THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 770/2013

In the matter between:

VARICO INVESTMENTS (EDMS) BPK **Applicant**

Versus

THE STANDARD BANK OF

SOUTH AFRICA LIMITED **1st Respondent**

THE REGISTRAR OF DEEDS,

CAPE TOWN **2nd Respondent**

JUDGMENT: 14 APRIL 2014

BOZALEK, J

[1] These are opposed motion proceedings in which the applicant, a property owning company, seeks a declaration to the effect that the first respondent, a large bank, has waived its rights to any monies or debt owing by the applicant, in respect of

which monies or debt the applicant had given collateral security in the form of a covering bond over certain immovable property in favour of first respondent.

[2] Further relief sought by the applicant is that the second respondent, the registrar of deeds, be directed to cancel and annul the said covering bond in the title deeds of the property.

[3] As is customary the registrar of deeds does not oppose the relief sought, merely pointing out that, from a registration point of view, there are no objections to the order being granted as prayed.

[4] The facts giving rise to the application are largely common cause save principally for the interpretation of an email sent on behalf of first respondent. The applicant's founding affidavit was deposed to by its director, a Mr Johan van der Berg (*'Van der Berg'*) who during 2009 – 2010 had also been a director and shareholder of a company known as Full On Meat (Pty) Ltd (*'FOM'*) which carried on business as a delicatessen. FOM had enjoyed an overdraft facility from first respondent, the account being held at the latter's Helderberg branch. By June 2009 the overdraft account, which was originally opened in April 2006, stood at approximately R441 000.00. An agreement was then concluded between FOM, represented by Van der Berg, and first respondent in terms whereof the facility would be reduced by an amount of R30 000.00 per month until FOM's liability was discharged in full by 31 August 2010.

A condition of that agreement was that the applicant would bind itself, to an unlimited extent, as surety for and co-principal debtor with FOM and further would register a second mortgage bond against the title deeds of certain fixed property it owned in Newlands, Cape Town in favour of first respondent.

[5] Van der Berg and two other persons, presumably directors of FOM, also bound themselves as sureties for and co-principal debtors with FOM in first respondent's favour. Regular monthly payments in reduction of the overdraft facility were duly made between August 2009 and August 2010 with one further payment being made in March 2011. By this time a dispute had arisen between FOM and first respondent as to what the correct outstanding balance was. According to first respondent it was in the region of some R45 000.00.

[6] Van der Berg states that repeated requests made of first respondent to ascertain how the outstanding balance was arrived at were unsuccessful. However, on 17 February 2012, in response to a further query from Van der Berg, an email was sent to him by Mrs R Abrahams (*'Abrahams'*) on behalf of first respondent in the following terms:

> *'Re: Full On Meat (Pty) Ltd – Acc 0724 25253*
>
> *Good day Sir.*
> *Please note that the account was written off and closed on 19 August 2011.*
>
> *I will request for a statement up until the write off date.*

I trust you will find this in order'

I shall refer to this communication as the 17 February email.

[7] According to Van der Berg he then purported to accept what he regarded as first respondent's waiver of any debt, albeit without immediately notifying first respondent thereof. At some point thereafter Van der Berg deregistered FOM and transferred the shares in applicant into his wife's name. This he did pursuant to a concession by the South African Revenue Services whereby a shareholder in a company owing residential property could transfer the property out of the company to a shareholder without incurring unfavourable tax consequences. The dispensation was only available up until 31 December 2012.

[8] It was only in October 2012 that Van der Berg's legal representatives wrote to representatives of first respondent drawing their attention to the contents of the 17 February email indicating that the bond should have been cancelled and requesting the title deeds to the property so that transfer could be passed from the applicant, presumably to Van der Berg's wife. This exchange led to an official of first respondent writing internally to Abrahams asking her to explain the meaning of the 17 February email. Her evendated reply to this internal query read as follows:

> *'Referring to my emails dated January 26 2012 and February 17 2012 to Mr van der Berg.*
>
> *The balance on the above account amounts to R47 819.77. Client requested a statement on how the balance amounted to R47 819.77 and an email containing the statement was emailed on 28 February 2012. Furthermore, the*

debt has been written off on 19.08.2011, meaning that the account was closed on branch level and the outstanding balance was handed over for collections to the Recoveries department.

I trust all is on (sic) order.'

[9] This interpretation of the 17 February email was expanded on in first respondent's opposing affidavit where the business lending manager in the personal and business banking credit division stated as follows:

'[20] On 19 August 2011 the balance (then standing at an amount of R41 819.77) was 'written off' at the branch and transferred to the recoveries department at the First Respondent.

…..

[24] It is, however, denied that, in banking terminology, 'written off' means that First Respondent renounces its right to look to its customer and sureties for payment of the outstanding debt.

[25] 'Written off' as used in the present context means that the debt is written off against the books of the branch and is then transferred to the books of the relevant recoveries department within the First Respondent as explained in the email dated 19 August 2012. …

[26] The allegation, therefore that the First Respondent renounced its rights in and to FOM's debts is denied as is the suggestion that the Applicant accepted the renunciation.'

[10] In the applicant's replying affidavit Van der Berg raised, in the alternative, the defence of estoppel in the following terms:

'6.1 Die bank erken dat die epos … aan my gestuur is …

6.2 Op geen stadium het die Bank die Applikant in kennis gestel dat die persoon wat gemelde epos gestuur het nie namens die Bank kon optree nie en die Bank kon bind nie.

6.3 … die Bank het verder die skyn geskep dat die skuld afgeskryf is deur die nalate om enige verdere stappe te invordering van die skuld te doen nadat ek in kennis gestel is deur die Bank dat die skuld afgeskryf is.

6.4 As sulks het die Bank aan die Applikant voorgehou dat die Applikant se skuld afgeskryf is deur die Bank en dat die Bank afstand gedoen het van sy eise en regte teen opsigte van die verhaling van enige balans verskuldig deur die applikant;

…

6.6 Die Applikant het gehandel op hierdie voorstellings wat deur die Bank aan hom gedoen is deur, onder andere, op te tree soos deur my uiteengesit….. insluitende deur die oordrag van aandele en die stappe betreffende die oordrag van die onroerende eindom, soos verwys in …. my loodsende eedsverklaring

…

6.8 Deur soos voormeld op te tree na aanleiding van die Bank se voorstelling en deur te aanvaar dat die woorde "written off" hul gewone betekenis dra het die Applikant tot sy benadeel gehandel.'

[11] In argument on behalf of the applicant, Mr van Heerden contended that the objective facts showed that there had been a waiver by first respondent of its rights to any monies owing by FOM (or any surety or co-principal debtor); in the alternative, that if this had not been established then at the very least first respondent was estopped from asserting that any amount was still due in respect of the principal debt. On behalf of first respondent, Mr Sievers argued that, regard being had to the principle in *Plascon Evans*[1], the applicant had failed to prove any waiver and also because certain terms in the suretyship agreement concluded by the applicant precluded any reliance on the 17 February email. As regards the estoppel argument, he contended that the applicant had failed to establish the representation it purported

[1] Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 H - I

to rely on or that it had altered its position to its detriment on the strength of any such representation.

DISCUSSION

[12] The applicant's case is built on a waiver, the existence of which is a question of fact. In *Laws v Rutherford*[2] Innes CJ stated as follows:

> *'Waiver is a question of fact, depending on the circumstances. It is always difficult, and in this case especially difficult to establish.'*

[13] Also to be borne in mind is the application of the *Plascon Evans* rule in these proceedings which entails that the applicant must establish its entitlement to the relief sought on the basis of those of its averments which have been admitted by first respondent together with the facts as set out by first respondent. The meaning of the 17 February email, what it was intended to convey, is very much in dispute. There is, furthermore, a presumption against waiver based on the notion that having gone to all the trouble to acquire contractual rights, people are, in general, unlikely to give them up. In this regard, again as was stated by Innes CJ in *Laws v Rutherford*:

> *'(t)he onus is strictly on the appellant. He must show that the respondent with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.'*

[14] The party alleging a waiver of a contractual right retains throughout the proceedings the overall onus of proving that the other party had full knowledge of the right when he allegedly had abandoned it. See *Feinstein v Niggli and Another* 1981 (2) SA 684 (AD) at 698 F – G.)

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[2] 1924 (AD) 261 at page 263

[15] It has repeatedly been held that clear proof is required of a waiver. In *Borstlap v Spangenberg* 1974 (3) SA 695 (A) 704 Corbett AJA stated as follows:

> *'Dit is herhaaldelik deur ons Howe beklemtoon dat duidelike bewys van 'n beweerde afstanddoening van regte geverg word, veral waar op 'n stilswyende afstanddoening staat gemaak word. Dit moet duidelik blyk dat die betrokke persoon opgetree het met behoorlike kennis van sy regte en dat sy optrede teenstrydig is met die voortbestaan van sodanige regte of met die bedoeling om hulle af te dwing.'*

[16] In *Road Accident Fund v Mothupi* 2000 (4) SA 38 (A) it was held that waiver was first and foremost a matter of intention. Whether it was the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably was the will of the party said to have waived it. Referring more specifically to the test to determine intention to waive, Nienaber JA stated that this had been said to be objective which means, first, that intention to waive, like intention generally, is judged by its outward manifestations; secondly, that mental reservations, not communicated, were of no legal consequence and, thirdly, that the outward manifestations of intention are judged from the perspective of the other party concerned, that is to say from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes. Nienaber JA stated further that the knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver. Once again he reaffirmed that the onus is on the party alleging the waiver and that clear proof is required on intention to do so.

> *'The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.'*

[17] Applying these principles to the present matter I do not consider that the 17 February email upon which the applicant relies, objectively speaking, reflects an unequivocal intention on the part of first respondent to waive its rights to recover the debt it regarded as being owed by FOM. In the first place the email must be considered within the context in which it was written, namely, a response to Van der Berg's requesting a statement on how the balance amounting to R47 819.77 was made up. The reply, was at best for the applicant, ambiguous. It refers to the *'account'* being *'written off'* and *'closed'.* By itself the statement that the account was closed would certainly not indicate a waiver. The key phrase relied on by the applicant is *'written off'* and that sits uncomfortably with a notion of an *'account'*. In common parlance a debt or a balance is written off but not an account. Adding to the ambiguity is Abrahams' statement that she would request a statement *'up until the write off date'*. Bearing in mind that Van der Berg was seeking an explanation of how the outstanding balance was arrived at, it would, objectively speaking, be illogical for Abrahams on the one hand to state that the debt was written off but on the other hand undertake to furnish a statement showing how the final balance was arrived at. Matters might have been different had Abrahams unequivocally stated in terms that the debt owing by FOM had been *'written off'*. This was not the case, however.

[18] Although one can well imagine that a reasonable person in the shoes of Van der Berg may have been initially puzzled by the terms of the email from Abrahams, and even that such puzzlement may have been tinged with the hope that first

respondent was indeed writing off FOM's debt, I do not consider that such person would, without further enquiry, have been unequivocally brought under the impression that the debt had been written off.

[19] As is evident from the affidavits, first respondent contends that the statement made by Abrahams in the 17 February email bore a specialised meaning, namely, that the debt was written off against the books of the local branch and was then transferred to the books of the relevant recoveries department. It specifically denied that, in banking terminology, *'written off'* in this context meant that the bank renounced its right to look to its customer, FOM, or any other parties liable for payment of the outstanding debt. There is nothing to gainsay this and, strictly speaking, applying the rule in *Plascon Evans* it must be accepted that first respondent never had the intention to waive its rights to recover the debt.

[20] It is also of some significance that this specialised meaning was the one which was given by Abrahams on the very day that her initial email was queried. This was contained in an email responding to the enquiry from her manager, who in turn was responding to Van der Berg's legal representative's claim that the debt had been waived by first respondent in the 17 February email. The applicant objected to this evidence on the basis that it offended against the parol evidence or integration rule and further that it was not substantiated by an affidavit from Abrahams. I regard the evidence as admissible, however. The integration rule, as Botha JA remarked *in*

National Board (Pretoria) (Pty) Ltd v Estate Swanepoel[3], is well summarised by Wigmore as follows:

> *'This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, i.e. its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.'*

[21] In *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 339 (SCA) the Court stated as follows:

> *'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 A at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question … Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent … Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible".'*

[22] Both of these dicta make it clear that a key qualification to the application of the integration rule is that the document in question must be intended to provide a complete memorial of the jural act. However, the notion that the 17 February email

[3] 1975 (3) SA 16 (A) at 26

was intended to be a complete memorial of a jural act is, at best for the applicant, the absolute high-water mark of its case. It was certainly not conceded by first respondent that this terse email was intended to provide a complete memorial of its waiver of rights against any parties arising out of FOM's debt. Bearing in mind, again, that these are motion proceedings and that first respondent's case is that the communication was by no means an integrated memorial of the jural act, I regard extrinsic evidence as to what its true meaning was, as admissible.

[23] As regards the applicant's objection that the email was not confirmed or supported by an affidavit from Abrahams, I do not consider that this diminishes from the weight of such evidence or renders it inadmissible. The original email was introduced into evidence by the applicant without any suggestion that it was not a valid document or that its contents, insofar as they expressed Abrahams' view as to what the 17 February email meant, were false or contrived. The applicant's case is rather that the objective meaning of the 17 February email is completely at odds with and trumps any specialised meaning which Abrahams herself may have intended.

[24] The meaning for which Abrahams and first respondent contend, moreover, is by no means inherently improbable or farfetched, namely, that the debt had been written off in the books of the relevant branch in order that it could be dealt with as a recovery by a specialised department. This interpretation is also lent weight by the fact that Abrahams was, as Van der Berg was aware, a collections officer in the

business lending recovery/credit rehabilitation and recoveries department in Johannesburg and not a local official in the Helderberg branch.

[25] In order to prove the waiver on which it seeks to rely on the applicant must discharge an onus, one not lightly accomplished, showing that first respondent, with full knowledge of its rights, decided to abandon these. As was stated in the Mothupi case [supra page 50, para 19] albeit in the context of conduct: '*(t)he conduct from which waiver is inferred, so it has been frequently stated, must be unequivocal, that is to say, consistent with no other hypothesis'*.

[26] All that the applicant can rely on is the 17 February email. There is no other evidence suggesting that Abrahams, acting on first respondent's behalf and with full knowledge of its rights, decided to abandon these. In my view, particularly given the ambiguity inherent in the phrase *'The account was written off and closed on 19 August 2011'*, the email falls well short of clear proof of a waiver.

[27] There are in addition other difficulties facing the applicant's case. It seeks to be released from its suretyship for the debts of FOM. That suretyship agreement made provision for when the applicant's liabilities would end in the following terms:

> *'12.6 Our liability for the Debts will only end when –*
>
> *12.6.1 our liability has been extinguished; or*
>
> *12.6.2 the bank gives us a written release from liability under this suretyship; or*
>
> *12.6.3 the bank cancels this suretyship in writing.*
>
> *12.7 This suretyship may only be terminated, cancelled or otherwise brought to an end in the way provided for in this suretyship'*

[28] Even giving the 17 February email the meaning contended for by the applicant, in my view it amounted to neither a cancellation of the suretyship in writing nor a written release from liability under the suretyship. Nor do I consider that the email can be brought within the terms of clause 12.6.1 since the applicant does not rely on any payment/s recently made, thereby extinguishing its liability, but only on a reference to an account being '*written off*' in an informal communication from first respondent. It is significant in this regard that one of the meanings of *'extinguished'* given in The Concise Oxford English Dictionary, 10th Edition, Revised, is *'to cancel (a debt) by full payment'*. Looked at as a whole, clause 12.6 is clearly intended to ensure that a surety's liability will only be terminated through a formal release and/or payment of the outstanding balance in full.

[29] A further contractual provision militating against the interpretation which the applicant seeks to place on the 17 February email is clause 17.2 of the self-same suretyship agreement which provides as follows:

> *'No compromise or other arrangement regarding the bank's claims against the debtor (FOM) will, if the bank does not give written consent, release us from liability under this suretyship'.*

[30] Thus, even assuming that a waiver by first respondent of its claim is proved, the applicant would only be released from its liability after obtaining *'written consent'* from first respondent. The applicant did not suggest, nor could it reasonably have done, that the 17 February email directed to Van der Berg, presumably in his capacity

as a director of FOM, constituted such a *'written consent'. C*lause 17.2 also tends to suggest that a greater degree or formality would be expected were first respondent to be releasing the applicant from its obligations under the suretyship for FOM's debt.

[31] In my view then the applicant has failed to establish, on these papers, that first respondent, with full knowledge of its rights, waived any claims it may have had against applicant as co-principal debtor with, and surety for, FOM's debt.

ESTOPPEL

[32] In the alternative, Mr van Heerden contended that first respondent was estopped from denying that it had waived its right to the debt owing by FOM and as such the applicant was entitled to the relief it sought.

[33] Broadly speaking, to establish an estoppel the party relying thereon must prove a representation, by words or conduct, including silence or inaction; the representation must be one of fact, it must have been made to the person invoking estoppel and that person has to establish that he or she acted on the faith of the representation and that in so doing he or she altered his or her position to his or her detriment.[4]

[4] See the discussion on estoppel by representation in LAWSA 2nd Edition Vol 9.

[34] The applicant only raised estoppel in its replying affidavit. The general rule in application proceedings is that an applicant must make out his case in its founding papers.[5] I do not consider that the applicant is precluded from raising the 17 February email, as constituting the representation founding the estoppel, only in reply since that email was central to its founding affidavit and was fully dealt with by first respondent in its opposing affidavit. In my view, however, insofar as the applicant sought in reply also to rely, as part of the representation, on first respondent's alleged failure to take steps to recover the debt after the email was sent, this was not permissible. First respondent was afforded no opportunity to explain any such omission. The applicant must therefore stand or fall by the 17 February email as constituting the representation.

[35] The applicant's estoppel response presupposes that it has failed to establish an intention to waive on first respondent's part. The question then is whether first respondent nevertheless created the impression with the applicant that it had waived FOM's debt, on the strength of which the applicant acted to its prejudice.

[36] As was held in *Mothupi*'s[6] case, the test for inferred waiver is the impression created by the conduct of the party said to have waived on the mind of the notional alter ego of the party relying on the alleged waiver (the applicant in this case); which is also the test for a representation in the context of estoppel.

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[5] Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 369 B
[6] (supra) at page 53 para 29

[37] That conduct was the sending by first respondent of the 17 February email. However, notwithstanding its ambiguity, I consider that this email was not capable of creating the reasonable impression that first respondent had waived its claim for recovery of the debt i.e. had *'written it off'*. I reach this conclusion for much the same reasons as apply to the applicant's reliance on a waiver, namely, the context in which the email was sent, the inherent ambiguity of its terms and the surrounding contractual provisions relating to the extinguishment of the debt and the release of sureties.

[38] In the event that I am incorrect and the applicant has established the representation on which it relies, I proceed to deal with the further requirements to successfully raise estoppel. In doing so I shall assume in favour of the applicant that the 17 February email to Van der Berg was a representation made to the applicant even though Van der Berg appears to have been addressing his enquiry to first respondent in his capacity as director of FOM, whose debt he had been settling.

[39] Any representation made can obviously be withdrawn and the party to whom it was made cannot rely upon estoppel unless it had acted on such representation prior to its withdrawal.[7] There is little in the applicant's papers to suggest that, by the time first respondent clarified its position, to the extent that this may have constituted a withdrawal of the representation relied upon by the applicant, the applicant had already acted to its detriment on the strength of that representation.

[7] See Hammerschlag v Dingle Hotel and Store 1925 GWL 24 at pg 29

[40] The details which the applicant furnished of how it acted to its detriment are somewhat sparse. Without furnishing dates Van der Berg states he deregistered FOM and transferred the applicant's shares to his wife's name with a view to taking advantage of a tax dispensation before 31 December 2012. It appears that, following an exchange of emails beginning on 25 October 2012, it was made clear to Van der Berg or his legal representatives that first respondent disputed that it had written off FOM's debt and that first respondent required payment of the outstanding balance before it would cancel the bond over the applicant's property and release the title deeds. At this stage the applicant does not appear to have taken any steps on the strength of the representation to its detriment. Nothing prevented Van der Berg from re-activating FOM or, had he wished to pursue the tax benefit scheme, from paying the outstanding amount allegedly owing by FOM and/or the applicant to first respondent under protest in order to have the bond cancelled. No case is made out as to why these steps could not have been taken within the deadline of the tax benefit scheme or why indeed the entire scheme was not initiated earlier, immediately after Van der Berg's receipt of the 17 February email.

[41] For these reasons I consider that the applicant has not established on these papers that first respondent is estopped from asserting that it did not waive any of its rights relating to the debt owing, in the first place, by FOM. It follows and therefore that the applicant is not entitled to the relief which it seeks.

[42] In the result the application is dismissed with costs.

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L J BOZALEK

JUDGE OF THE HIGH COURT