THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20463/14

In the matter between:

UWE DOMINICK	**First Appellant**
HEINER DOMINICK	**Second Appellant**
CHARMAINE LYNN DOMINICK	**Third Appellant**

and

NEDBANK LIMITED	**Respondent**

Neutral citation: *Dominick v Nedbank Limited* (20463/14) [2015] ZASCA 160 (13 November 2015)

Coram: Mpati P, Cachalia, Petse & Dambuza JJA & Gorven AJA

Heard: 8 September 2015

Delivered: 13 November 2015

Summary: Suretyship – Principal and surety – discharge of surety claimed on ground of prejudice caused by creditor's conduct – creditor failing to apply set-off allowed by principal agreement – failure to apply set-off not constituting breach of terms of agreement – prejudice not resulting from breach of legal duty or obligation - surety not entitled to release.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Rogers J, sitting as a court of first instance):

The appeal is dismissed, with costs.

JUDGMENT

Mpati P (Cachalia, Petse & Dambuza JJA and Gorven AJA concurring):

[1] This appeal concerns the question of the release of sureties (the appellants) from their obligations under deeds of suretyships signed by them. The three appellants were the seventh to ninth defendants, respectively, in an action instituted by the respondent (Nedbank) in the Western Cape Division of the High Court, Cape Town, for payment of the sum of R1 450 037.12, plus interest. The sum claimed was allegedly due and owing on an overdraft facility granted by Nedbank to a close corporation known as Puricare CC (Puricare). Puricare was the first defendant in the action, while the second to ninth defendants were cited as sureties and co-principal debtors with Puricare by virtue of deeds of suretyship (suretyships) signed by them individually, in terms of which they each bound themselves for the due payment of any amounts which may become due and payable to Nedbank by Puricare. In terms of the suretyships, the liability of the seventh and eighth defendants (first and second appellants, respectively) was limited to R510 000 each, whilst that of the ninth defendant (third appellant) was limited to R1 200 000. (Since the witnesses, during the trial, and the court below referred to the members of Puricare as 'shareholders' I shall, for convenience, do likewise.)

[2] All the defendants initially opposed the action, but on 4 February 2014 – the day before the trial commenced – a settlement agreement was concluded between Nedbank and the second to sixth defendants in terms of which those defendants,

collectively, agreed to pay to Nedbank an amount of R1 000 000 'in full and final settlement of all amounts owing by them and/or claimed against them on the basis and grounds set out in [Nedbank's] particulars of claim . . .'. The action, therefore, proceeded against the three appellants only. After hearing evidence and arguments on behalf of the parties the trial judge (Rogers J), in a comprehensive judgment, found in favour of Nedbank and ordered each of the appellants to pay to Nedbank the sums limited by their respective suretyships, with interest at 11,5 per cent per annum and costs on the scale as between attorney and client. He subsequently refused the appellants' applications for leave to appeal. This appeal is with the leave of this court.

[3] Puricare[1] was a water purification business, involved in building effluent disposal facilities for sewerage plants or normal water treatment plants and for agricultural purposes. Initially, its directors were Mr Kenneth Harris (Harris), his wife, Olive, Messrs Albert Wiffen (Wiffen) and Riaan Kirsten (Kirsten). They were cited in the action as the third, fourth, fifth and sixth defendants, respectively. I shall, as the court below did, refer to them collectively as the 'Harris group'. According to Mr Uwe Dominick, the first appellant and only witness who testified on behalf of the appellants at the trial, he was approached during February 2009 by Kirsten, whom he knew and who asked him to manage the business of Puricare and to find a buyer as an investor. Subsequently, an agreement was concluded between the first and second appellants, on the one hand, and the Harris group on the other. At that time the members of the Harris group, who were also the shareholders of Puricare, were experiencing financial difficulties. Puricare's balance sheet showed a loss of R800 000. In terms of the agreement the first and second appellants obtained a 40 per cent shareholding in Puricare. They agreed amongst themselves that the first appellant would occupy the position of managing director, while the second appellant would be in charge of business operations and marketing.

[1] It went into liquidation subsequent to the institution of the proceedings in the high court. Although its liquidators were joined, they played no part in the proceedings and Nedbank sought no relief against them.

[4] The first appellant's uncontested evidence was that Puricare was trading on an overdraft account with Nedbank, in respect of which he and the second appellant became the authorised signatories, together with Ms Belinda Fourie, the first appellant's sister-in-law. The overdraft facility was limited to R150 000, for which Harris and his wife had stood surety in unlimited amounts. With the first and second appellants at the helm, Puricare showed growth and boasted a turnover of R4 million by August/September 2009. Although showing growth and profitability, it was still cash-strapped because there was a lot of 'work-in-progress' for which payment would mainly become due at the end of a particular contract. But it needed money to pay salaries and to meet its obligations towards its creditors. The first appellant had authority to apply for an overdraft on behalf of Puricare. He accordingly approached Mr Patrick Schwartz (Schwartz), a business manager at Nedbank, George, Western Cape, with whom he had had previous dealings. In the event, Nedbank granted an additional, temporary, overdraft facility of R350 000 in September 2009, for a period of three months. The additional facility would expire on 10 December 2009. On the expiry date the facility was extended until 15 January 2010, when it was extended further for yet another month.

[5] When the first appellant realised that Puricare's debtors were not making payments and salaries would soon be due, he arranged, through Schwartz, on 27 January 2010, for yet another overdraft facility with Nedbank for the amount of R750 000. In an email addressed to Wiffen dated 31 January 2010, the first appellant advised that he and his wife, Charmaine, had 'signed personal suretyship for R700 000', which his wife was prepared to invest for three months. An agreement (principal agreement), concluded on 29 January 2010, lists the three facilities as follows:

'4.1 The R150 000,00 overdraft facility is a demand facility, granted on a fluctuating basis, without a specific expiry date.

4.2 The R350 000,00 overdraft facility is granted on a temporary basis and will expire on 15 February 2010.

4.3 The R750 000 overdraft facility will be reviewed as per facility stated in 4.2.'

Clause 10.2 of the principal agreement records that limited suretyships of R510 000 each, incorporating cessions of loan funds, in favour of Nedbank had been provided by the first and second appellants, as well as Kirsten and Wiffen. In clauses 10.7 and 10.8 it is recorded that a limited suretyship for R1 200 000 had been provided by Ms C L Dominick (Charmaine), together with a first covering bond for the same amount over a fixed property, erf 6471 George, registered in her name. The principal agreement also records the existence of suretyships signed by Harris and his wife, Olive, in unlimited amounts in favour of Nedbank (clause 10.2).

[6] However, early in February 2010, a shareholders' meeting was held to discuss the cash flow problems experienced by Puricare, since the additional facilities were to expire on 15 February 2010. According to the first appellant the meeting became 'very heated', with the Harris group accusing him and the second appellant of mismanaging the business. This culminated in the second appellant severing ties with Puricare. The first appellant testified that he informed Nedbank of these developments. He requested Schwartz to ensure that the sureties were cancelled once the expected funds had been deposited into the overdraft account, thus clearing that account. I should mention that at the time the first appellant applied for the R750 000 overdraft facility he assured Schwartz that 'substantial cash' was expected 'to come back into the business' and that orders were 'on hand' from Harlem Effluent Treatment Plant (R1.78 million), Golden Gate Effluent Treatment Plant (R1.6 million) and Buffalo City Municipality (R1.4 million).

[7] At a shareholders' meeting held on 15 February 2010 the Harris group resolved to terminate the first appellant's directorship of Puricare, as well as his authority over the overdraft account. The first appellant thereafter refrained from effecting any transactions on the account although he was still able to access it electronically. He was also able to access another account that had been opened with Nedbank, at the instance of Kirsten, early in February 2010. This account was known as the Agri account and was specifically earmarked for the agricultural side of Puricare's business. The first appellant was thus able to monitor the transactions of both accounts.

[8] It is common cause that on 19 February 2010 Puricare dispatched a letter to its clients, co-signed by Kirsten and Robert Barnard, as CEO, advising that it (Puricare) had been changed from being a close corporation to a company (Pty Ltd). The letter also contained an instruction that all payments were henceforth to be deposited into the Agri account. The first appellant testified that on 5 March 2010 he noted that the Agri account had a credit balance of R280 000, whilst there was a debit balance of R153 000 in the overdraft account. He sent an email to Schwartz bringing this to his attention. The email continued:

'Apparently the Harlem funds will be paid early next week. I request Nedbank to do the right thing and move the funds immediately onto the CC account and simultaneously cancel the R750k facility signed by Charmaine Dominick. Puricare has not shown any interest in resolving this matter.'[2]

On 9 March 2010 the first appellant sent yet another email to Schwartz – he also sent copies of the email to two senior credit managers at Nedbank – informing him that the Harlem funds had been paid into the Agri account and that there was a credit balance of R942 348.21 in it, while the overdraft account showed a debit balance of R1 413 155.27. It appears that on the same day Nedbank transferred an amount of R913 155 from the Agri account to the overdraft account, reducing the overdraft to R500 000.27.

[9] Puricare objected and on 12 March 2010 it's attorneys wrote to Nedbank complaining that the latter had unilaterally 're-couped funds of approximately R913 000 on 8 March 2010'. They demanded that the amount 'be made available immediately to allow the company to resume trade', failing which Puricare would approach the high court urgently for appropriate relief. Nedbank obliged and, on 17 March 2010, transferred an amount of R749 155 from the overdraft account to the Agri account. Puricare's indebtedness to Nedbank on the overdraft facility was thus increased to R1.25 million. It is not in dispute that on 23 March 2010 an amount of R735 990.61 was electronically transferred from the Agri account to a private account held at Absa Bank in Wiffen's name. After this transaction the Agri account was left with a nil balance. On 29 April 2010 an amount of R280 000 was paid into

[2] The 'CC account' referred to in the email is the overdraft facility account.

the overdraft account, but on 30 April 2010 an equivalent sum (R280 269 to be exact) was transferred from that account into the Agri account. The first appellant was unable to explain the transfer, but maintained that it was to his prejudice.

[10] It was put to the first appellant under cross-examination that Nedbank had no option but to reverse the first transfer it had made as a consequence of the intervention of Puricare's attorneys. His response was that the money had been earmarked for the overdraft account and that the agreement between him and Schwartz was that the overdraft facility would be cleared by the funds that were scheduled to be paid into it. As to the transfer of the R280 269 from the overdraft account to the Agri account, the first appellant could not dispute what was put to him on behalf of Nedbank, namely, that Schwartz would testify that the transfer was at the specific request of Puricare, to which Nedbank acceded.

[11] Schwartz confirmed most of the first appellant's testimony relating to the arrangements that were made for additional overdraft facilities to Puricare. He testified that Nedbank had no part in Puricare's instruction for its debtors to pay moneys due to it into the Agri account. He confirmed that he had had various discussions with the first appellant about the reversal of payments made by Puricare's debtors into the Agri account, but said that Nedbank could not summarily transfer the funds in the face of possible legal action against it.

[12] Other amounts were, subsequently, also transferred from the Agri account to Wiffen's account with Absa Bank during the period 1 April 2010 to 19 April 2010. With regard to the reversal of the transfer of a major portion (R749 155) of the amount of R913 000 from the Agri account to the overdraft account, Schwartz testified that this was done on the advice of Nedbank's internal legal advisers. As to the transfer of the sum of R280 269 from the overdraft account to the Agri account he said that during a discussion he had had with Wiffen after the money had been paid into the overdraft account, the latter (Wiffen) had claimed that the payment had gone into an incorrect account and that that was the reason for the transfer.

[13] The appellants' original plea was amended during the course of the trial and the amended plea was neatly summarised by the court below as follows:

'(a) There was a duty on Nedbank not to act in a manner that would be prejudicial to the [appellants] in their capacity as sureties.

(b) Nedbank, despite having been informed that Puricare had no intention of repaying the overdrawn facility, allowed Puricare to transfer funds from the overdrawn account to the Agri account.

(c) In particular, on 17 March 2010 Nedbank unilaterally transferred an amount of R749 155 from the overdrawn account to the agri account, despite the fact that at that time no overdraft facility existed, alternatively the overdraft facility was only R150 000.

(d) Furthermore, on 29 April 2010 an amount of R280 269, earmarked to reduce the overdraft, was paid into the overdraft account but on 30 April 2010 Nedbank unilaterally transferred the same amount from the overdraft account into the agri account, despite the fact that at that time no overdraft facility existed, alternatively the overdraft facility was only R150 000.

(e) As a result of Nedbank's prejudicial conduct towards them, the [appellants] are entitled to release from the suretyships.'[3]

In essence, therefore, the appellants denied that they were bound by the terms of the surety agreements. They pleaded further that in allowing Puricare to arrange that funds earmarked for the overdraft account to be deposited into the Agri account and by allowing the transfers of funds from the last-mentioned account to another bank Nedbank acted to their prejudice. As a result of Nedbank's prejudicial conduct, so it was pleaded, the appellants had been released from their obligations as sureties and that, accordingly, the claim against them should be dismissed, with costs.

[14] In this court, counsel for the appellants did not challenge the evidence of Schwartz that on 15 February 2010 – after the first and second appellants' directorships of Puricare had terminated – Nedbank extended the overdraft facilities of R350 000 and R750 000 until 8 March 2010 at the request of the Harris group and that after 8 March 2010, there was a further extension of the R150 000 and

[3] Paragraph 38 of the judgment. (Paragraph numbering reformatted from the original.)

R350 000 overdraft facilities. But, clearly, when it transferred the sum of R749 155 from the overdraft account to the Agri account on 17 March 2010, Nedbank also extended the R750 000 overdraft facility to an undetermined date. In *Estate Liebenberg v Standard Bank of SA Ltd* 1927 AD 502 at 507-508, Wessels JA held:

'It must at once be conceded that by our law every extension of time is not considered to effect a novation. It seems quite clear that if the extension of time is given after the debt becomes payable and when the debtor is *in mora*, then a failure to sue the debtor, or even the actual granting to him of an extension of time, cannot be regarded as a novation, and therefore the surety is not discharged. The surety then has the remedy in his own hands: all he need do is to pay the principal creditor and then proceed against the principal debtor. Van der Linden in his *Gewijsden*, p. 263, quotes a case to this effect decided by the Hooge Raad. In that case the extension was granted after the due date. The surety claimed that he was discharged on that ground (p. 265), but the Court held a contrary view. In *Colonial Government v Edenborough* (4 S.C. 290, p. 297) Sir HENRY DE VILLIERS expressed himself in the following terms: --- "Speaking broadly, I take it as the result of the best authorities I have consulted that mere delay in enforcing the creditor's claim, or even an extension of the time of payment, which does not amount to a novation of the debt, does not in our law exonerate the surety."'

Nonetheless, in a concurring judgment Curlewis JA held:

'[W]here time is of the essence of the contract of suretyship, if before the date of payment arrives the creditor enters into an agreement with the debtor whereby the obligation to pay on that date is extended to a later date (which is what seems to me to be understood by the expression "*prorogatio obligationis*" in the case of a debt as distinguished from "*prorogatio solutionis*," though I say so with diffidence), the surety becomes released from his obligation as such.'

(See also C F Forsyth and T J Pretorius *Caney's The Law of Suretyships in South Africa* 6 ed (2010) at 208.)

[15] The principle relating to the release of a surety as a result of prejudice caused to him or her by the actions of the creditor was set out as follows by this court (per Olivier JA) in *Absa Bank Ltd v Davidson* [1999] ZASCA 94; 2000 (1) SA 1117 (SCA) para 19:

'As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If . . . the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. . . .'

(See also *Bock & others v Duburoro Investments (Pty) Ltd* [2003] ZASCA 94; 2004 (2) SA 242 (SCA) paras 18 to 21.)

Accepting this statement of the law as correct, counsel for the appellants contended that in the present instance the appellants, at the very least, should have been released *pro tanto* by an amount of R1 195 155. But, considering that all the amounts received from Puricare's debtors and transferred out of the Agri account came to a total sum of R2 111 849.04, counsel argued, the appellants should be released *in toto*.

[16] The last of these submissions may be disposed of presently. As counsel for Nedbank correctly contended, the appellants' case, from their plea and the evidence tendered, was limited to only three transfers, namely amounts of R749 155 from the overdraft account to the Agri account on 17 March 2010; R735 990.61 from the Agri account to Wiffen's private account with Absa Bank on 23 March 2010 and R280 269 from the overdraft account to the Agri account on 30 April 2010. The amount of R735 990.61 was not mentioned in the plea, but was brought up by the first appellant during his testimony. In any event, the transfers made from the Agri account to Wiffen's accounts with Absa Bank constituted a breach, by Puricare, of the terms of the principal agreement. In terms of clause 11 thereof, Puricare (the borrower) 'unconditionally and irrevocably' undertook not to, among other things, 'transfer' any part of its assets to any financial institution other than Nedbank (clause 11.3.3), unless written permission to do so was received from Nedbank (clause 11.3). Thus, even if Nedbank had 'allowed' Puricare, as alleged, by not taking any action, to transfer the moneys to Absa Bank, it was not in breach of the principal agreement. Puricare was. No written permission was alleged to have been given by Nedbank for the transfers.

[17] It is so that, in terms of clause 12 of the principal agreement, Nedbank was entitled, in its sole discretion, 'to set off the indebtedness of [Puricare] to [it] under or . . . arising from [the overdraft facilities] any and all amounts standing to the credit of [Puricare] in the books of Nedbank' (clause 12.3.9), in the event Puricare or any surety committing 'a breach of any terms and conditions' set out in the principal agreement (clause 12.2.2). It was submitted, on behalf of the appellants, that the instructions given to Puricare's debtors by the Harris group to pay the proceeds of sales due to Puricare into the Agri account was in breach of clause 13 of the principal agreement. That clause provided that an account was to be opened at any branch of Nedbank into which 'proceeds of all sales, including cash sales and receipts from debtors, are to be banked timeously into this account'. It was accordingly contended that in failing to apply set-off, by transferring the moneys paid into the Agri account to the overdraft account and to clear the last-mentioned account, or to place a *caveat* on the funds in the Agri account to ensure they are not transferred out of that account, Nedbank prejudiced the appellants.

[18] But Nedbank was entitled, in its sole discretion, to apply set-off after Schwartz had been alerted by the first appellant that Puricare's directors intended not to clear the overdraft facilities. It was not obliged to do so. Its failure to apply set-off was, therefore, not in breach of any of the terms of the principal agreement, nor those of the suretyships. In any event, Schwartz testified that he did not know that Wiffen would take out the money from the Agri account and deposit it in his account with Absa. It follows that what remains for consideration is whether the transfer of the amounts of R749 155 and R280 269 from the overdraft account to the Agri account was to the appellants' prejudice.

[19] The alleged prejudicial conduct complained of was that Nedbank allowed debit transactions on 17 March and 30 April 2010 on the overdraft account, when the (original) date of expiry of the R350 000 and R750 000 overdraft facilities, 15 February 2010, had come and gone. However, as has been mentioned above (par 13), those overdraft facilities had been extended. In his heads of argument counsel for the appellants acknowledged that on 15 February 2010 and on 8 March 2010

arrangements had been made for the extension of the overdraft facilities of R350 000 and R750 000 and that after 8 March 2010 there was a further extension of the R150 000 and R350 000 facilities. I have mentioned (para 13 above) that when Nedbank transferred R749 155 from the overdraft account to the Agri account, at the instance of Puricare's attorneys, it thereby also extended the R750 000 facility. But I should mention that when it transferred the sum of R913 000 from the Agri account to the overdraft account, Nedbank was entitled, in its sole discretion and in terms of clause 12.3.9 of the principal agreement, to do so by way of set-off against amounts standing to the credit of Puricare in its (Nedbank's) books. This is because Puricare had breached the terms of clause 13 of the principal agreement by instructing its debtors to pay proceeds of sales due to it into the Agri account (see para 16 above). Nedbank could, therefore, have refused to comply with the demand of Puricare's legal representative to reverse the transfer. Similarly, it could have refused Wiffen's request to transfer the R280 269 on 30 April 2010 from the overdraft to the Agri account. But I do not think it was in breach of the principal agreement or the suretyships when it succumbed to the threat of legal action from Puricare's attorneys and transferred R749 155 from the overdraft to the Agri account on 17 March 2010, or acceded to Wiffen's request that it transfer R280 269 from the overdraft account on 30 April 2010 to the Agri account.

[20] Clause 3 of the suretyships signed by the appellants provides that '[i]t shall always be in Nedbank's discretion to determine the extent, nature and duration of any banking facilities to be allowed the principal debtor and all admissions or acknowledgments of indebtedness by the principal debtor shall bind [the surety]'. In my view, Nedbank was entitled, in terms of clause 3 of the suretyships, to extend the two overdraft facilities of R350 000 and R750 000 when it did. And, in terms of clause 1 of the suretyships, the appellants bound themselves, 'jointly and severally, as surety and co-principal debtor in *solidum* (which means, where there are several sureties, each is liable in full), for the repayment on demand of all amounts which the principal debtor may *now or at any time hereafter* owe Nedbank . . .'. (My emphasis) Since the extensions of the overdraft facilities were authorised by the suretyships, no breach of any legal duty owed to the appellants, or obligation towards them under the two agreements, was committed by Nedbank when it effected the transfers in

question. It follows that as long as Puricare remained indebted to Nedbank on the overdraft facilities, each one of the three appellants remained liable under the suretyships for the repayment, on demand, of all moneys owed to Nedbank by Puricare. They were not released and the appeal must accordingly fail.

[21] In his heads of argument counsel for the appellants dealt with the legal position relating to an out-and-out cession and a cession in *securitatem debiti*. In terms of clause 10.3 of the principal agreement all debtors of Puricare were ceded to Nedbank. I suppose what counsel wished to rely on was the failure of Nedbank to exercise its right as cessionary against the debtors of Puricare. Such argument was, however, not pursued in earnest. But even if Nedbank's failure to exercise its rights as cessionary had constituted a breach of one or both agreements – which was not the case - I do not think the point was a good one in any event. It was never pleaded, nor dealt with in the court below.

[22] The appeal is dismissed, with costs.

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L Mpati
President

APPEARANCES

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