

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 2022/2183

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
21 April 2023 DATE	 SIGNATURE

In the matter between:

THE SPAR GROUP LIMITED

APPLICANT/PLAINTIFF

and

ANDRE LEANDRA COETZEE

FIRST RESPONDENT/DEFENDANT

LYN OSWALD COETZEE

SECOND RESPONDENT/DEFENDANT

LAWRENCE OWEN COETZEE

THIRD RESPONDENT/DEFENDANT

SYLVIA CYNTHIA COETZEE

FOURTH RESPONDENT/DEFENDANT

Neutral citation: *The Spar Group Limited Vs Andre Leandra Coetzee & 3 Others*
(Case No: 2022/2183) [2023] ZAGPJHC 561 (21 April 2023)

JUDGMENT

BERGER AJ:

- [1] The applicant (Spar) seeks leave to amend its particulars of claim in its action against the four defendants (the respondents in this application).
- [2] In the particulars of claim, it is alleged that each of the four defendants concluded written deeds of suretyship, in favour of the plaintiff, for the due and punctual fulfilment and performance of the obligations of various named close corporations.
- [3] In relation to the principal debts covered by the deeds suretyship, it is alleged that each of the close corporations was indebted to the plaintiff in specific sums of money *"plus interest calculated from 4 June 2019..."*.
- [4] Attached to the particulars of claim, in respect of each of the principal debts, is a certificate of balance in respect of the amount allegedly owed to the plaintiff by the close corporation concerned. The final certificate of balance is attached, marked annexure "G".
- [5] The background to this application started with a notice in terms of Uniform Rule 23, delivered by the defendants, calling on the plaintiff to remove certain matter from the particulars of claim which, according to the defendants, was considered vague and embarrassing.

- [6] The plaintiff responded with a notice in terms of Rule 28, foreshadowing certain amendments to the particulars of claim. This in turn provoked an objection from the defendants along the same lines as their notice in terms of Rule 23.

The first amendment

- [7] The first amendment sought by the plaintiff seeks to insert the words "*which branch (i.e. division) for present purposes is Spar Southern Region*" into paragraph 8.2 of the particulars of claim after the words "*signed by a credit manager for the time being of any branch of Spar*".
- [8] The effect of the amendment is to make clear that, according to the plaintiff, a branch of Spar includes a division and, in this case, the branch is the Spar Southern Region. That is because, in each of the certificates of balance attached to the particulars of claim, the certificate is signed by a certain Marc Nicholas De St Pern, describing himself as the "*Divisional Credit Manager of the Spar Group Limited (Southern Region)*".
- [9] Each of the deeds of suretyship provides that "... *the nature and amount of our/the debtor's indebtedness to Spar shall at any time be determined and proven by a written certificate purporting to have been signed by the credit manager for the time being of any branch of Spar, which certificate shall, upon the mere production thereof, be binding on us and in any legal proceedings against us be prima facie proof of the contents of such certificate and of the fact that such amount is due and payable and shall be valid as a liquid document against us in any competent Court ...*".

[10] As a result of the defendants' objection to the proposed amendment, the plaintiff delivered the application for leave to amend. Instead of filing an answering affidavit, the defendants elected to file a notice in terms of Rule 6(5)(d)(iii), raising exclusively questions of law in response.

[11] In relation to the first amendment sought, the defendants (now respondents) persisted with the argument that the signatory to the certificates of balance does not identify himself as, or confirm that he is, a credit manager for the time being of any branch of Spar.

[12] This argument ignores the fact that the proposed amendment seeks to plead that a branch of Spar means a division of Spar, which includes Spar's Southern Region. The whole point of the amendment is to plead that the signatory of the certificates of balance is in fact the credit manager of the relevant branch of Spar.

[13] Whether or not that is correct will have to be determined at trial. However, that is the plaintiff's case regarding the validity of the certificates of balance.

[14] In my view, the defendants' objection to the first amendment is frivolous and vexatious. It raises no question of law. Indeed, in argument before me, Mr Venter, for the respondents, was constrained to abandon the first ground of objection.

The second amendment

[15] The second amendment sought by the plaintiff consists of three parts. First, there is the insertion of words alleging that each of the principal debtors "*traded inter*

alia in accordance with the Spar Standard Terms of Sale annexed marked 'G' ('the Standard Terms')". Second, there is the insertion after the words "plus interest" of "in accordance with the Standard Terms, at the rate of 5% above the prime overdraft lending rate charged by Spar's principal bankers from time to time (currently 7.5%) to date of final payment". Third, there is the inclusion of a copy of the applicable Standard Terms as annexure "G" (in blank).

[16] In their notice in terms of Rule 6(5)(d)(iii), the defendants (respondents) raised their second complaint. First, the defendants complain that no basis has been laid for the inclusion of the Spar Standard Terms of Sale, or how the terms form part of the agreement between the principal debtor and the plaintiff. Second, they complain that the document is unsigned, without explanation therefor. Third, they complain that the plaintiff has selectively quoted from the document in relation to the interest rate charged.

[17] In general, the defendants contend that the second amendment should not be allowed because the particulars of claim would remain vague and embarrassing, would not comply with the rules relating to pleadings (Rule 18), and would not set out a cause of action, as a result of which the defendants would be unable to plead.

[18] It should be noted that the defendants' second complaint relates exclusively to the interest charged by the plaintiff on the principal debts. In their original notice in terms of Rule 23, the defendants complained about being unable to ascertain the rate of interest, how it was calculated, and on what it was based. It was also

contended that the plaintiff was claiming contradictory interest charges, thus rendering the particulars of claim vague and embarrassing.

[19] The plaintiff responded by seeking to introduce the Spar Standard Terms of Sale as annexure "G" to the particulars of claim. Since there is already an annexure "G", Mr Alli, on behalf of the plaintiff, requested that I make a further amendment and mark the Standard Terms as annexure "H".

[20] In any event, the Standard Terms are alleged to be the basis upon which the plaintiff charged interest on the principal debts at the rate of 5% above prime. Indeed, clause 2 of the Standard Terms provides for such a rate of interest. The fact that clause 2 might not be the applicable rate is a matter to be decided on trial.

[21] The plaintiff's case is that the Spar Standard Terms were part of the agreement between the plaintiff and the principal debtors. However, that is not the basis of the plaintiff's cause of action against the defendants, which is based squarely on the deeds of suretyship. The deeds in turn make provision for the certificates of balance. The underlying documents, upon which the certificates of balance are calculated, do not form part of the plaintiff's cause of action.

[22] Mr Venter argued that the Standard Terms do not meet the requirements of Rule 18(6). However, the plaintiff has complied with Rule 18(6) by pleading the deeds of suretyship in the manner it has done. The Standard Terms are not part of the plaintiff's cause of action. They simply explain the rate of interest charged on the

principal debts. The plaintiff is therefore not required to comply with Rule 18(6) insofar as the Standard Terms are concerned.

[23] There is also no contradiction between the rate of interest charged on the principal debts, and the rate of interest claimed on the amounts due by the sureties (the defendants).

[24] In my view, the second amendment clears up any confusion there may have been regarding the rate of interest charged on the principal debts. The plaintiff's particulars of claim, once amended, will not be vague and embarrassing, and the defendants will be able to plead thereto.

Costs

[25] In my view, the defendants' opposition to the application has been frivolous and vexatious. The plaintiff's response to the Rule 23 notice was full and informative. The "*points of law*" raised by the defendants in response are manifestly without substance.

[26] The deeds of suretyship provide for the payment of costs on the scale of attorney and own client. In its notice of application for leave to amend, the plaintiff sought costs on the party and party scale, only in the event of opposition.

[27] Mr Alli sought attorney and client costs on the basis of the manner in which the defendants litigated this application. In light of the costs order sought in the notice of application, I do not think that a punitive costs order is appropriate.

[28] Accordingly, I make the following order:

1. The plaintiff is granted leave to amend its particulars of claim in the manner set out in the plaintiff's notice of amendment dated 23 March 2022.
2. The reference to annexure "G", wherever it appears in the plaintiff's notice of amendment dated 23 March 2022, should be replaced with the words "*annexure H*" and the document headed "*Standard Terms of Sale*" should be marked accordingly.
3. The defendants are directed to pay the plaintiff's costs of this application, jointly and severally, the one paying, the others to be absolved.



D I Berger

**ACTING JUDGE
OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 21 April 2023.

Heard on : 17 April 2023

Delivered: 21 April 2023

Appearances:

For the Applicant:

Mr Y Alli

For the Respondents:

Mr A J Venter