



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **4136/2020**

In the matter between:

NEDBANK LIMITED
(REG NO: 1951/000009/06)

Plaintiff

and

DANIËL JOHAGEM JACOBUS HATTINGH
(ID NO: [....])

1st Defendant

HENDRINA JOHANNA HATTINGH
(ID NO: [....])

2nd Defendant

OCTA ENGINEERING (SA) (PTY) LTD
(REG NO: 1998/023574/07)

3rd Defendant

OCTA HOPPERS (PTY) LTD
(REG NO: 1998/015317/07)

4th Defendant

CORAM: JP DAFFUE J

HEARD ON: 03 MARCH 2022

DELIVERED ON: 07 MARCH 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16:00 on 07 March 2022.

I INTRODUCTION

- [1] This is a summary judgment application with a little bit of a twist. A *point in limine* has been taken on behalf of the 4th defendant to the effect that the attestation of the founding affidavit in support of the application for summary judgment lacks compliance with regulation 7(1) of the regulations published in terms of the Justices of the Peace and Commissioners of Oaths Act¹ and is therefore a nullity. Consequently, so it was submitted, the application for summary judgment is a nullity and should be struck from the roll with costs.

II THE PARTIES

- [2] The plaintiff in the main action and applicant in the application for summary judgment is Nedbank Ltd who has been represented by Adv CJ Welgemoed, instructed by VDT Attorneys, Pretoria, c/o Phatshoane Henney Attorneys, Bloemfontein.
- [3] The 1st, 2nd and 3rd defendants do not feature in the summary judgment application as default judgment has already been granted against them. Furthermore, 1st and 2nd defendants have been sequestered recently and the 3rd defendant has been liquidated earlier.
- [4] Adv JF Mitchley appeared before me on behalf of the 4th defendant on the instructions of Peyper Lessing Attorneys, Bloemfontein.
- [5] Henceforth I shall refer to the parties as the plaintiff and 4th defendant respectively.
- [6] The plaintiff has instituted action as long ago as 27 October 2020 and once it has amended its particulars of claim, the 4th defendant filed its plea on 8 November 2021 and thus more than a year after institution of action.
- [7] On 22 November 2021 the plaintiff filed its application for summary judgment which was set down for hearing on 20 January 2022. The 4th defendant failed to file an answering affidavit in accordance with the rules of court which necessitated not only a postponement, but an application for

¹ 16 of 1963

condonation. The required documents were eventually filed on 28 January 2022. On 20 January 2022 the matter was postponed to the opposed roll of 3 March 2022. The 4th defendant was ordered to pay the wasted costs occasioned by the postponement. I am satisfied that condonation should be granted and this will be reflected in the order to be made.

III POINT *IN LIMINE*: THE ALLEGATION THAT THE FOUNDING AFFIDAVIT LACKS COMPLIANCE WITH REGULATION 7(1) AND IS A NULLITY

[8] Regulation 7(1) of the aforesaid regulations reads as follows: “7(1) A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.” *Ex facie* the application for summary judgment the commissioner of oaths is one Alexia Steensma of Velile Tinto & Associates, 942 Disselboom Avenue, Pretoria. She is an attorney and it is accepted that Velile Tinto & Associates is a firm of attorneys practising in Pretoria. The plaintiff’s attorneys of first instance are VDT Attorneys Inc with offices situated at the corner of Bronkhorst & Dey Streets, Brooklyn, Pretoria.

[9] No averment whatsoever is made in the answering affidavit of the 4th defendant that could have alerted either the plaintiff or the court that the attestation was not in accordance with regulation 7(1).

[10] An allegation in this regard was made for the first time on 25 February 2022, four court days before the hearing, in Adv Mitchley’s heads of argument on behalf of the 4th defendant. Counsel deemed it fit to refer to attorney Steensma’s LinkedIn profile, indicating that she is the HOD VAF in respect of Nedbank since May 2021. The court was directed to the relevant website and a copy of a screenshot of the relevant page was also attached to the heads of argument. During the hearing it appeared to be common cause that attorney Steensma is in the employ of Velile Tinto & Associates which firm is also on the plaintiff’s panel of attorneys. It should be common cause that financial institutions such as the plaintiff, as well as other big corporates, do not make use of one firm of attorneys only, but several firms who are then placed on such entity’s panel of attorneys.

[11] I quote the following from the 4th defendant's heads of argument:

"[27] The relationship between the deponent and the commissioner of oaths (albeit that she does not work for the firm of attorneys presently on record), is one where clearly they have a personal association of such a nature that the commissioner of oaths is an attorney for the Plaintiff in many other matters and on their litigation panel, and thereby clearly has an interest in the Plaintiff's general business and the success of their litigation.

[28] In the circumstances the affidavit is a nullity, which nullity cannot be condoned."

The aforesaid point was reiterated during counsel's oral submissions, to wit that attorney Steensma, being on plaintiff's litigation panel, has an interest in the plaintiff's general business and the success of their litigation, and I have to accept, specifically in respect of this application.

[12] The facts in this matter are clearly distinguishable from those that Pickering J had to deal with in *Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers, (Radue)*² which judgment was recently followed in *Fransch v Premier, Gauteng Province and Another*.³ In *Radue* the commissioner of oaths not only shared the same business address as the attorneys for the defendant in a summary judgment application, but it was also obvious that the commissioner of oaths was practising in association with the defendant's firm of attorneys.

[13] Pickering J emphasised that the "commissioner of oaths who attests an affidavit is required to be impartial, unbiased and entirely independent of the office where the affidavit is drawn."⁴ (emphasis added). On the facts of the matter the court held in *Radue* as follows⁵: "It seems clear to me that by entering into an association the attorneys have established some sort of formal relationship with each other in consequence whereof their respective offices are to some extent connected. In my view the fact that the ambit of such relationship might differ widely from case to case is not of importance in the context of this case. What is of importance is that the attorneys, by entering into such

² 1998 (3) SA 677 (E)

³ 2019 (1) SA 247 (GJ) at paras 4 - 6

⁴ *Radue* at 681 F

⁵ *Ibid* at 682D - G

association, have obviously agreed that some mutual benefit in relation to the conduct of their practices be derived by each from their association. Were this not so no purpose would be served thereby. By reason of that association it can therefore ordinarily be expected that each is concerned to some extent with the interests of the other. That being so, it cannot be said, in my view, that the office of the one attorney is entirely independent of the office of the other or that the one attorney is completely impartial and unbiased in relation to the affairs of the other. *Prima facie*, therefore, the requirement of complete independence is lacking. In these circumstances an attorney practising in association with another attorney has an interest such as would preclude him or her from functioning as a commissioner of oaths in respect of an affidavit drafted by the other attorney.”

- [14] Having found regulation 7(1) peremptory in nature, the court held in *Radue*, notwithstanding this conclusion, that it could not close its eyes for the version in the answering affidavit. It held that the defendant had made out a *bona fide* defence and it was afforded an opportunity of putting its defence before the court in a regular manner by having the affidavit re-attested before a competent commissioner of oaths.⁶
- [15] When I asked the 4th defendant’s counsel whether it would not be appropriate to postpone the application for summary judgment in order to have the founding affidavit re-attested, should I find in her client’s favour on the point raised, she submitted that the whole application for summary should be regarded as a nullity and struck from the roll. In *Radue* and the authorities relied upon the court mentioned the danger that an unbiased and impartial commissioner may influence the deponent in regard to the subject matter of the affidavit.⁷
- [16] The mere fact that the two firms of attorneys featuring herein may be on the plaintiff’s panel of attorneys, cannot be used in support of a responsible submission that they are not functioning totally independent from each other. In fact, there can be no doubt that they are completely independent from each other. I cannot see on what conceivable basis could it be held that attorney Steensma has an interest in the present litigation, or that she would want to, or could have influenced the deponent in regard to the issue at hand. Notwithstanding my request, the 4th defendant’s counsel could not

⁶ *Ibid* 682 H - I

⁷ *Ibid* 680 E – 681 G

provide me with any authorities in support of her submissions. The facts in *Radue* and authorities relied upon are clearly distinguishable from the facts *in casu* and consequently, I am not bound to follow any of these judgments.

- [17] The 4th defendant's purely technical defence is therefore rejected, but even if I was in agreement with the submission that regulation 7(1) was contravened, I would have postponed the summary judgment application in order to allow the plaintiff to have the affidavit re-attested. In my view, courts should ensure that disputes are dealt with on their merits and technical defences that merely cause delay and nothing else should be frowned upon and dismissed.

IV DEFENCES ON THE MERITS

- [18] The 4th defendant raised the following defences on the merits as is apparent from its plea:

18.1 It "and/or its representative was not advised that they would be entering into an unlimited and open-ended suretyship agreement, which would apply to all past and future debt"⁸

18.2 It or its representative "did not generally understand or appreciate the risks, costs or obligations under the proposed agreements" and therefore "entering into the credit agreement made the defendants over- indebted" and "the loan agreement stand to be declared reckless."⁹

18.3 "The signatory of the surety agreement was not duly authorized to sign and bind the 4th defendant."¹⁰

18.4 In respect of the amounts claimed, the 4th defendant pleaded that these amounts were not correctly calculated and the certificates of balance

⁸ Paragraph 8.2 of the pleadings bundle p 206

⁹ Paragraphs 8.3 & 8.4 at p 207

¹⁰ Paragraph 8.7 at p 208

attached to the particulars of claim were not correct since the plaintiff failed to allocate any payments received after issuing of summons.¹¹

[19] In the answering affidavit to the summary judgment application the defences were raised in the following terms:

19.1 The plaintiff is claiming amounts much less than in the summons without amending the summons and without any explanation.

19.2 The amounts claimed are not liquidated and reference is made to the difference between a letter of the plaintiff's attorneys dated 1 September 2021 and the latest certificate of balance dated 10 November 2021. At best for the 4th defendant, its counsel referred to a R7 difference in respect of the loan account.

19.3 It is also alleged that more monies may become available from the liquidation of the 3rd defendant and the administration of the insolvent estates of 1st and 2nd defendants who have now been sequestrated. Therefore, further amounts may accrue to the plaintiff from any of these estates.

19.4 The applicability of the National Credit Act and non-compliance therewith were again raised.

19.5 The 4th defendant has drawn attention in the answering affidavit to the different signatures alleged to be that of the 1st defendant, Mr DJJ Hattingh (Mr Hattingh) on the various documents attached to the particulars of claim. I shall revert thereto in a moment.

[20] It is apparent from the papers that the 4th defendant's deponent became a director of the 4th defendant company on 1 May 2005 only.¹²

¹¹ Paragraph 14.2 at p 210

¹² See COR 39 at p 68 of the application papers

- [21] The plaintiff pleaded that an unlimited suretyship agreement was entered into by the 4th defendant, it duly represented by the 1st defendant.¹³ The suretyship agreement is annexed as annexure “E4”.¹⁴
- [22] Unlike in the case of the suretyship agreement of the 3rd defendant,¹⁵ where the name of the 1st defendant was inserted on the attached extract of the minutes of a meeting of the 3rd defendant resolving that it would enter into the suretyship agreement, no such resolution is attached to annexure “E4” pertaining to the 4th defendant. In fact, the name of the person signing the document on behalf of the 4th defendant does not appear at all. It must be remembered that it is the plaintiff’s case in the particulars of claim that the 1st defendant, Mr Hattingh, signed annexure “E4” on behalf of the 4th defendant. This document was already signed as long ago as 11 February 1999, whilst annexure “E3” was signed on 20 July 2017. One does not need to be a handwriting expert to see that there is a clear difference between the two signatures. Both these signatures also clearly differ from the alleged signature of Mr Hattingh on his personal deed of suretyship dated 9 September 1992.
- [23] The 4th defendant’s counsel wisely decided not to make any submissions pertaining to non-compliance with the National Credit Act and it is not necessary to deal any further with the defences in this regard.
- [24] The submissions pertaining to lack of integrity of the plaintiff’s statements of account and the certificates of balance are not persuasive. Clearly, the plaintiff has received payments, bearing in mind the liquidation of the 3rd defendant and dividends received, since the issuing of summons which occurred more than 14 months ago. The criticism is unfounded and there is no reason not to accept the latest certificates of balance in respect of the overdraft agreement as well as the loan agreement.
- [25] In 2019 rule 32 was amended materially. Sub-rule 2(b), for example now reads as follows:

¹³ Particulars of claim para 16.16 – 16.20 of the pleadings bundle at pp 30 & 31

¹⁴ Pleadings bundle, pp 126 & 127

¹⁵ Annexure “E3” of the pleadings bundle, pp 123 to 125

“(2) (b) The plaintiff shall, in the affidavit referred to in sub-rule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff’s claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.”

Sub-rule 3 now reads as follows:

“(3) The defendant may—

(a)...

(b)satisfy 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.” (emphasis added)

[26] I agree with the following *dictum* of Makgoka JA in *NPGS Protection & Security Services CC and Another v Firstrand Bank Ltd*¹⁶ (a minority judgment, but not overruled by the majority):

“[14] Indeed, the court would be remiss in its duties if such defences, clearly devoid of any bona fides, stand in the way of plaintiffs who are entitled to relief. The ever increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by our courts. See, for example, the well-known judgment of this court in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) where the proper approach to applications for summary judgments is stated.”

[27] The 4th defendant’s counsel confirmed during oral argument that she was not party to the drafting of the plea and answering affidavit. In my view the legal practitioner who consulted in order to draft the plea did not do his profession proud. I fail to understand how it could be alleged that the signatory of the suretyship was not authorised to sign and bind the 4th defendant and/or that the 4th defendant’s representative was not advised that an unlimited and open suretyship was entered into. Clearly these allegations were grabbed from the air, bearing in mind that the suretyship agreement was allegedly signed in 1999 and the 4th defendant’s deponent became involved with the 4th defendant in 2005 only. These allegations are nothing but speculative and should be rejected. I say this, bearing in mind that when the 4th

¹⁶ 2020 (1) SA 494 (SCA) at para 14

defendant had the opportunity to obtain an affidavit in support of the opposition of the summary judgment application to specifically deal with these allegations, it did not do so.

[28] I would have expected the 4th defendant's deponent to not only disclose fully the nature and grounds of the various defences, but also the material facts relied upon therefore, in line with sub-rule 32(3)(b). It was possible for the 4th defendant to rely on an affidavit of any other person who could swear positively to the facts, in particular Mr Hattingh, cited as the 1st defendant. The 4th defendant's counsel submitted that Mr Hattingh might perhaps not be interested in supporting the 4th defendant's defence and therefore unwilling to depose to an affidavit. This is nothing, but speculative. I would have expected the legal practitioner who drafted the plea to consult with either Mr Hattingh, or any of the other directors or officials of the 4th defendant at the time when the suretyship was entered into, to wit February 1999 and if that was not possible, to at least set out full details of the attempts made in this regard in the answering affidavit.

[29] Having said this, I cannot close my eyes to the following:

29.1 The signature on the instalment sale agreement, annexure "A" to the particulars of claim.¹⁷ It is the plaintiff's case that Mr Hattingh, the 1st defendant, signed the document on 20 July 2015.

29.2 The same signature appears on annexure "A" to the instalment sale agreement and on the attached resolution,¹⁸ as well as the attached declaration in respect of insurance.¹⁹

29.3 Mr Hattingh's signature also appears on the special resolution for 3rd defendant to be voluntarily liquidated.²⁰

¹⁷ See para 4.1.4 of the particulars of claim pp 8, 38, 39, 45 & 46

¹⁸ Pleadings bundle pp 47

¹⁹ At pp 48 & 49 of the pleadings bundle

²⁰ Pleadings bundle pp 54 & 55

29.4 The same signature pertaining to the banking facilities also appear on annexure “B” to the particulars of claim.²¹ No doubt it belongs to Mr Hattingh.

29.5 The same signature, that of Mr Hattingh, appears on the loan agreement, annexure “C”.²² These documents were signed on 27 August 2019, save for the extract of minutes which Mr Hattingh apparently signed on 20 May 2010.²³

29.6 Mr Hattingh’s alleged signature on the suretyship agreement dated 9 September 1992 appears to be quite different from the previous documents referred to above.²⁴ However, I am not asked to adjudicate that aspect as default judgment was granted against Mr Hattingh.

29.7 The suretyship of 3rd Defendant dated 20 July 2017 is attached as annexure “E3” to the particulars of claim.²⁵ This document is clearly signed by Mr Hattingh as is evident from the resolution attached to the suretyship. The signature is also remarkably similar to the other signatures referred to above.

29.8 The alleged suretyship agreement of the 4th defendant in favour of plaintiff dated 11 February 1999 is attached as annexure “E4”.²⁶ It is not stated in the document who signed it on behalf of the 4th defendant and no resolution is attached to the suretyship. The signature, allegedly that of Mr Hattingh, differs vastly from all other signatures that could be ascribed to him as mentioned above.

[30] When plaintiff brought the application for summary judgment it knew that in terms of the amended rule 32 it had the opportunity and also the obligation to identify any point of law relied upon, the facts upon which the plaintiff’s

²¹ Pleadings bundle pp 59 & 60

²² At pp 67, 72, 73, 74 & 75

²³ Pleadings bundle p 73

²⁴ Annexure “E1” at pp 118 & 119 of the pleadings bundle

²⁵ Record pp 123 - 125

²⁶ Pleadings bundle pp 126 & 127

claim is based and also to explain briefly why the defence as pleaded does not raise any issue for trial.

- [31] The plaintiff's deponent tried to deal with the plea in para 17 of the founding affidavit,²⁷ but she did not deal at all with the allegation in paragraph 8.7 of the plea that the signatory was not duly authorised to sign and bind the 4th defendant.
- [32] Although the 4th defendant perhaps followed a shotgun approach by relying on several speculative defences, the documentation placed before me has caused an uneasiness as to whether Mr Hattingh signed annexure "E4", and if so, whether the 4th defendant in actual fact authorised him to sign the suretyship agreement in 1999 as the plaintiff alleges in its particulars of claim.
- [33] Although I was on the verge of granting summary judgment, I am not prepared to close the doors of the court for the 4th defendant in the specific and unique circumstances of this case as identified above.
- [34] Notwithstanding the conclusion arrived at herein, it is apposite to make the following observation. I have not been persuaded by the 4th defendant's counsel that summary judgment should be refused merely because of the fact that the plaintiff may receive a substantial dividend from the insolvent estates of 1st and 2nd defendants and/or even a further dividend in the liquidation of the 3rd defendant. Such possibilities can never stand in the way of the plaintiff "to recover from the surety, to the full extent of this suretyship any sums remaining owing thereafter."²⁸ I, with respect, do not agree with the judgment in *Business Partners Ltd v Towers and Another*.²⁹ The learned judge did not rely on any authority for the conclusion arrived at. Fact of the matter is, any monies paid by the principal debtor or any of the other sureties will eventually absolve the 4th defendant from paying that amount or

²⁷ Summary Judgment application p 10

²⁸ *New Port Finance Company (Pty) Ltd and Another v Nedbank Ltd; Mostert and Another v Nedbank Ltd* [2015] 2 All SA 1 (SCA) at para 12

²⁹ (32325/2017) [2018] ZAGPPHC 349 (1 March 2018)

amounts, but it does not mean that the plaintiff is not entitled to obtain summary judgment for the amount or amounts that are due at the stage when the application is moved.

[35] The court has a discretion pertaining to the award of costs. I am not prepared to grant a costs order against the plaintiff at this stage as I am of the view that it was fully entitled to move the application for summary judgment. I have come to the assistance of the 4th defendant only in so far as I have doubt as to who actually signed the relevant suretyship agreement and whether that person was duly authorised by the 4th defendant to act accordingly. Therefore, it would be fair to both parties if the costs of the application stand over for adjudication at a later stage and after hearing of evidence during the trial.

VII ORDER

- [36]
1. The 4th defendant's application for condonation pertaining to the late filing of its answering affidavit is condoned.
 2. The 4th defendant shall pay the costs of the condonation application on an unopposed basis.
 3. The application for summary judgment is refused.
 4. Leave is granted to the 4th defendant (the respondent in the application for summary judgment) to defend the action.
 5. The costs of the application for summary judgment is reserved for later adjudication.

JP DAFFUE J

On behalf of plaintiff:
Instructed by:

Adv CJ Welgemoed
Phatshoane Henney
BLOEMFONTEIN

On behalf of the 4th defendant: Adv JF Mitchley
Instructed by: Peyper Lessing Attorneys
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