

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 14249/2010

In the matter between,

ABSA BANK LIMITED

And

FRANCA COLOMBA GROENWALD

RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
14/01/2011
DATE
SIGNATURE

14/1/2011

JUDGMENT

MAVUNDLA J;

- [1] This is an opposed application for summary judgment against the respondent in respect of **claim 1**: For payment of an amount of R284 177. 35 together with interest at the rate of 18.5% per annum capitalized monthly from 18 December 2009 to date of payment together with taxed attorney and client cost; in respect of **claim 2** for payment of an amount of R257488. 56 together with interest at the rate of 11.5% per annum capitalized monthly from 18 December 2009 to date of payment together with taxed attorney and client cost.

- [2] The amount claimed in respect of claim 1 is the balance of the principal debt due by Simply Fish [Edenvale] CC to the plaintiff.
- The amount claimed in claim 2 is the balance of the principal debt due by Simply Fish [Edenvale] to the plaintiff.
- [3] The liability of the defendant in respect of both claims arises from the fact that it signed on 13 October 2007 surety in favour of the plaintiff "for the repayment of any sum or sums of money," which Simply Fish [Edenvale] owes or may owe to the Bank from whatever cause arising and the due fulfilment of all liabilities incurred by the Debtor in his own name or in the name of any business under which he may be trading..."¹.
- [4] The defendant in opposing the summary judgment application contends in its affidavit that the letter of demand never reached him because it was sent to Post Office box 41348 Garsfontein. And therefore there was no compliance with section 129(1)(a).

¹ Clause 1 of the Suretyship attached as annexure A to the summons.

[5] Defendant further avers that during the negotiations with regard to the cheque account claim 1 and simultaneously claim 2 it was expected of her to sign as surety for the increase of the outstanding bond account of Steffenini Property Devolvment Trust for the additional security for Simply Fish Edenvale CC. held at the Plaintiff. The increased bond loan would act as security for the duration of the loan in respect of claim 2.

[6] According to the defendant it was never agreed in her presence nor discussed with her that Simply Fish Edenvale CC cheque would be overdrawn or such facility. She however further states that she earns an amount of R1300. 00 per month and had to make several payments because the existing bond of Steffenini Property Development was already R16 000, 00 per month. She made it clear to the plaintiff's representatives that were there to be further debt given to her she would not be in a position to repay, however she was informed that the bond increase was merely cosmetic. The defendant further avers that it was never her intention to sign the surety for any liability of

Simply Fish Edenvale CC and that the documents she signed in that regard be used.

- [7] It was further submitted on behalf of the defendant that there was no express agreement to increase the loan and that the conduct of the plaintiff in allowing such increase breached the agreement and that therefore the respondent should not be held liable for such increased outstanding amount. In this regard I was referred to the matter of *Fry and Another v First National Bank of South Africa Ltd* 1996 (4) SA 924. It is further contended that the particulars of claim do not state what the principal debt was.
- [8] The plaintiff concedes that the letter of demand was remitted to the aforesaid mentioned postal address. It is further submitted that the plaintiff subsequently corrected this mistake by sending another s129 (1) (a) letter dated 9 September 2009 to 682 Honoria Street Garsfontein (chosen domicilium). This latter letter was delivered by the Sheriff at the aforesaid mentioned

address on the said date. It is submitted that the second letter was a rectification which should be accepted by this Court.

[9] It was further submitted on behalf of the plaintiff that the contention by the defendant with regard to the alleged purpose she signed the agreement for, this is not admissible because it is parole evidence. It is further submitted that the particulars of claim fully set out what the claim is. It has further been submitted on behalf of the plaintiff that the defendant does not state what the limitation of the agreement was. It is finally submitted that the defendant does not have a *bona fide* defence and that the summary judgment should be granted against the defendant.

[10] It is trite law that in order to successfully resist summary judgment application, the defendant must satisfy the Court that he has a *bona fide* defence by disclosing fully the nature and material facts upon which his defence is premised, which

appear, if proven on trial, to establish a *bona fide* defence which is good in law; *vide* Maharaj v Barclays National Bank Ltd²

[11] The defence so disclosed must go to the merits, and not merely technical, *vide Evelyn Haddon & Co Ltd v Leonjanko (Pty) Ltd*³.

[12] As pointed out earlier the contention of the defendant is that that there was no express agreement to increase the loan. The deed of Suretyship expressly state that the defendant bound herself for the repayment "of any sum or sums of money, which the Debtor owes or may owe to the Bank from whatever cause arising and the due fulfilment of all liabilities incurred...". The defendant seeks to explain what the terms of the agreement

² 1976 (1) SA418 where at 426 A-C Corbett J.A. said that:

" Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one or the other party. All the Court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded. (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be...while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. (See, generally, *Herb Dyers (Pty) Ltd v Mahommed and Another* 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another* 1965 (2) SA 914 (N); *Arend and Another v Astra Furnishers (Pty) Ltd* [1974 (1) SA 298 (C)] at 303-4; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467E-H. At the same time defendant is not required to formulate his opposition to the claim with the precision that he would be required of a plea; nor does the Court examine it by the standards of pleading (See *Estate Potgieter v Elliott* 1948 (1) SA 1084 at 1088-9; *Herb Dyers* case *supra* at 32.).

³1967(SA) 662(O) at 666A.

were. By so doing he is attempting to introduce extrinsic evidence. Further with regard to her intention this is equally parole evidence. In this regard it is apposite to cite with respect Mlambo JA who said in *Fedbond Participation Mortgage v Investec Employee*⁴ that:

“[14] Properly viewed Fedbond’s argument in this regard suggests that the written agreement does not contain all the terms agreed by the parties and seeks admission of facts that add to the terms thereof. This is referred to as the intergration rule in terms of which extrinsic evidence of additional terms of a written agreement not embodied therein is admitted. See *Union Government v Vianini Ferro-Concrete Pipes*⁵ where the following was stated:

“Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such documents be contradicted, altered, added to or varied by parole evidence...”

⁴ [2010] 4 ALL SA 467 (SCA) at 473c—d.

⁵ (*Pty*) Ltd 1941 AD 43 at 47. See also *Johnson v Leal* 1980 (3) 927 (A) at 944B-D [Also reported at (1980) 2 ALL SA 366 (a)-ED].

[13] The matter of *Fry and Another v First National Bank of South Africa Ltd (supra)* relied upon by the defendant; in my view does not assist the defendant in the light of the *Fedbond Participation Mortgage v Investec Employee (supra)* matter. I therefore find that the defendant cannot go outside the written contract to explain what was agreed upon and what his understanding of the agreement or intention was when she signed the surety. I find that he is bound by the terms as reflected in the deed of suretyship she signed.

[14] The contention by the defendant that there was no compliance with s129(1) is premised on the fact that the first letter of demand was sent per registered mail to P O Box 41349 Garsfontein and not to chosen domicilium address 682 Honoria Street Garsfontein. The defendant alleges that this letter of demand never came to her attention.

[15] In the unreported matter of *Firststrand Bank Ltd. And Carl Beck Estates (Pty) Ltd and Carl Beck*⁶ Satchwell J, stated as follows:

⁶ 2009 (3) SA 384at 389H-390E.

" Sureties and NCA

- [16] The second respondent sought to rely on the argument that he, as a co-principal debtor, was a consumer to whom a notice in terms of section 129 was required to be given.
- [17] The second respondent entered into a surety agreement whereof he undertook to bind himself in favour of the plaintiff for all debts of the first respondent in unlimited amount. He signed that suretyship undertaking as 'surety and co-principal debtor'.
- [18] There is no doubt that the suretyship obligations of the second respondent theoretically fall within the definition of a credit agreement which encompasses a credit guarantee in terms whereof "a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction..." However, section 8(5) requires the credit guarantee to apply to the obligations of another consumer in terms "a credit transaction to which this Act applies". I have already found that the NCA does not apply to the mortgage agreement between the applicant and the first respondent. Accordingly, the obligations of the first respondent to the applicant were not incurred in terms of a credit transaction to which the NCA applies. The second respondent therefore cannot claim that the NCA applies to him on the basis that the obligations arise in terms of a credit guarantee as set out in section 8(5) of the NCA."
- [19]...
- [20] The following reasoning of Trollip JA IN *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 at 471, credit was, in fact, not granted to the second respondent. The loan finance granted and the mortgage agreement is and was between the **applicant** and first respondent. The second respondent was not advanced credit and did not become party to the contract between

the applicant and the first respondent He did not contract with the applicant to acquire himself or be a party to the agreement between applicant and the first respondent.

- [21] The second respondent signed as surety and co-principal debtor. The right enforceable by the applicant against the second respondent arises from the contract of suretyship. The contract between applicant and second respondent is separate and distinct from the bond agreement between the applicant and second respondent, although it is accessory to it. The second respondent is not a consumer and did not receive credit. He is a guarantor of a consumer's obligation to a credit giver. Second respondent's contractual relationship with the applicant remains ancillary to the main agreement between the applicant and the first respondent.
- [22] The authorities on this point are clear. A surety who has bound himself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship. Signing as surety and co-principal debtor does not render a surety liable in any capacity other than a surety who renounced the benefits of exclusion and division. As De Villiers CJ stated, "the use of the words 'co-principal debtor' does not transform the contract into any other than suretyship".

- [16] In casu, the defendant's indebtedness in respect of both claims arises from the fact that she signed as surety for the payment of any amount whatever the source owed by Simply Fish Edenvale CC to the plaintiff. I find the words of Trollip JA⁷

⁷ Vide *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* (supra) at 471: "credit was, in fact, not granted to the second respondent. The loan finance granted and the mortgage agreement is and was between the applicant and first respondent. The second respondent was not advanced credit and did not become party to the contract between the applicant and the first respondent He did not contract with the applicant to acquire himself or be a party to the agreement between applicant and the first respondent."

apposite in casu and find that the second respondent is not a consumer and did not receive any credit from the applicant.

I also find that the NCA does not apply in casu and it was therefore not necessary for the applicant to give any notice to the second respondent in terms of section 129⁸.

[17] Assuming that the Credit Act applies in casu, which I do not concede, I take note of the fact that the plaintiff concedes that the first letter of demand was not sent to the chosen domicilium. However, this letter was remitted per registered post. In *Munien v BMW Financial Services (SA) (Pty) Ltd*⁹ the Court said:

"In *Van Niekerk and Another v Favel and Another*¹⁰ it was held that the requirement of notifying the purchaser of the contract concerned and making demand of the purchaser to rectify the breach of contract was satisfied, provided that the letter had in fact been sent to him by registered post, whether or not it was received by the purchaser."

⁸ Vide *Firstrand Bnak Ltd v Carl Beck Estates (Pty) Ltd and Carl Beck* (supra) at paragraph: "5 Section 129 of the NPA requires a credit provider to comply with certain procedures before commencing legal proceedings against a defaulting consumer. These procedures require, inter alia, that the credit provide give the consumer written notice of the default and propose referral to an entity which may resolve any dispute or result in agreement on a plan for full payment. Any approach by the credit provider to court must comply with certain time periods linked to the giving of such notice."

⁹ 2010 (1) SA 549 at 559 D-E.

¹⁰ 2006 (4) SA 548(W).

[18] *In casu* the first letter was remitted by registered post. It is immaterial whether the defendant received it or not, but the plaintiff, in my view, substantially complied with the need to bring to the attention of the defendant that he was in default and should regularise her breach.

[19] The plaintiff subsequently remitted through the sheriff a second letter of demand on 9 September 2010 to the chosen *domicilium*. The second letter, save for the address, is substantially the same as the first letter. Although the applicant did not send the letter of demand to the chosen address, in my view, both letters taken together, it can be concluded, as I do, that the plaintiff has substantially complied with the provisions of s129 (1).

[20] With regard to the contention of the defendant that the particulars of claim do not state what the principal debt was, I need to point out that the defendant in his opposing affidavit must disclose fully the nature and the grounds of his defence and the material facts upon which he relies, *vide Maharaj v*

Barclays National Bank Ltd (supra). The contention referred to in this paragraph has not been raised in the defendant's affidavit and it comes as an after thought. Technical defences that do not go against the merits but merely on the language of the formulation of the particulars of claim are not to be countenanced, *vide Trans-African Insurance C O. Ltd v Maluleka*.¹¹

[21] The plaintiff issued simple summons which are, in my view, lucid that the first claim is in respect of the cheque account and that the amount owing is R284 17735 and that the second claim is in respect of the loan agreement for the payment of the amount of R257 488.50 being the balance. The defendant can hardly claim, in my view that he is prejudiced in the manner the claims are couched and cannot hide behind the fact that the principal debt has not been stated; *vide JNO. G Teale & sons Ltd v Vrystaatse Plantediens Ltd*.¹² In the premises I find that there is no merit in this contention as there is no prejudice

¹¹ 1956 (2) SA 273 (A.D.) at 278 F-G:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

¹² 1968 (4) SA 371 A at 374 G – H. *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 WLD.

suffered by the defendant as he can clearly see what the claims are for.

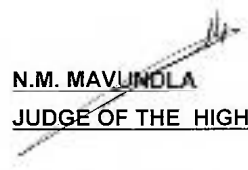
[22] In the premises summary judgment is hereby granted against the respondent/defendant as follows:

AD CLAIM 1

1. Payment of the sum of R284 177-35;
2. Interest at the rate of 18.5% per annum as from 18 December 2009 and 11% ^{to} date of payment; 
3. Payment of cost of suit as between attorney and client, to be taxed.

AD CLAIM 2

1. Payment of the sum of R257 488. 56;
2. Interest at the rate of 11.5% per annum as from 18 December 2009 and 11% ^{to} date of payment; 
3. Payment of cost of suit as between attorney and client, to be taxed.


N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 19 /10/2010
DATE OF JUDGEMENT : 14 /01/2011
APPLICANT ATT : ROTH WESSELS MOTLA CONRADIE
INC.
APPLICANT ADV : ADV. H.J.L VORSTER
RESPONDANT ATT : CLAUDIA PRIVATO INC.
RESPONDANT ADV : ADV. C. HARMS