IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

CASE NO.: 535/2013

In the matter between:

ABSA BANK LIMITED **Plaintiff**

And

KIRK HERMAN **First Defendant**
LIZA HERMAN **Second Defendant**

JUDGMENT

BESHE J:

[1] This is an application for summary judgment by a commercial bank against the defendants arising out of suretyships by means of which the defendants bound themselves as sureties and co-principal debtors with Shelfzone 119 (Pty) Ltd, the principal debtor in the year 2010.

[2] The defendants who are married to each other out of community of property oppose the application.

[3] It is trite that the purpose of summary judgment is to assist the plaintiff in a case where the defendant enters an appearance to defend in order to delay the granting of plaintiff's rights in circumstances where the defendant cannot set up a *bona fide* defence against plaintiff's claim.

[4] In the present case, the second defendant has deposed to the opposing affidavit in which she alleges that she is authorised by her husband, the first defendant to do. *Mr Richards* who appears on behalf of the plaintiff pointed out that no affidavit was deposed to by the first defendant confirming that the

second defendant is authorised to depose to the opposing affidavit. Second defendant does however, make an averment that the facts contained in the said affidavit are within her personal knowledge. An opposing affidavit can be deposed to by the defendant, or by any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action. I am of the view that second defendant's affidavit complies with this requirement and the contents thereof can be considered in regard to both defendants.

[5] In the said affidavit, second defendant declares that both defendants have *bona fide* defences to the plaintiff's claim, those being:

(a) The debt is not due, owing or payable.
(b) Plaintiff has failed or neglected or refused to provide the court with the relevant Loan Agreement from which the principal debt emanates and thus failed to establish the validity of the surityship.
(c) Defendants have not waved legal exception known as *beneficuim excussionis* and the plaintiff has not excussed the principle debtor in terms of the absent loan agreement.
Other defences raised by the defendants are the following:
(d) The principal debtor having been liquidated on the 26 March 2013, such liquidation should be finalised to allow the plaintiff to recover the principal debt from the principal debtor before initiating premature recovery proceedings against the defendants. The last two defences raised by the defendants concern the provisions of the National Credit Act 34 of 2005. However in argument before me the defendants no longer placed reliance of the last three mentioned defences.

[6] The notice of summary judgment application must be accompanied by an affidavit made by the plaintiff or person who can swear positively to the facts and if the claim is founded on a liquid document, a copy of the document must be annexed to the affidavit. See Rule 32 (2) of the Uniform Rules of this Court in this regard. In the present case, summary judgment is sought against the defendants jointly and severally for:
1.1 Payment of R930 566.69.

1.2 Interest of the said sum.

2.1 Payment of the sum of R1 129 374.39.

2.2.1 Interest of the said amount.

3. Costs.

[7] The application for summary judgment is accompanied by an affidavit deposed to by Rumark Creswell Watson, the manager of the plaintiff. In paragraph 3 of his affidavit, Watson states: “I have read the summons and verify the cause of action and the indebtedness to the plaintiff in the amounts and on the ground stated in the summons”.

[8] In the summons the cause of action and indebtedness of the defendants is said to be based on the provisions of suretyships in respect of which defendants bound themselves as sureties and co-principal debtors. The said suretyships are attached to the summons. The following are *inter alia* the terms of the suretyships:

- that each person who signs as surety for the obligations of the debtor shall be jointly and severally liable as surety and co-principal debtor for such obligations.
- a certificate signed by the manager of the bank shall be sufficient proof of any rate of interest and of the amount owing in terms of the suretyship for the purpose of judgment.

Also attached to the summons are certificates of indebtedness which certify that principal debtor and sureties are indebted to the plaintiff jointly and severally as follows:

1. In respect of a cheque account, the amount due and payable as at 19 November 2012 is R930 566.00 plus interest.

2. An amount of R1 129 374. 39 is due and payable as at 19 November 2012 in respect of term loan account.

[9] The defendants do not furnish and reasons why they contend that the debt is not due and payable. *Mr Williams* for the defendants argued that there was no allegation that the principal debtor has defaulted which default would then trigger the liability of the defendants. He argued further that plaintiff's action against the defendants was premature. I do not think there is merit in these submissions because as is apparent from the suretyship agreements, the defendants who bound themselves as co-principal debtors and as being jointly and severally liable as sureties and co-principal debtors. I also do not have any reason to doubt the accuracy of the certificates of indebtedness referred to above. In my view these sufficiently prove the debtedness of the defendants as well as the fact that the amount claimed is due and payable.

[10] In so far as excurssion is concerned, a surety who binds himself also as a co-principal debtor is deemed to have renounced the benefit of excurssion. Even in the case of surety who has not renounced the benefit of excurssion, he cannot rely on this defence if the principal debtor is insolvent. See *The Law of South Africa, Joubert, Second Edition paragraph 298.* In c*asu* in paragraph 8 of her opposing affidavit, the second defendant states that the liquidation of the principal debtor was ordered on the 26 March 2013.

[11] I am not persuaded that the defences raised by the defendants amount to *bona fide* defences that are good in law.

[12] Accordingly summary judgment is granted in favour of the plaintiff against both defendants jointly and severally, the one paying the other to absolved for:

> **1. Payment of the sum of R930 566.69.**
>
> **1.2 Interest on the sum of R930 566.69 at the rate of 13.5% per annum from 20 November 2012 to date of payment.**
>
> **2. Payment of the sum of R1 129 374.39.**
>
> **2.1 Payment of interest on the sum of R1 129 374.39 at the rate of 11.5% per annum from 20 November 2012 to date of payment.**
>
> **3. Costs between attorney and client.**
>
> **4. Costs of this application.**

____

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff	:	Mr Richards
Instructed by	:	McWILLIAMS & ELLIOT ATTORNEYS 83 Parliament Street Central PORT ELIZABETH Tel.: 041 – 582 1250 Ref.: Mr E Murray
For the Defendants	:	Mr Williams
Instructed by	:	RICHARD LAWRENCE ATTORNEYS 82 Main Road Walmer PORT ELIZABETH Tel.: 041 – 581 0596 Ref.: Mr R Lawrence
Date Heard	:	7 May 2013
Date Reserved	:	7 May 2013
Date Delivered	:	9 May 2013