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

Case No: 13504/2014

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

SCARLET DAWN TRADING 135 CC

First Defendant

(Registration Number 2005/080754/23)

CHRISTINE JOSEPH

Second Defendant

DAWID JACOBUS JOSEPH

Third Defendant

Court: Canca, AJ
Date of Hearing: 24 August 2016
Judgment: 5 September 2016

JUDGMENT

INTRODUCTION

1. I shall refer to the parties in this application as they are cited in the main action.
2. This is an application for summary judgment against the third defendant, the plaintiff having already obtained judgment against the first and second defendants. The judgment sought is for the payment of the sum of R196 965,50, together with interest thereon, at the rate of 14.5 percent per annum calculated and capitalised monthly from 1 July 2014 to date of payment. The applicant also seeks costs as between attorney and client. The application has its origins in a deed of suretyship.
3. The third defendant, who is married in community of property, opposes this application on various grounds. In brief summary, the defences raised are the following:
 - 3.1 The deponent to the affidavit in support of the application was unable to attest to the facts and verify the cause of action;
 - 3.2 The particulars of claim were excipiable;
 - 3.3 The third defendant denies:
 - (a) signing the suretyship;
 - (b) that his wife consented to the suretyship; and
 - (c) the amount claimed or that the same is due and payable; and
 - 3.4 The third defendant requests the Court, in the exercise of its discretion, to refuse summary judgment in this matter.

BACKGROUND FACTS

4. The second and third defendants are siblings and were, at all material times, members of the first defendant. During July 2006, the parties concluded a written credit agreement in terms of which the plaintiff lent and advanced monies to the first defendant in respect of cheque account number 4[...] opened at its Kuils River Branch. This credit agreement was apparently inadvertently destroyed during August 2009 by the company that handles the plaintiff's document management. An unsigned copy of the general terms and conditions which applied to overdraft and other banking facilities in 2006 was attached to the plaintiff's particulars of claim.

5. It was a specific term of the credit agreement that a certificate signed by a manager of the plaintiff would be *prima facie* proof of the amount owing to the plaintiff, the interest due or any other fact or matter relating to the cheque account or overdraft facility.

6. A suretyship bearing the details of the third defendant and those of his wife (and apparently signed by them at the plaintiff's Zevenwacht branch on 31 January 2009) forms part of the papers in this application. This suretyship, as with the credit agreement, also provides that a certificate signed by a manager of the plaintiff was *prima facie* proof of the amount owing to it.

7. It is convenient to quote the clause dealing with the certificate in full given some of the defences raised by the third defendant referred to in paragraph 3 above. The clause reads as follows:

“A certificate signed by any manager of the Bank [the plaintiff] shall be sufficient proof of any applicable rate of interest and the amount owing in terms hereof or of any other fact relating to the suretyship for the purposes of judgment, proof of claims against insolvent and deceased estates or otherwise and if I/we dispute the correctness of such certificate, I/we shall bear the onus of proving the contrary. It shall not be necessary to prove in such proceedings the appointment or capacity of the person signing such certificate.”

8. A certificate of balance was duly signed by the plaintiff's manager; Legal Resources: Business Support and Recoveries, on 31 July 2014 reflecting the amount owing as at 30 June 2014 and for which judgment is sought.

9. A summons was issued and served on the defendants but for reasons that are not entirely clear from the papers, judgment by default was obtained only against the first and second defendants. However, a warrant of execution against the movable assets of the third defendant was issued on 21 October 2014, and on receipt of a *nulla bona* return, the plaintiff applied to have the third defendant and his wife's immovable property declared executable.

10. The application to declare the property executable was granted on 19 January 2016, erroneously it subsequently turned out, as there was no judgment against the

third defendant, only the first and second defendants. The judgment declaring the aforesaid property executable was abandoned by the plaintiff during April 2016.

11. The third defendant entered an appearance to defend the action. Acting in terms of Rule 32, the plaintiff brought this application for summary judgment on 6 June 2016. As already mentioned in paragraph 3 above, the third defendant opposes the application for the reasons set out therein. Given this background, I now turn to deal with the merits of the application.

THE PLAINTIFF'S CASE

12. The essence of the plaintiff's case is that the third defendant has failed to disclose a *bona fide* defence.

THE THIRD DEFENDANT'S DEFENCES

13. It is appropriate to consider the defences in the order set out in paragraph 3 above.

14. Was the deponent to this summary judgment application in a position to attest to the facts and verify the cause of action? Mr van der Linde, for the third defendant, contends that the deponent to the verifying affidavit in support of this application had in the affidavit in support of the application to declare the third defendant's property executable, misled the Court as there was in fact no judgment against him. Therefore,

so it was contended, she cannot be said to be in a position to swear positively to the facts in this matter as same were not within her personal knowledge. The deponent should have done more to convince me that she understands the nature and meaning of the phrase “swear positively to the facts” as required by Rule 32 of the Uniform Rules of Court, so the contention continued.

15. The deponent to the verifying affidavit, Ms Philander, is a manager in the employ of the plaintiff’s business banking, restructuring and recoveries division. She avers that she has acquainted herself with all the data relating to this matter and as a result, the facts are within her personal knowledge.

16. The plaintiff is a large organisation and as correctly conceded by Mr van der Linde, the wording of Ms Philander’s affidavit was not unusual as it was substantially similar to those of large corporate institutions. What the third defendant takes issue with is the fact that Ms Philander had in a previous affidavit failed to bring an essential aspect of that matter to the Court’s attention. Consequently, I should not believe the correctness of her affidavit in this matter as well, it was contended.

17. In his affidavit opposing summary judgment, after citing the actions that led to his property being wrongly declared executable based on Ms Philander’s affidavit in support thereof, the third defendant states, *inter alia*, that:

“ 6.8 Clearly the Court was misled into granting an order in circumstances where there was no reason whatsoever for the granting of that order.

7. *Now in the present matter apparently the same Lizelle Philander has deposed to the affidavit supporting summary judgment.*
8. *It is clear that the previous affidavit in this matter was economical with the truth and in fact totally misleading to the Court hearing the application to declare the property executable. I see no reason why the Court should believe Philander's affidavit in this matter either.*
9. *She mentions no detail which would assist the Court in confirming that she actually had sight of the documents which purportedly set out the cause of action against me."*

18. It is trite that, as was held by Corbett JA (as he then was) in Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423F:

"The mere assertion by a deponent that he 'can swear positively to the facts' (an assertion which merely reproduces wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of the words ..."

In setting out the rationale for summary judgment proceedings, Navsa JA in Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) at 12 A-C states, *inter alia*, that:

"Our courts, both of first instance and at appellate level, have during that time ["After almost a century of successful applications in our courts ..."]

rightly been trusted to ensure that a defendant with a triable issue is not shut out.”

The learned Judge, citing the Maharaj case, states that summary judgment applications essentially involve a two-stage enquiry. This involves ‘*first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be bona fide and good in law. A Court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment ... However, the learned Judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.*’

19. There is no evidence in the affidavit resisting summary judgment proffered which sustains the assertion that Ms Philander was unable to attest to the facts and verify the cause of action. There was no need for her to furnish the Court with details confirming that she had sight of the documents in this matter. It is sufficient for her to positively aver, as she has done, that she had acquainted herself with the documents, given that they were under her control. The fact that Ms Philander’s affidavit in a previous application contained a crucial omission or mistake cannot be held against her in this application in the absence of evidence that her current affidavit suffers a similar defect.

20. I agree with Mr Jonker, for the plaintiff, that the objection to the verifying affidavit has no merit and does not disclose a *bona fide* defence.

21. Are the Particulars of Claim excipiable? The third defendant relies on two grounds for this defence. Firstly, he avers that no cause of action is disclosed. The

foundation of this averment being that, having alleged that the first defendant opened a cheque account with it, the plaintiff has failed to disclose on what basis that amounted to advancement of credit and, in addition, has failed to plead the date, place and between whom it was agreed that credit would be granted to the first defendant on the cheque account. The second ground is that the plaintiff's prayer to have the third defendant's property declared executable is not related to its cause of action based on money owed on a cheque account. Relying on the above, it was contended by the third defendant that the summons contained vague, irrelevant and embarrassing allegations which made it impossible for the third defendant to plead and stood to be struck out. Something the third defendant undertook to do on being granted leave to defend the action, so the argument continued.

22. Mr Jonker's response was, in brief summary, simply this: The third defendant's complaint was not understood. The simple summons sets out the plaintiff's cause of action in that (a) paragraph 1.1 thereof alleges that monies were lent and advanced by the plaintiff to the first defendant at its special instance and request on a cheque account and (b) pleads the suretyship in paragraph 1.5 of the particulars of claim. Regarding the third defendant's contentions with respect to the prayer to have his property declared executable, the plaintiff was no longer pursuing an order in terms of that prayer in this application.

23. It is these allegations to which the third defendant is required to plead. Insofar as he contends that the allegations contained in the summons fail to disclose a cause of action, he has not persuaded me that upon every interpretation the summons can reasonably bear, no cause of action has been disclosed. Insofar as he contends that

the allegations contained in the summons are vague and embarrassing, he has similarly failed to persuade me that any alleged vagueness or embarrassment goes to the root of the cause of action. I therefore agree with Mr Jonker that this defence is not only vague and flimsy but also lacks conviction. In my view, the defence is not *bona fide* and therefore stands to be rejected.

24. Did the third defendant and his wife sign the suretyship? In summary, the third defendant avers that he recalls, as a member of the first defendant, attending the plaintiff's Kuils River branch in order to apply for an overdraft on behalf of the first defendant. He states that an overdraft in the sum of R40 000 was granted but that he was not asked to sign a suretyship agreement. The first time he saw the suretyship, was when the summons was served on him. He admits that the signature on the suretyship is his but denies that he "*put it there*" and, in an apparent support of this assertion, states that his handwriting does not appear anywhere else on the document. He also denies having signed any document on behalf of the first defendant at the plaintiff's Zevenwacht branch which, *ex facie* the suretyship, appears to be where the document was signed.

25. The third defendant also denies that his wife permitted him to sign the suretyship or that she signed the document as well even though her signature appears on the suretyship. Although he states that his wife's organisation does its banking at the Zevenwacht branch, he denies that either his wife or himself would ever have signed documentation to do with the first defendant at that branch as all the first defendant's banking was done at the Kuils River branch.

26. The third defendant is being disingenuous. It is common knowledge, given the technologically advanced age we live in, that banking institutions are such that a customer can transact his or her business at any of its branches. One is not confined to the branch where one does most, if not all, of one's business. It is well within the realm of possibility that, as his wife's business conducted its banking at that branch, it was convenient for her to have the suretyship signed at the Zevenwacht branch. Also, no affidavit by his wife was filed to confirm the third defendant's averments, rendering the averments pertaining to his wife, hearsay evidence. No weight is therefore afforded to that evidence. Rampai AJP in Patrick Thabang Kgotlagomang v Petrus Johannes Joubert (A 203/2013) 4 September 2014, an unreported judgment of the Free State Division of this Court, with respect, correctly, states that *"it is very easy to deny one's signature. If such simple denials, unexplained defences, and vague suspicions were to be glorified as triable issues or bona fide defences, then the commercial world would be absolutely paralysed with catastrophic economic repercussions. The Courts would not cope with the resultant endless tide of commercial litigation."* In any event, the real purpose of section 17(5) of the Matrimonial Property Act 88 of 1984, which deal with litigation against spouses married in community of property, is not to permit a spouse married in community of property to a debtor to avoid liability in respect of debt incurred in the furtherance of the interests of the joint estate, but rather to safeguard creditors who deal with such a debtor. See Nedcor Bank Ltd and Another 1999 (3) SA 767 SECLD at 770 G – 771 A

27. This defence also lacks conviction. It does not contain a *bona fide* defence and has no merit.

28. Is the amount due and owing? The third defendant states that he ceased being involved in the business of the first defendant in September 2008. He and the second defendant, his sister, agreed that he would resign as a member, she would run the business of the first defendant on her own and that she would bear the responsibility for repaying the overdraft, which at that stage was approximately R30 000,00. Numerous requests by the third defendant to the plaintiff for an explanation of the dramatic increase in the overdraft amount elicited no response, so the averment continued. This is the high water mark of the third defendant's resistance to the relief sought under this defence.

29. Mr Jonker, correctly argued that this defence is set out so baldly and vaguely that it fails to meet the minimum requirements an opposing affidavit must comply with in summary judgment applications. Colman J, in Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (TPD) at 229A held, *inter alia*, that “*what I have set out in that regard is not a demand for, or an encouragement to present lengthy and prolix affidavits in summary judgment cases. All that is required is that the defendant's defence be not set out baldly, vaguely or laconically that the court, with due regard to all the circumstances, receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have.*”

30. The third defendant has not provided any evidence to dispute the *prima facie* evidential value of the certificate of balance upon which the amount claimed is based. It is not sufficient in proceedings of this nature for a defendant to simply aver that he or she does not know how the amount claimed increased so significantly from what he or

she knew the outstanding amount was when he or she was still actively involved in the business. It seems to me that such an enquiry, properly, should have been directed at the person who ran the business, in this case, the second defendant. Also, an affidavit by the second defendant confirming the query of the amount in the certificate of balance, might have assisted the Court in the evaluation of the merits of this defence. This the third defendant failed to provide. Finally, default judgment has already been granted against the first and second defendants and nowhere in the papers is it alleged that the aforesaid defendants are challenging the judgments against them.

31. In the circumstances, I find that this defence is also not *bona fide* and good in law.

32. In a final attack the third defendant requests that, based on equity and to ensure that justice is done between the parties, I should exercise my discretion and refuse summary judgment. This would allow the third defendant to properly ventilate the issue between him and the plaintiff, so the contention continued.

33. The learned Judge in Breitenbach *supra* at 229C states that “*even if the defendant’s affidavit does not measure up fully to the requirements of sub-rule (3) (b) of Rule 32, the Court may nevertheless refuse to grant summary judgment if it thinks fit ... The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.*” In this matter, it is manifestly clear, as I have shown above, that none of the defences raised by the third defendant are *bona fide* and good in law. There has simply been no evidence that the third defendant has a triable issue or a sustainable defence that warrants a trial. The third

defendant has not even offered or has paid the sum he claims he was aware of when he exited the business of the first defendant. And, there is nothing in his affidavit that suggests that a refusal to exercise my discretion in his favour will result in an injustice to him.

34. For all the reasons set out above, the application for summary judgment in this matter must succeed.

35. In the result, I order as follows:

There will be summary judgment against the third defendant in terms of prayer (a) and (c) of the plaintiff's particulars of claim.

CANCA, AJ

Appearances

For the Plaintiff : Adv JW Jonker
Instructed by:
Sandenbergh Nel Haggard Attorneys
Bellville

For the Third Defendant : Adv DJA van der Linde
Instructed by:
Meyer Attorneys
Cape Town

