THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1113/2016

In the matter between:

AUGUST NTHAKO NDUBU	**FIRST APPELLANT**
JOAO MANUEL VICENTE DA ENCARNACAO	**SECOND APPELLANT**
QUANTUM LEAP INVESTMENTS 221 (PTY) LTD	**THIRD APPELLANT**
TUBE-MECH SERVICES (PTY) LTD	**FOURTH APPELLANT**

and

FIRST RAND BANK LIMITED	
t/a WESBANK	**RESPONDENT**

Neutral citation: *Ndubu v First Rand Bank* (1113/2016) [2017] ZASCA 61 (26 May 2017)

Coram: Lewis, Tshiqi, Majiedt and Swain JJA and Coppin AJA

Heard: 5 May 2017

Delivered: 26 May 2017

Summary: Suretyship: release of surety due to alleged prejudicial conduct of creditor in not accepting offers that would eliminate or reduce surety's liability: onus on surety to prove defences: surety failed to discharge onus: appeal dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Monama J sitting as court of first instance):

1 The appeal is dismissed.

2 The appellants are to pay the costs of the appeal jointly and severally, the one paying the others to be absolved.

JUDGMENT

Coppin AJA (Lewis, Tshiqi, Majiedt and Swain JJA concurring):

[1] This appeal relates to the liability of the appellants, as sureties, to the respondent, First Rand Bank Limited, trading as Wesbank (Wesbank). In a trial action, the Gauteng Local Division of the High Court, Johannesburg, granted judgment against the appellants as sureties for the indebtedness of Sizwe Personnel Service (Pty) Ltd (Sizwe), arising out of four instalment sale agreements, in respect of two trucks and two trailers. The appellants were ordered to pay the shortfall on the sale of these assets by public auction at the instance of Wesbank. The total sum amounted to some R694 042 and they were ordered to pay that plus interest. The appeal is before this court with the leave of the court a quo. The issue before this court is whether there is any foundation for the various defences that the appellants raised as sureties.

Factual matrix

[2] Broadly outlined, the common cause facts are the following. On 17 October 2007 Wesbank entered into four separate instalment sale agreements (credit agreements) with Sizwe in terms of which it sold and

delivered two trucks and two interlink trailers (the vehicles) to Sizwe. On the same date the appellants bound themselves jointly and severally, in solidum and as co-principal debtors, in favour of Wesbank in respect of Sizwe's liability arising from, or incidental to, the four credit agreements.

[3] The first appellant was a director of Sizwe and at all material times the second appellant was its managing director. The second appellant was also managing director of the third appellant and sole director of the fourth appellant. I shall, for ease of reference, refer to the fourth appellant as Tube-Mech.

[4] On 6 April 2010 Sizwe was placed under voluntary liquidation by way of a special members' resolution. Messers Oelofsen and Kharivhe were appointed as liquidators on 6 July 2010, having served as the provisional liquidators until then. Prior to Sizwe's liquidation, Mr Oelofsen had been consulted by the second appellant and his attorney, Mr Prinsloo, in connection with its liquidation.

[5] From the outset and throughout the process, the appellants, represented mainly by the second appellant, acting with the assistance of the appellants' bookkeeper, Mrs Viviers, had been in frequent contact with Mr Oelofsen and Wesbank regarding Sizwe's indebtedness in respect of the vehicles. Various attempts were made by the appellants to reduce the indebtedness, and from about April 2010 to about January 2011, monthly instalments due in terms of the credit agreements were paid by certain of the appellants.

[6] Despite Sizwe's liquidation, the vehicles were not delivered forthwith to either the liquidators or Wesbank. But soon after it was placed in liquidation the second appellant, through Mrs Viviers, sought from Wesbank settlement figures for the indebtedness under the credit agreements. And during this period, Tube-Mech, which was owned and controlled by the second appellant, sought finance to purchase the vehicles.

[7] On 31 May 2011, Mr Visage, the sales manager of a truck dealership where the vehicles were kept, Truck-World (Pty) Ltd (Truck-World), made a written offer on its behalf to the liquidators to purchase three of the four vehicles, namely, two trucks and one interlink trailer (the first offer) The first offer was to purchase the two trucks for R513 000 (including VAT) each and one interlink trailer for R250 800 (including VAT).The offer stated that it was final and the offeree was requested to confirm acceptance of the offer 'as soon as possible', because the offeror needed to prepare the vehicles for sale. However, on 14 June 2011 the first offer was withdrawn in writing by Mr Visage. His letter withdrawing the offer addressed to Oelofsen, stated the following:

'Ons aanbod om te koop gerig aan u op die Sizwe voertuie was me[t] inbegrepe dat dit binne n redelike tydperk aanvaar sou word. Hierdie aanbiedinge is nie aanvaar nie en word dus teruggetrek.

Hoop u vind die bogenoemde in orde'.[1]

[8] The second offer came a few days later, on 23 June 2011, from Tube-Mech. It made a written offer, addressed to Mr Oelofsen, to purchase one truck for R681 379.33 (including VAT), the other truck for R680 869.39 (including VAT) and the two components of one interlink trailer for R328 622.38 (including VAT) each. This offer, which was apparently made after settlement figures had been obtained from Wesbank, was, in total, more than the first offer by approximately R370 000, but was subject to Tube-Mech obtaining finance for the purchase. Tube-Mech had difficulties in securing the necessary finance.

[9] On or about 27 July 2011, Mr Oelofsen, who was aware of Tube-Mech's difficulty in securing finance, instructed Wesbank to repossess the vehicles. The appellants contended that their retention of the vehicles until then was with the knowledge, or acquiescence, of the liquidators and Wesbank and that they delivered them to Wesbank as soon as they were required to do so.

[1] Own translation: 'It was implicit in our offer that was addressed to you, to purchase the Sizwe vehicles, that it would be accepted within a reasonable time. Since the offer was not accepted, it is thus withdrawn. I hope you find the above in order.'

[10] By 18 August 2011, Tube-Mech was still struggling to obtain finance to purchase the vehicles. As a result, on 2 September 2011 Mr Oelofsen, who testified to the effect that he acted in this matter with the concurrence of his co-liquidator, informed Wesbank that it was authorised to sell the vehicles. However, Wesbank did not proceed to do so immediately and by 13 September 2011 was still considering Tube-Mech's application for financing. Wesbank decided not to finance Tube-Mech in the light of various factors that were canvassed in evidence at the trial, but which need not be traversed here.

[11] By 27 September 2011, Wesbank had cleared the vehicles for sale by public auction. On 12 October 2011, which was long after the second meeting of creditors, the vehicles were sold at a public auction.

[12] On 18 October 2011, a written offer dated 10 October 2011, made by PF Business Services (Pty) Ltd, and addressed to Mr Oelofsen, was brought to Mr Oelofsen's attention by the appellants' attorney. The offer was for the purchase of the two trucks for R680 869.39 (including VAT) each, and the two interlink trailers for R361 323 (including VAT) each (the third offer).

[13] The amount realised for the vehicles at the auction was subsequently paid by Wesbank to the liquidators. As mentioned, the full extent of Sizwe's indebtedness was not extinguished at the auction, resulting in a shortfall of approximately R700 000. Wesbank consequently instituted action proceedings, in the court a quo, against the appellants, as sureties of Sizwe, for the shortfall after it had received its dividend from the liquidators in respect of each credit agreement.

The appellants' defences

[14] Before us, as in the trial court, the appellants, essentially, adopted a shotgun approach in defending themselves against Wesbank's claims. Some of their defences were inserted in their plea by way of an amendment shortly before the trial commenced. The appellants sought to be released entirely from their respective obligations under the suretyship. As a basis for that they

alleged firstly, as a main ground of defence, that Wesbank had refused to accept, or had declined the three offers; that such conduct amounted to a breach of obligations which Wesbank had in terms of the credit agreements, or the suretyship agreement, or generally. Further, that as a result of such conduct the appellants were prejudiced, in that they were still liable to make payment to Wesbank, whereas acceptance of the said offers, according to them, would have extinguished their indebtedness under the suretyship, or reduced it substantially.

[15] Secondly, the appellants alleged that since Wesbank's claims were for damages, it had failed to mitigate its losses by not accepting the offers. The appellants, thirdly, raised what they described as a constitutional point, namely, that they (as sureties) ought to be released from their obligations on the basis of public policy because of Wesbank's conduct in respect of the offers. They were essentially contending for the development of a 'long-stop' defence, if all else failed.

[16] Fourthly, the appellants relied on miscellaneous points, the more prominent of which was that Wesbank could not rely on s 83 of the Insolvency Act[2] because Wesbank had not complied with s 83 or s 84 of that Act. I shall show later that those provisions have no application in this case. Another miscellaneous point, which was accorded even less attention by the appellants, was that the sale of the vehicles was invalid. Not much needs to be said of the latter defence. The buyer of the vehicles was not cited, or joined in the proceedings and obstacles, such as, for example, that posed by s 157(1) of the Insolvency Act,[3] were overlooked and not dealt with by the appellants in their pleadings or at the trial.

[17] But for the points dealing with the Insolvency Act, all the other defences of the appellants had a common denominator, or foundation, namely, the three

[2]Insolvency Act 24 of 1936 (the Insolvency Act).
[3]Section 157(1) provides that '…(1) [n]othing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court.'

offers made to purchase the vehicles. This was also conceded by counsel for the appellants.

[18] The appellants had the onus of proving their defences, in particular, that they ought to be released as sureties because of the alleged breaches by Wesbank of its obligations.[4] In light of the circumstances of this case it is not necessary to go beyond the factual substratum of the defences and to deal with the legal position regarding the discharge of sureties on the grounds of prejudice.[5]

The defences relating to the offers

[19] Counsel for the appellants correctly conceded in this court that the appellants' contentions regarding the first and second offers did not withstand scrutiny and were to be rejected. The first offer was withdrawn before it could be accepted or rejected by the liquidator or Wesbank. The letter withdrawing the offer, which is quoted earlier in this judgment, is totally inconsistent with the hearsay evidence that the appellants relied upon to the effect that Mr Oelofsen would have said to Mr Fitchett, a clerk of the appellants' attorneys, that Wesbank had rejected the first offer. Mr Oelofsen denied the allegation that he had rejected the offer. There is no reliable evidence that Wesbank or the liquidator had rejected the offer. The letter of withdrawal does not imply that the offer was rejected and the fact that the offer had to be withdrawn puts beyond doubt that it was not rejected. The rejection of an offer made to a specific person results in the termination of that offer and it is no longer open for acceptance.[6] Mr Visage would not have withdrawn an offer that had been rejected.

[20] The second offer was subject to Tube-Mech obtaining finance. It could not obtain the necessary finance and that offer accordingly fell away. It was not rejected by either the liquidator, or Wesbank. Much of the trial court's time was

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[4]See *Absa Bank v Davidson* [2000] 1 All SA 355 (SCA); 2000 (1) SA 1117 (SCA) para 19; *Bock & others v Duburoro Investments (Pty) Ltd* [2003] 4 All SA 103 (SCA) ; 2004 (2) SA 242 (SCA). In respect of the mitigation of damages: See *Dominion Earthworks (Pty) Ltd v M J Greef Electrical Contractors (Pty) Ltd* 1970 (1) SA 228 (A).
[5]See *Absa Bank v Davidson* supra; *Bock & others v Duburoro Investments (Pty) Ltd* supra.
[6]See R H Christie and G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 52.

taken up by the appellants' futile challenge to Wesbank's bona fides in refusing Tube-Mech's application for finance. The evidence overwhelmingly supports the genuineness, rationality and reasonableness of Wesbank's decision in that regard.

[21] The third offer was also never rejected by either Wesbank, or the liquidator. It was submitted to the liquidator, to whom it was addressed, and who was the person in authority, after the vehicles had been sold on 12 October 2011. In respect of this offer though, the appellants' tack was to blame a Wesbank employee, Mrs Zelda Mafune for the fruitlessness of the offer. They contended that when Mrs Viviers contacted Mrs Mafune on 10 October 2011 to enquire about the person to whom she had to submit this offer, Mrs Mafune, on some undisclosed basis, had a duty to inform Mrs Viviers of the date of the sale.

[22] In light of the evidence, these contentions are ill-founded. It is clear that Mrs Viviers was negligent in not timeously communicating the offer to the liquidator. Ms Viviers' explanation that she did not know whom to contact about the third offer was a ruse, or excuse, for her own negligence. If she was in possession of the third offer on 10 October 2011, there could have been no justifiable reason for her not submitting it to Mr Oelofsen. It was addressed to him. So, logically, he would have been the one to contact in respect of it. Mrs Viviers was familiar with Mr Oelofsen, and with his office. The evidence puts this beyond contention. She was the one who engaged Mr Oelofsen and Wesbank since the inception of the liquidation regarding the financing issues, the takeover of the vehicles and the other offers.

[23] Mrs Viviers' evidence under cross-examination that she did not contact Mr Oelofsen because he had not been particularly responsive regarding the previous offers, can be rejected out of hand. Not knowing whom to contact and not contacting someone deliberately, are two entirely different, irreconcilable versions. But for Mrs Viviers' contradictory evidence, there is nothing to show that Mr Oelofsen had been unresponsive in respect of the previous offers.

[24] In any event, it is also not conceivable how Mrs Mafune could have had an obligation, let alone a legally enforceable one, to inform Mrs Viviers of the date of the auction, when she was not specifically asked about it. Mrs Mafune rightly referred Mrs Viviers to Mr Oelofsen. In any event, Mrs Mafune testified that even if she had been asked about the date, she would not have been able to disclose it to Mrs Viviers, because of Wesbank's rules of confidentiality.

[25] Despite the fact that Mrs Mafune had on 10 October 2011 referred Mrs Viviers to Mr Oelofsen, to whom the offer was addressed and despite the alleged urgency of the measures to be taken to ensure a beneficial outcome for the appellants relating to the sale of the vehicles, as testified to by the second appellant, Mrs Viviers did not act commensurately. Instead, she only sent the offer to Mr Prinsloo, the appellants' attorney, on 12 October 2011, with a covering letter requesting him to send the offer to Mr Oelofsen. Nothing was alluded to that prevented Mrs Viviers from herself sending the offer directly to Mr Oelofsen, or to his office and to have done so on time.

[26] Before this court counsel for the appellants attempted to make something of the evidence of Mr Moore, Wesbank's Corporate Asset Manager, and that of Mr Oelofsen, to the effect that they, respectively, would have looked favourably at the third offer if it had been brought to their attention timeously. But that exercise was futile since those views, in the light of all the other evidence, are irrelevant. The fact is that the third offer was submitted too late, because the vehicles had already been sold.

[27] That concludes the consideration relating to the offers and accordingly, the determination of the fate of the bulk of the appellants' defences that are premised on the offers.

The defence invoking s 83 and s 84 of the Insolvency Act

[28] Wesbank did not rely on s 83 for its claims. Section 83 deals with the realization of securities for claims, and is essentially for the protection of the creditors. The section is referred to in Wesbank's particulars of claim, in the context of its payment to the liquidators of the proceeds of the sale of the

vehicles. The allegation in each of its claims is that '[t]he plaintiff, as it was obliged to do in terms of the provisions of section 83 …, duly paid the amount of…' to the liquidators.

[29] Reference was clearly being made to s 83(10) of the Insolvency Act, which requires a creditor, who has realised his security, to pay the net proceeds of the realisation to the trustee (or liquidator), or to the Master, if there is no trustee. The relevant part of the section provides:

'Whenever a creditor has realized his security *as hereinbefore provided* he shall forthwith pay the net proceeds of the realization to the trustee, or if there is no trustee, to the Master …' (Emphasis added.)

[30] Latching on to the words in the section '…as hereinbefore provided …', the appellants apparently used the abovementioned allegation in Wesbank's particulars of claim as a springboard, essentially arguing that Wesbank could not rely on s 83 because the sale took place after the second meeting of creditors and that Wesbank had not complied with the preceding provisions of s 83. They read s 83(10) to mean that the subsection could be complied with only if there was compliance with the other (preceding) provisions of s 83. Their interpretation of that subsection is wrong. In *Venter NO v Avfin (Pty) Ltd*[7] this court held that reference in s 83(10) 'to the preceding provisions was intended to be no more than a general reference to the realisation of securities as contemplated in the earlier subsections of s 83. It was not intended to import into s 83(10) a requirement of compliance with those subsections as a precondition to the obligation of the creditor to pay over the proceeds of his security to the trustee'.[8]

[31] The appellants' contentions also did not take into account the facts of this case. Sizwe's was a voluntary winding up by its members. In such a case creditors do not have to prove their claims. The liquidators simply had to settle

[7] *Venter NO v Avfin (Pty) Ltd* 1996 (1) SA 826 (A). See also Robert Sharrock et al *Hockly's Insolvency Law* 9 ed (2012) at 178-179.
[8] Ibid at 843A-B.

all debts, realise the assets and submit their liquidation and distribution account to the Master.[9]

[32] Section 84(1) of the Insolvency Act provides that where goods were delivered to a debtor in terms of an 'instalment sale agreement'[10] upon the sequestration of the debtor's estate, such a transaction shall be regarded as creating a hypothec over such goods in favour of the creditor, whereby the amount still due to the creditor in terms of the transaction shall be secured. Even though a hypothec had been created in favour of Wesbank, as contemplated in terms of s 84 of the Insolvency Act, Wesbank was not in possession of the vehicles until the Master instructed it towards the end of August 2011 to repossess them. The vehicles were also only sold on the instruction and authorisation of the liquidators. Mr Oelofsen explained in detail the modalities for the keeping and sale of assets and the reasons why the sale occurred as it did.

[33] In any event, s 157 of the Insolvency Act provides that nothing done in terms of the Act shall be invalid because of a formal defect or irregularity, unless a substantial injustice has been thereby done, which, in the opinion of the court, cannot be remedied by any order of the court. The appellants did not only fail to prove any defect or irregularity as contemplated, but failed to prove that if there were any, that they could not have been excused as contemplated in s 157. The appellants were not creditors and they had no right to a notice of the sale. In any event, the duty to provide such notice to creditors rests on the liquidator.[11]

[34] I have earlier dealt with the untenability of the appellants' contentions regarding the validity of the sale. The appeal, accordingly, stands to be dismissed.

[35] Regrettably, the court a quo did not furnish reasons for granting the appellants leave to appeal to this court. In this matter there was no reasonable

[9] Ibid Robert Sharrock et al *Hockly's Insolvency Law* at 252.
[10] As defined in the National Credit Act 34 of 2005.
[11] See s 83(9) of the Insolvency Act.

prospect of success and no compelling, or other justifiable reason, for leave to appeal to have been granted, is discernible.[12] It has been pointed out in previous, reported, decisions that the inappropriate granting of leave to appeal to this court increases a litigant's costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court to compete for a place on this court's roll with a matter which is not.[13]

[36] In the result the following order is made:

1 The appeal is dismissed.

2 The appellants are to pay the costs of the appeal jointly and severally, the one paying the others to be absolved.

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P Coppin

Acting Judge of Appeal

[12]See s 17(1)*(a)* of the Superior Courts Act 10 of 2013.

[13]See *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others* [2003] 3 All SA 123 (SCA); 2003 (5) SA 354 (SCA) para 23 (separate concurring judgment of Marais JA). See also: *S v Monyane & Others* 2008 (1) SACR 543 (SCA) para 28.

APPEARANCES:

For the Appellants:	R J De Beer Instructed by: Rossouw & Prinsloo Inc, Vereeniging Rosendorff Reitz Barry, Bloemfontein
For the Respondent:	K Meyer Instructed by: Smit Jones and Pratt, Johannesburg Symington & De Kock, Bloemfontein