

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022/2098

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
15/06/2023	

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

RENA BUSINESS SOLUTIONS (PTY) LTD

First Defendant

MOKOBANE MOTHUSIMANG LELE

Second Defendant

MOKOBANE MANINI DAPHNE

Third Defendant

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court Online and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 15 June 2023.

JUDGMENT

- [1] This is an opposed application for summary judgment in which the plaintiff claims payment in the amount of R1 918 084.59 together with interest on the aforesaid sum at the rate of 7.75% linked, per annum, capitalised monthly from 8 April 2022 to date of final payment. The application is opposed solely on the grounds that the defendants have a *bona fide* defence to the plaintiff's claim.
- [2] In circumstances where the plaintiff's claim is for a liquidated amount in money, the defendant is, in terms of Rule 32(3)(b), required to:
- "[S]atisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."
- [3] Accordingly, the defendants are obliged to set out facts and particulars in their affidavit resisting summary judgment to enable this Court to decide whether the nature and grounds of their defence have been disclosed and whether such defence is *bona fide* and good in law.

The parties

- [4] The plaintiff, ABSA Bank Limited ("ABSA"), is a public company duly registered and incorporated with limited liability in accordance with the laws of the Republic of South Africa, trading, *inter alia*, as a banker and financier in terms of the provisions of the Banks Act¹ and registered as a credit provider in terms of the provisions of the National Credit Act 34 of 2005.²
- [5] The first defendant, Rena Business Solutions (Pty) Ltd, is a company duly registered and incorporated with limited liability in accordance with the laws of the Republic of South Africa.
- [6] The second defendant, Mothusimang Lele Mokobane is an adult male married in community of property to the third defendant, Manini Daphne Mokobane.

¹ 94 of 1990.

² 34 of 2005.

Background facts

- [7] On 1 October 2020, the plaintiff and the first defendant, represented by the second defendant, entered into a Covid-19 NCA Out Loan Agreement, marked annexure "A" ("the agreement"). The third defendant signed a consent in terms of the provisions of the Matrimonial Property Act.³ In its particulars of claim, the plaintiff pleads that the first defendant breached the terms of the Covid Loan agreement in that the first defendant failed to pay the requisite monthly instalments to the plaintiff on the relevant due dates. Also, that the first defendant was in arrears with its payment obligations in terms of the Covid Loan agreement in the amount of R265 722.39 as at 13 December 2021.
- [8] Due to the first defendant's alleged breach of the payment terms of the Covid Loan agreement, the plaintiff elected to cancel the Covid Loan. The plaintiff accelerated the full outstanding indebtedness and instituted legal proceedings pursuant to such cancellation. The plaintiff pleads that the amount of the facility advanced had to be repaid in equal instalments of R37 274.62, with the first instalment being payable on 1 May 2021 and the last instalment payable on 1 April 2026. These allegations are admitted by the defendants in the plea.
- [9] The defendants defence is two-fold. First, the defendants allege that payments were made to the plaintiff by the first defendant and as a result, the defendants deny they are liable to the plaintiff as alleged. It is contended by the defendants that the following payments were made - R140 476.77 on 2 July 2020; R396 170.28 on 8 September 2020; R40 000.00 on 13 November 2020; R162 109.92 on 22 January 2021; and R1 015 570.95 on 22 January 2021 totalling R1 754 327.80.
- [10] The defendants allege that because of payments having been made, an email was sent by a representative of the plaintiff confirming that payments "totalling R353 362.25 received were allocated to expunged [sic] the Covid relief account". However, as evidenced by the proof of the alleged payments, in respect of the

³ 88 of 1984.

abovementioned transactions, each payment was made to a beneficiary account, "ABSA VEHICLE MANAGEMENT", with account number: 4059751674.

- [11] The email relied upon by the defendants, annexure "MLM12", dated 28 September 2021, from the plaintiff addressed to the defendants in relevant parts reads thus:

"The discrepancies between your communicated arrear position as well as our figures has been taken to account and thoroughly investigated and we have found that all POPs sent through to us were duly allocated to your account. You will recall that you were granted payment relief when the Covid Pandemic Lockdown began so 3 payments totaling R353,362.25 was allocated to expunged the Covid relief account. As per minutes below you were required to expunge 70% of the total arrears by 22 September 2021 which will equate to:

CAF= R312,013 arrears @ 70% equals R218,409.10 (Received R86000)

AVMS = R4,387,762 arrears @70% = R3,071,433.40 (No payment received).

Please provide us with POP of these funds by COB today so we can ensure allocation to your accounts, if this is not received please be advised that your account will be handed over to legal without any further communication".

- [12] Any suggestion that payments were made to expunge the Covid loan account based on MLM12 is not only disingenuous, but without any basis on the defendants' own version. As the plaintiff pointed out, in the heads of argument, two of the five alleged payments were made by the defendants before the Covid Loan agreement was even concluded on 1 October 2020 and before the facility was even extended to the first defendant. If anything, MLM12 serves to confirm that the defendants had more than one account with ABSA which they were servicing.

- [13] In this case however, there is no denying that the relevant account which pertains to the Covid Loan agreement is account number 30-5315-5716, as evidenced from the account summary, from the written notice of default as well as the Certificate of balance. The first ground of defense is quite clearly without merit.

- [14] Secondly, the second and third defendants also allege as a defence that they were not given the opportunity to read the suretyship agreements, nor were they specifically advised of the legal consequences thereof. In addition, they were informed by the ABSA official facilitating the agreement that signature of the suretyship agreement was merely a formality and that same would not adversely bind the signatories.
- [15] The surety agreement, annexure B of the founding affidavit, is in bold letters clearly headed as such. By her conduct in appending her signature to the document, the third defendant misrepresented that it was her intention to be bound by the suretyship and thereby misled ABSA into granting the loan so that it is equally clear that the contract came into existence by quasi mutual consent. Once this is so, the onus rests upon the party seeking not to be bound by it to prove that his error in signing it was *iustus* as defined in *George v Fairmead*.⁴
- [16] The defendants in the present case have failed to put up a defence on the merits of the application. Accordingly, the order that follows is appropriate in a case such as this.

Order

- [17] The following order will issue:

- 17.1 Judgement is granted against the defendants, jointly and severally, the one paying and the other to be absolved for:
- [a] Payment in the sum of R1 978 236.68;
 - [b] interest in the aforesaid sum at the rate of 7.75% linked per annum capitalised monthly from 8 April 2022 to date of final payment; and
 - [c] Costs of suit on the scale as between attorney and client.

⁴ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A.


T P Mudau
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 3 May 2023

Date of Judgment: 15 June 2023

APPEARANCES

For the Applicant: Adv. N Alli

Instructed by: Jay Mothobi Inc

For the Respondents: Adv. M Rodrigues

Instructed by: Paul T Leisher & Associates