



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2021/10867

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
07/06/2023 	
DATE	SIGNATURE

In the matter between:

REIN VAN DER HORST

First Plaintiff

JOSEPH BRIAN GUBBINS

Second Plaintiff

and

DANIEL PARREIRA

First Defendant

OMNIWARE ENTERPRISE SOLUTIONS

Second Defendant

Neutral Citation: *REIN VAN DER HORST & JOSEPH BRIAN GUBBINS v DANIEL PARREIRA & OMNIWARE ENTERPRISE SOLUTIONS* (Case No. 2021/10867)
[2023] ZAGPJHC 639 (07 June 2023)

JUDGMENT

MALUNGANA AJ

- [1] This is an application for summary judgment. The applicants, to whom I shall refer to as “the plaintiffs, instituted action against the first and second defendants, in which the plaintiffs seek from the first defendant payment of R750 000.00, and other relief. The plaintiffs’ cause of action against the defendants is founded on the deed of suretyship in terms of which the first defendant bound himself in favour of the plaintiffs as surety for, and co-principal debtor with an entity called Monday Africa (Pty) Ltd. The second defendant is merely cited as an interested party, and no relief will be sought against it in this application.
- [2] It is alleged in the particulars of claim that on or about 1 October 2019, the plaintiffs and the defendants concluded a shareholder’s agreement in respect of their shareholding in Monday Africa (Pty) Limited (‘the company’). In terms of the said agreement the plaintiffs would each provide the initial funding for the working capital required to fund a start-up phase of the company by way of providing a loan in the amount of R1 500 000.00.¹
- [3] The initial shareholder’s loan would be repayable by the company on the earlier of the following instances:

“7.7.1 the Company’s cash flow is sufficient to repay the loan based on sound solvency and liquidity principles;

7.7.2 1 August 2020;

7.7.3 The Company is wound up or placed into business rescue; or

7.7.4 The Second Defendant ceasing to be a Shareholder for any reason whatsoever.

(Clause 7.2)”

¹ Case lines 001-5 to 001-6. Particulars of Claim

[4] The first defendant stood surety for the company's liability to the plaintiffs in the sum of R750 000.00.² The written deed of suretyship is shown in annexure "B" to the particulars of claim.

[5] The following averments from the plaintiffs' particulars of claim are relevant:

"11. Pursuant to the agreement and over the period October 2019 to May 2020 the First and Second Plaintiffs loaned and advanced to the Company the sum of R1 500 000,00 in accordance with their obligations as set out in the Agreement;

12. In terms of clause 7.2 of the Shareholder's Agreement, the Company became liable to repay the Initial Shareholder's loan on 1 August 2020;

13. In breach of the agreement the Company has failed to repay the Initial Shareholder's loan or any part thereof to the First and Second Plaintiff.

14. In consequence of the aforesaid breach the First and Second Plaintiffs have suffered damages in the sum of R 1 500 000,00."

[6] It is trite that the defendant must, in order to avert the consequences of summary judgment, advance his or her contentions in resistance to the plaintiff's claim with a sufficient degree of clarity to enable the court to ascertain whether he or she has deposed to a defence which if proved at the trial, would constitute a good defence to the action. See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 at 425G-426E.

[7] The defendants do not dispute that the first defendant signed the agreement shown in annexure "A" to the particulars of claim.³

² Case lines 001-6. Para 7.8 of the Particulars of Claim

³ Case lines 006-2. Para 3.2 of the Defendants' Plea. "In amplification of the aforesaid denial but without derogating from the generality thereof, the defendants plead that: 3.21 Annexure "A" to

[8] In his plea the first defendant has raised several defences to the plaintiffs' claim. The following relevant averments are contained in the plea:

“5.2.1 In terms of annexure “B” to the particulars of claim, the first defendant bound himself as surety” ... in terms of the provisions of clause 7.2 of the shareholders agreement...”;

5.2.2 Clause 7.2 of the shareholders agreement provides that 60% of the loan provided to the Company by the first and second plaintiffs would be secured by the first defendant by means of suretyship annexed to the particulars of claim marked “B”;

5.2.3 Although annexure “A” to the particulars of claim contemplated that the plaintiffs would loan an amount of R1,500,000.00 to the Company, the plaintiffs breached this obligation in that they only loaned an amount of R1,000,000,00 to the Company;

5.2.4 On a proper construction of annexure “B” to the particulars of claim and clause 7.2 of annexure “A” to the particulars of claim, the first defendant's liability under suretyship was limited to 50% of the amount loaned by the plaintiffs to the Company;

5.2.5 Because the plaintiffs only loaned an amount of R1,000,000,00 to the Company, the first defendant's contemplated liability under the suretyship is limited to 50% of the amount, namely, an amount of R500 000,00.

[9] The first defendant further pleads that the plaintiffs exercised *de facto* control of the company, and had conducted the company in such a manner

the particulars of claim is signed by the first defendant on behalf of the second defendant; and 3.2.2 neither the first nor the second plaintiff signed the agreement.”

that it made it impossible for the company to repay the loan accounts plaintiffs for the plaintiff.

- [10] The plaintiffs have characterized the defences raised by the defendants as bare denials to their claim. According to the plaintiffs even if it were to be accepted that on proper construction of annexure "B", read with clause 7.2 of the shareholder's agreement, the first respondent's liability of the suretyship is limited to 50% of the amount loaned to the Company has, the defendants failed to set out a defence as to why summary judgment should not be granted.⁴
- [11] For the reasons which will become apparent in this judgment, I respectfully agree with the plaintiffs' contention set out above. The defences raised by the defendants, are in my view, highly technical in nature and do not constitute the defences in the context of rule 32(3)(b). The defendants admit that the plaintiffs advanced an amount of R1000 000,00 as a loan to the first defendant and the loan not been repaid. The first defendant further does not dispute that he stood surety as co-principal debtor with the company for the repayment of the loan to the plaintiffs.
- [12] However, the first defendant contends in paragraph 7.5 of the answering affidavit, that the plaintiffs have failed to excuse the principal debtor under the circumstances which he is entitled upon the benefit of excussion, which has not been renounced. On this issue, it is evident from the deed of suretyship that the first defendant has bound himself as co-principal debtor with the company for the latter's debt to the plaintiffs. It is a clear law that the first defendant cannot avail himself of the benefit of excussion (*beneficium odinis*). He is understood to have undertaken the payment of the debts as his own, without an excussion of any other person. In advancing his argument, counsel for the plaintiff placed his reliance on the decision of *Geber v Wolson* 1955 1 All SA 373 (A), and other authorities

⁴ Case lines 007-7. Para 16 and 18 of the Plaintiffs' Supporting Affidavit

mentioned at the footnote of his heads of argument as they appear on Case lines 014-11, para 32.

[13] The first defendant further contends that the plaintiffs have breached a legal duty by misappropriating funds of the company and using the latter as conduit to benefit their other companies. It is this conduct that rendered it impossible for the company to repay the loan. I hold that there are no material facts placed before me to back up contentions. The fundamental question still remains. Did the first defendant 'fully disclose the nature and grounds of his defence, and the material facts upon which it is founded, which if proved at the trial will constitute an answer to the plaintiff's claim'.

[14] What is clear is that the allegations of the defendants are entirely lacking in any particularity. One would expect the defendants to set out the material facts upon which such contentions are based if indeed the defences were *bona fide*. The defendants have alleged that the plaintiffs were in *de facto* control of the company and have made it impossible for the company to repay the loan in that they diverted business and funds to other entities. The defendants should be able to furnish some kind of details to back up these allegations.

[15] I am therefore satisfied that the defendants have failed to prove that they have a *bona fide* defence to the plaintiffs' claim. The allegations set out in the first defendant's affidavit simply do not accord with the requirements of rule 32 (3)(b). It follows that summary judgment should be granted against the first defendant.

Order

1. The first defendant is ordered to pay to the first and second plaintiffs the amount of R750 000.00;

2. Interest at the rate of 7% per annum on the aforesaid amount from date of summons to the date of final payment.

3. Costs of action


A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

MALUNGANA PH

Appearances

For the Plaintiffs : Sarajulie Swartz

Instructed by : Botoulas Krause & Da Silva

For the Defendants : Don Mahon

Instructed by : McCornick Londt Inc