Standard Bank of South Africa Ltd v Vally and Another (2023-077576) [2024] ZAGPPHC 978 (26 September 2024)

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2023-077576

(1) REPORTABLE:

(2) OF INTEREST TO OTHER JUDGES:

(3) REVISED.

Date **26 September 2024**

Signature

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Applicant

and

SHAHEEN ISMAIL VALLY

(ID NO 6[...]) First Respondent

MOHAMMED ISMAIL VALLY

(ID NO 9[...]) Second Respondent

JUDGMENT

WILLIAMS, AJ

[1] On 13 May 2019 the first and second respondents, jointly and severally, in writing, guaranteed as a principal and independent obligation, to guarantee and pay in full the debts of O'Cornish & Associates (Pty) Ltd to the applicant. (The Guarantee was for a limited amount of some R11 million.) The respondents renounced the legal benefits (set out in paragraph 6 of their Guarantee). They also agreed that a certificate under the hand of any manager or authorised signatory of the applicant, shall be sufficient proof of the contents and correctness thereof (and shall be valid as a liquid document for those purposes). The Manager, Business Solutions and Recoveries, of the applicant on 22 May 2023 certified the indebtedness of the first and second respondents in respect of :

1.1. Claim 1 – in the amount of R5,067,694.56, plus interest calculated thereon at 13,75%, compounded monthly in arrears, from 25 April 2023 to date of payment;

1.2. Claim 2 – in the amount of R1,431,989.76, plus interest calculated thereon at 13,75%, compounded monthly in arrears, from 25 April 2023 to date of payment.

Such Certificates of Balance was issued in respect of each of the respondents.

[2] The first and second respondents opposed the application for payment, brought by the applicant.

[3] They deny that their address was correctly recorded in the agreement (i.e. the *domicilium citandi et exedutandi)*. Nothing turns on this since they have been able to file answering affidavits and are aware of the proceedings.

[4] There is also no merit in the argument that the applicant did not provide the company with a written opportunity to remedy its failure to pay, nor is there any merit in the alternative defence that a written demand was to be made also on the respondents, before the amount can be regarded as due and payable. It is trite that a demand may be made *interpellatio extrajudicialis*, for example by way of a letter of demand or it may be by way of, for example, the instituting of action or application process (*interpellation judicialis).* The allied contention that the application against the respondents was premature on these bases, is to be rejected.

[5] The only real defence raised by the respondents is that under section 133 of the Companies Act there is a general moratorium placed on legal proceedings against the company which is in business rescue. The respondents are seemingly unaware that, unlike a suretyship, a Contract of Guarantee entails that the guarantor/s undertakes the principal obligation to indemnify the promise.

[6] **Section 133** of the **Companies Act, 71 of 2008**, does preclude legal proceedings against a company under business rescue (without the consent of the business rescue practitioner) – but that does not mean (as argued by the respondents) that because of that fact no amount is due by the company. The moratorium prevents proceedings being commenced against the company whilst it is under business rescue, not that the company does not owe.

[7] The respondents' indebtedness is an independent indebtedness, not dependent on the principal obligation by the company being due and payable when the creditor comes knocking on their door.

[8] The fact that the company was placed under business rescue on 9 June 2022, is thus neither here nor there. The fact that there is a moratorium on "legal proceedings" against a company in business rescue, does not absolve the respondents from having to pay. It is trite that a Contract of Guarantee is not akin to that of suretyship. It is not an accessory debt – but an indemnification promise which remains in force (even the obligation may fall away in the case of a suretyship). Unlike suretyship, a guarantor undertakes to pay regardless. The fact that the company, in the parlance of suretyship, is an accessory debt, does not apply in the case of a guaranteed debt.

[9] The estate of the first respondent was sequestrated in the Gauteng Local Division, Johannesburg, on 6 February 2024 (under Case No 2023-113396). I thus order, insofar as the application pertains to the first respondent, that the application is postponed *sine die*. That would allow joinder of the trustee of the first respondent, if needed.

[10] Accordingly, I grant judgment against the second respondent for payment of :

10.1. R5,067,694.56, plus interest thereon calculated at the rate of 13,75% per annum, from 25 April 2023 until date of final payment (both days inclusive);

10.2. R1,431,989.76, plus interest thereon calculated at the rate of 13,75% per annum, from 25 April 2023 until date of final payment (both days inclusive);

10.3. Costs on the scale as between attorney and client, as agreed in the Guarantee given by the respondents, respectively;

10.4. The judgment is joint and several with any judgment granted or that may be granted against O'Cornish and Associates (Pty) Ltd or against the first defendant;

10.5. The claim against the first defendant is postponed *sine die*, should his trustee have to be joined.

WILLIAMS AJ

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Date heard : **15 April 2024**

Date of judgment : **26 September 2024**

Representation for the applicant :	Adv D van den Bogert
	Instructed by Vezi de Beer Incorporated
Representation for the respondents :	Shaheen Ismail Vally - First respondent in person
	Mohammed Ismail Vally – Second respondent in person