will be extinguished in whole or in part …";

while the Afrikaans text reads:

> "*'n Verweerder wat 'n teeneis het* wat, as dit slaag, die eiser se eis geheel of gedeeltelik sal uitwis …."

Erasmus J held that the narrower meaning, which is common to both versions, i.e. that of the Afrikaans version, must be adopted. He accordingly concluded that Rule 22(4) is confined to a defendant who has filed a counterclaim of his own (at 431E-F). Rose-Innes J (in *Standard Bank*) on the other hand, arrived at his conclusion on the basis that the law "is that all the defences of the principal debtor, save personal defences, are available to the surety and co-debtor", and that it would therefore be anomalous if the effect of Rule 22(4) were to preclude, as a matter of pleading, the setting up of a defence which a defendant has as a matter of law.

[10] In *Inter Industria Bpk v Nedbank Bpk en 'n Ander* 1989 (3) SA 33 (NC) Steenkamp J expressly declined to follow the view taken by Erasmus J in the *J R & M Moffett* case and preferred that of Rose-Innes J in the *Standard Bank* case. In the present matter the court *a quo* held that the provisions of Rule 22(4) cannot be relied upon in circumstances where "the counterclaim (if any) lies on behalf of a different defendant in a different forum".

[11] In the view I take of this matter it is unnecessary to express a firm view on the issue and I expressly refrain from doing so. Suffice it to say, however, that the view taken by Rose-Innes J in the *Standard Bank* case and followed by Steenkamp J in *Inter Industria v Nedbank* is the more attractive. If that view is correct, there seems to be no reason for differentiating between cases where the principal debtor and the surety have been sued together in one action or where they have been sued separately and in different *fora*. As I have stated, however, it is not necessary to express a firm view on

these matters. I shall accept, for present purposes, that a surety and co-principal debtor can, on these facts, avail himself of the provisions of Rule 22(4) and thus that the appellants in the present case were entitled to request that judgment in the respondent's claim be postponed until judgment in the principal debtor's claim in reconvention to be instituted in the High Court of Botswana against the respondent has been given.

[12] Turning to the contents of the opposing affidavit, the proceedings before the court *a quo* being an application for summary judgment, the issue is not whether the defence to be raised is likely to succeed or fail, but merely whether it is *bona fide*. As such, the opposing affidavit must disclose fully the nature and grounds of the defence (here, in the sense of a valid counterclaim by the principal debtor) and the material facts relied upon therefor (Rule 32 (3)(b)). The nature of the defence to be raised is an alleged claim for loss of profit, which can arise in this case only from a contractual breach on the part of the respondent or from a negligent performance of its obligations

in terms of the loan agreement.

[13] The appellants allege in the opposing affidavit that apart from delays in advances the respondent only provided working capital finance as against suppliers' invoices. This resulted in the principal debtor being unable to expend moneys on capital equipment. The alleged delays in advances are unspecified. There is no allegation that they were unreasonable and therefore in breach of the respondent's obligations in terms of the loan agreement. The bald statement that there were delays in advances does not constitute material facts to be relied upon for the alleged claim for loss of profit. The inability of the principal debtor to expend moneys on capital equipment is merely a consequence of the alleged delays in giving advances.

[14] Equally lacking in substance is the allegation that the respondent "only provided capital finance as against suppliers' invoices". Again there is no allegation that this was in breach of the respondent's obligations in terms of the loan agreement. Clause

7.5 of the loan agreement provides that:

> "A disbursement of the Loan or parts thereof shall be by way of cheque or bank draft either to:-
>
> 7.5.1 the COMPANY as part of its working capital, in which case such payment shall be effected directly to the COMPANY's bank account:
>
> or
>
> 7.5.2 the suppliers of goods and/or services to the COMPANY against specific invoices unless otherwise agreed to in writing by [the respondent] and copies of receipts from any such suppliers shall be furnished in each case by the COMPANY to [the respondent] which may decline to permit further disbursements from the Loan until any outstanding receipts as aforesaid are furnished by the COMPANY."

On the face of it, it appears that the respondent had a choice to act either in terms of clause 7.5.1 or 7.5.2. I mention this merely by way of illustration. There is no substantiation as to the nature of the breach, if any. To my mind no material facts have been set out in the opposing affidavit upon which reliance can be placed for an alleged

claim for loss of profit.

[15] The second alleged cause of action arises from an interim order obtained from the High Court of Botswana, *inter alia*, prohibiting the principal debtor from removing or disposing of certain listed items of movable property from its premises and authorising the respondent to place a security guard at the premises to ensure compliance with the order. The effect of the execution of the order, so it is alleged, was to prevent the principal debtor from carrying on its business and it was accordingly compelled, by virtue of the execution of the order, to immediately cease trading. Apart from the fact that it has not been alleged that the respondent acted contrary to the court order, I fail to appreciate how a prohibitory order in the terms just mentioned could have caused the principal debtor to cease trading. Once again the allegation lacks substance. And as was correctly pointed out by counsel for the respondent, the principal debtor was in any event entitled, in terms of the order, to

anticipate the return day on 24 hours' notice. It has not been alleged that the principal debtor availed itself of this procedure. I agree with counsel for the respondent that there is no discernible factual basis for concluding that the execution of the order *per se* resulted in the destruction of the principal debtor's business. The allegation that the order was improperly obtained on the strength of false averments that the principal debtor was moving office takes the matter no further.

[16] It follows that the appellants failed to set up a *bona fide* defence to the respondent's claim so as to avoid summary judgment. In view of this conclusion it becomes unnecessary to consider a further submission by counsel for the respondent that the alleged loss of profit is clearly in the nature of special or consequential loss, which is ordinarily regarded as being too remote to be recoverable, unless the parties actually or presumptively contemplated the probable result from a breach of the contract.

[17] It therefore cannot be said that in granting summary judgment the court below exercised its discretion wrongly.

The appeal is accordingly dismissed with costs.

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L MPATI JA

CONCUR:

HOWIE JA)

LEWIS AJA)