

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022/004177

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>16/5/23</u> <u>Keightley</u>	
DATE	SIGNATURE

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

CLASSIC ACCESSORIES CC

First Defendant

M MOODLEY

Second Defendant

S NAIDOO

Third Defendant

Neutral citation: *ABSA Bank Limited v Classic Accessories CC & Others* (Case No. 2022/004177) [2023] ZAGPJHC 492 (16 May 2023)

Summary:

JUDGMENT

Keightley J:

- [1] This is an application for summary judgment in terms of which the plaintiff, Absa Bank Limited (Absa), seeks an order directing the first, second and third defendants, jointly and severally, the one paying the other to be absolved, to pay an amount of R425 601.34. The first defendant, Classic Accessories CC (Classic) is the original and primary creditor under an overdraft facility extended by Absa by way of a facility letter. The second and third defendants signed suretyship agreements in terms of which they undertook liabilities as sureties and co-principal debtors in favour of Absa. Absa contends that Classic exceeded the overdraft facility limit and, based on this breach, it instituted an action for recovery of the amounts due and owing.
- [2] The second and third defendants did not oppose the action, nor have they opposed the grant of summary judgment.
- [3] The only party to defend/oppose Absa's claim is Classic. The deponent to the affidavit resisting summary judgment on behalf of Classic is Mr Naicker. He acquired 100% of the membership of Classic from the second and third defendants. Classic pleads that Absa's claim was not included on a list of liabilities owed by Classic that was provided to him by the erstwhile members. I will say more about this shortly.
- [4] Initially, Classic raised five defences in its resistance against summary judgment. However, at the hearing of the matter, Mr Snyman, for Classic, advised that his client would no longer be persisting with the prescription defence. This followed my admitting into evidence, by way of condonation, a supplementary affidavit from Absa containing details of transactions on the relevant back account. Classic did not oppose the admission of the affidavit, the contents of which effectively put paid to the prescription defence.
- [5] The second defence arises out of Mr Naicker's averment that the erstwhile members of Classic did not disclose the existence of the overdraft debt to him. Mr Naicker contends that in these circumstances, Classic, which is now 100% owned by him, should not be held jointly liable for the debt. The defence is simply a non-starter: Classic is a legal *personam* in its own right. Whether or not its

current member was aware of the debt or not is irrelevant to Classic's liability under the terms of the facility letter. In argument, Mr Snyman suggested that I should be minded to lift the corporate veil in a case like this to avoid an injustice to Classic. This defence was not pleaded or supported by the necessary averments. No triable issue arises out of Mr Naicker's assertion that he personally did not know of the obligation to Absa: it is Classic's obligation, and the law requires that Classic be held bound to it.

- [6] Classic's next defence was that the National Credit Act 34 of 2005 was applied to the overdraft facility agreement and that Absa had failed to comply with its obligations under s 129 of the Act. Absa's case, as outlined in its particulars of claim, is that the Act does not apply because Classic is a juristic person within the meaning of s 4(1)(a)(i) of the Act and the facility agreement is a large agreement as defined in s 9(4), being in excess of the amount of R250 000. In terms of s 4(1)(b), the application of the Act is thus excluded, says Absa. In other words, the Act does not apply because Classic is a juristic person whose annual turnover equals or exceeds the R1 million threshold specified in s (1)(a)(i), or because, in the event of its turnover being below this amount (as asserted by Mr Naicker), the facility was a large agreement and thus excluded under s 4(1)(b).
- [7] Mr Snyman advanced a creative argument based on the definition of 'large agreement' in s 9(4)(b). That section says that a credit agreement is a large agreement if it is a credit transaction involving a principal debt falling at or above the R250 000 threshold. He said that at the time that the agreement was entered into, the principal debt would be nil, because the facility was in the form of an overdraft, which permitted the debtor to draw down from the facility in the future. If this argument had legs, it would mean that the Act would apply to all overdraft facilities, even if they were for millions of Rands. This would be surprising indeed. However, the Act itself makes it clear that this creative interpretation has no merit. Section 7(2), which deals with the thresholds, expressly states that for purposes of applying the monetary threshold to a credit facility, 'the principal debt of the credit facility is the credit limit under that facility'. This puts paid to this defence.
- [8] The final defences are interlinked. It is common cause that Absa referred to two agreements in its particulars of claim: the first being a current account agreement

and the second being the facility agreement or facility letter. Absa pleaded the terms of the former agreement but averred that the original thereof had been misplaced or destroyed. It was thus unable to attach it, but attached, instead, a blank unsigned agreement of the same type used by Absa when Classic opened its current account with the bank. Absa did annex a copy of the facility letter, as well as the surety agreements to its particulars of claim.

- [9] Classic pointed to the anomaly of the current account agreement not being attached and pleaded that it constituted a failure to comply with Rule 18(6), which requires that a true copy of a written agreement relied upon must be attached to the particulars of claim. It was contended that this defect could be used to attack Absa's pleadings at trial. In related argument to the court, Mr Snyman submitted that the absence of the written current account agreement meant that there was a paucity of evidence to support the averments relating to the current account agreement between the parties. This paucity of evidence, so it was argued, meant that Absa was unable to meet the exacting requirements for the grant of summary judgment in its favour. What is more, without the necessary evidence, the deponent to the affidavit in support of the summary judgment application could not verify Absa's cause of action. On this basis, too, it was argued, summary judgment should be refused.
- [10] The difficulty with these related defences is that Classic's breach upon which Absa relies is a breach of the overdraft facility agreement. A copy of that agreement is attached to the particulars of claim, as are the suretyship agreements. While there is obviously a link with the current account operated by Classic, in that the overdraft was drawn from that account, it cannot be disputed that the current account exists and that Classic transacted on that account. Copies of the account showing transactions up to and including November 2020 were attached to the supplementary affidavit. There is thus more than enough evidence to establish that an overdraft facility existed, and that Classic breached its terms by exceeding the limit. Indeed, these facts are not disputed. There is thus no merit in these remaining defences: they do not raise triable issues that should be permitted to be ventilated at trial.

[11] Absa attached a certificate of balance as prima facie proof of the amount of the indebtedness. The facility agreement does not make provision for a certificate of balance. Absa pleaded that the current account agreement did. Furthermore, the two surety agreements provided that a certificate would prima facie establish the amount of Classic's indebtedness. Classic has not seriously taken issue with the amount of indebtedness averred by Absa. In the circumstances, I accept the figure as certified therein.

[12] I make an order in the following terms:

Summary Judgment sought against the First, Second and Third Defendants, jointly and severally, the one paying the other to be absolved for:

1. Payment of the amount of R425 601.34;
2. Interest thereon at the rate of 8.50% [prime (currently 7.50%) plus 1.00%] per annum, capitalized monthly from 16 February 2022 to date of payment, both dates inclusive
3. Costs on the attorney and client scale.


R/M KEIGHTLEY
JUDGE OF THE HIGH COURT

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 Case Lines. The date for hand-down is deemed to be 16 MAY 2023.

APPEARANCES

**COUNSEL FOR PLAINTIFF
PLAINTIFFS ATTORNEYS**

**ADVOCATE JJ DURANDT
JAY MOTHOB I INC.**

**COUNSEL FOR DEFENDANT
DEFENDANT ATTORNEYS**

**ADVOCATE D SNYMAN
RICHEN ATTORNEYS INC.**

DATE OF HEARING:

04 MAY 2023

DATE OF JUDGMENT:

16 MAY 2023