

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022/3707

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

29 JANUARY 2024

DATE

SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

MAVIE, NONHLANHLA RUTH

Respondent

JUDGMENT

MIA, J

- [1] The plaintiff seeks summary judgment against the defendant for payment of the sum of R27 325 034.91 plus interest on the amount at the rate of 6.55% per annum calculated daily compounded monthly in arrears from 1 February 2022 to the date of final payment with both days included. The plaintiff also seeks an order for attorney and client scale costs. The application for summary judgment is opposed.

ISSUE

- [2] Counsel agreed that the application filed in terms of Rule 30 and the determination whether Mr Maninjwa should pay punitive costs are not ready for determination and are not before this court for determination either. The sole issue for determination is whether the plaintiff is entitled to summary judgment, which the defendant disputes.

FACTS

- [3] The plaintiff and the principal debtor entered a structured loan credit facility agreement. The principal debtor is the Keliana Group (Pty) Ltd. The plaintiff agreed to lend the defendant the amount of R 30 000 000.00. The agreement made provision for the agreed terms of interest. The principal debtor agreed to repay the amount due in monthly instalments depending on the amount loaned. If the maximum facility were utilised, the monthly instalment would be the amount of R385 140.18. According to the plaintiff, the principal debtor breached the agreement because it failed to pay due amounts. On the plaintiff's version, various attempts were made to settle the matter. The arrears escalated and the plaintiff demanded R712 663.40 from the principal debtor on 23 August 2021.
- [4] The plaintiff's cause of action is based on a suretyship in favour of the plaintiff for the amounts due by the principal debtor. The credit loan facility agreement refers to a suretyship and specifically mentions a suretyship related to the structured loan facility. This suretyship was signed on 15 March 2018 and is attached to the particulars of claim. A second suretyship agreement was signed in 2017.
- [5] The defendant's defence to the application for summary judgment raises several issues, reflected in the plea and three special pleas filed separately. The plaintiff filed a supplementary affidavit to address the issues raised as the special pleas were filed after the application for summary judgment was filed and it contended that it was a party affected by the defendant's plea which had changed over the course of the defendant filing a second and third plea which amended the first plea. The *lis pendens* issue was not pursued in the application for summary judgment as the defendant no longer pursued it, according to counsel for the defendant. The issues in the special plea were:

- 5.1 non-compliance with clause 14.1.4 of the agreement, non-fulfilment of suspensive conditions,
- 5.2 the plaintiff 's cause of action is incomplete,
- 5.3 exclusion of the principal debtor,
- 5.4 non- joinder

[6] Counsel for the plaintiff argued that the defendant's defences were contradictory in that she raised the issue that she received no notice of the demand and then also contended that the plaintiff's claim was defective in that it did not require the defendant to pay the full amount. The defendant contended further that the plaintiff failed to exercise "its election" which prevented the claimed amount from becoming due, alternatively that it failed to comply with its obligations in terms of clause 14.1.4. A further alternative contention was that the plaintiff's letter of demand was defective as it did not require the defendant to pay the full amount or that it notified the defendant of the default whilst exercising the right to claim the full amount.

[7] Counsel submitted that the defendant's contentions were mutually destructive in that it required notification of the demand on the one hand and then agreed that the plaintiff need not make a demand before claiming the full amount. Counsel for the plaintiff argued that the plaintiff did send a letter of demand to the principal debtor at the *domicilium* address indicated in the structured loan facility agreement when it was not required to. This informed the principal debtor of its breach and allowed it ten days to remedy it. She emphasised that the plaintiff was not required in terms of clause 14.1.4 to send a letter of demand to the principal debtor or the defendant. It did, however, send such a letter to the principal debtor, and this letter of demand was also attached to the summons served on the defendant. Thus, counsel argued that the defendant was aware of the plaintiff's election to cancel the agreement and, having received the summons, also received the attached letter of demand.

[8] Clause 14.1.4 of the structured loan facility agreement, provided that:

"The bank shall be entitled in its sole and absolute discretion, without notice to the borrower and without prejudice to any of its other rights under the agreement or at law, to cancel the agreement.

In terms of clause 14.1.4, it is clear that the plaintiff was not obliged, in terms of the contract, to give notice of mora or to send a letter of demand to the principal debtor or defendant who is the surety. It was also clear that the suspensive conditions must have been fulfilled as it required documents to be furnished before the registration of the bond. There was no contention that the documents were not furnished, thus it follows that the suspensive conditions were complied with. There is no evidence to support the view that there was non-compliance with the suspensive conditions. The defendant's reliance on this defence is misplaced, as it was a requirement that the documents be provided to ensure registration of the mortgage bond.

- [9] Counsel for the defendant argued that the defendant signed a suretyship agreement on 15 March 2018 wherein she stood surety for the principal debtor in an unlimited amount to the plaintiff. He submitted that the plaintiff could not rely on the suretyship signed in 2017, which was not attached to the particulars of claim. Whilst the particulars of claim refer a suretyship marked as Annexure "AB3", this document is not attached to the particulars of claim. Thus the 2017 suretyship agreement could not be applicable as it predated the date on which the structured loan facility agreement was granted as submitted by counsel for the defendant.
- [10] The structured loan facility references the surety signed concerning the structured loan facility, namely the suretyship signed in 2018. This latter suretyship agreement was attached to the particulars of the claim and referred to the structured loan facility. With regard to the structured loan facility agreement and the suretyship agreement signed in 2018, it is evident that they are read together. The suretyship signed in 2017 before the structured loan facility agreement was signed cannot thus be relied upon where the agreement refers to the particular suretyship agreement. The suretyship agreement signed

in 2017 was also not attached to the particulars of claim and the summons¹ even though reference was made to Annexure "AB3".

- [11] The plaintiff's case is premised on a certificate of balance, which is attached to the particulars of claim. The breach on the part of the principal debtor was the failure to make payment. The plaintiff sent a letter of demand to the principal debtor when the arrears were R 27 325 034.91. The outstanding debt escalated according to the plaintiff and on 27 June 2023, was approximately 8.6 million Rand in arrears. The summons requested the amount of R27 325 034.91. The attached letter of demand informed the principal debtor that it had 10 days to remedy the breach, failing which the full amount would become payable. The full amount exceeds the R27 325 034.91, as counsel for the plaintiff argued that the full amount exceeded this figure. The certificate of balance attached to the particulars of claim, is only for the amount of R27 325 034.91. I have considered that the plaintiff elected to pursue the full amount; however, the full amount is not the amount indicated in the particulars of the claim.
- [12] Whilst I accepted counsel for the plaintiff's submission that the plaintiff is entitled to act in terms of the structured loan facility agreement, the particulars of claim do not have the suretyship signed in 2017 attached. In any event I am not persuaded that this earlier suretyship is applicable to the structured loan facility agreement where the structured loan facility agreement refers specifically to a particular suretyship agreement. In addition, I had regard to counsel for the defendant's submission that the structured loan facility was not reduced. The principal debtor could request a reduction, and the bank was entitled to the structured loan facility agreement to reduce the facility. The reduction did not occur either at the instance of the defendant or at the instance of the plaintiff. Counsel for the defendant submitted that the words "subject to" did not merely indicate a condition but was indicative of the parties' intention to suspend their obligations. The bank elected to cancel the agreement instead. To suggest that a different interpretation ought to be placed upon the words that appear in clause 14.1.4 would require this court to impose a different agreement upon the parties.

¹ Record, Annexure, Caselines 001-28

[13] It was argued further that clause 14.1 did not refer to the surety. Counsel for the plaintiff conceded this. She submitted instead that the surety was not a party to the loan facility agreement and there was no need to join the principal debtor in these proceedings. The plaintiff relied on the loan facility agreement and the 2017 suretyship agreement. The addresses differed in the different documents. However, it is accepted that the demand came to the defendant's attention, who sought various settlement options. These settlement options are referred to in correspondence.

[14] The defendant is required in terms of Rule 32(3)(b), to satisfy the court that it has a bona fide defence. In the absence of Annexure "AB3" attached to the particulars of the claim, and the plaintiff's reliance on the 2017 suretyship agreement as submitted by counsel for the plaintiff, I am persuaded that the defendant has attempted to make payments despite the reliance on inactivity during the Covid pandemic when for a period of time principal debtor could not operate. The amount which appears in the draft order differs from the claim in the summons. To the extent that the claim has increased, and there are different amounts claimed, and for the reasons furnished above, I am not satisfied that the plaintiff is entitled to summary judgment.

ORDER

[15] Consequently, the following order is made:

1. The application for summary judgment is dismissed.
2. The defendant is granted leave to defend.
3. Costs in the application for summary judgment are costs in the cause of action.


SC Mia
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv. C. Dénichaud
Instructed by Jay Mothobi INC.

For the Respondent:

Adv. P. Mbana
Instructed by S.A Maninjwa Attorneys

Heard: 08 August 2023

Delivered: 29 January 2024