IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED.

Case Number: 29137/2016

19/3/2018

In the matter between;

FIRST RAND BANK LIMITED	Applicant
and	
ANDRE; GEORGE DU PLESSIS	First Respondent
JORPE(PTY) LTD	Second Respondent
JORPE TURNKEY PROJECTS CC	Third Respondent

JUDGMENT

NOWOSENETZ AJ

[1] The applicant claimed judgment in its notice of motion for payment of the amount of R 2 911 156,88 against the respondents jointly and severally arising from three suretyships signed on February 2010 by each of them as co-principal debtors and sureties for the indebtedness of Astradeals 121 CC (Astradeals). the principal debtor. The first respondent admits

signing the respective suretyships on his own behalf and on behalf of the ether two respondents as director and member respectively. The principal debt arose from credit facilities granted to Atradeals by the applicant between 2007 and 2010. The first respondent was the sole member of Astradeals which was converted to a private company of which he was the sole member. The applicant abandoned its claim against the second respondent. (The first and third respondents are referred to as ;the respondents'). Both parties filed affidavits late, but no prejudice was caused and neither party objected. Condonation was granted. On 12 March 2018 at the roll call the respondents applied for leave to file a supplementary answering affidavit, The basis was new evidence relating to alleged undisclosed payments and the Rule 35(12) developments. The applicant was also given leave to file a supplementary replying affidavit, both of which were duly filed.

BACKGROUND

[2] The applicant granted credit facilities and advanced monies to Astradeals pursuant to three agreements dated 25 October 200 7, 16 November 2007 and 3 February 2010. The first respondent was only a signatory to the third agreement which he admits.

[3] Astradeals defaulted on repayments from June 2014 and no further payments were made (save for a payment of R20 000 in October 20 14). The applicant applied for the liquidation of Astradeals and a provisional order was issued in this division on 31 March 2105. A settlement agreement signed by the first respondent on behalf of Astradeals was made an order of court on 5 May 2015 and the provisional order of liquidation was discharged. Astradeals admitted its Indebtedness towards the applicant in the amount of R 2 735 347.33 together with interest at the then facility rate of 8.5% plus 0,25% interest per annum compounded monthly calculated from 20 November 20 14. Astradeals undertook to settle Its indebtedness by 5 August 2015. The settlement was not a novation and the securities under the facility agreements were intact.

[4] Astradeals again defaulted and on 15 October 2015 it was placed under final liquidation at the instance of another creditor. As at 29 October 2015 the deponent of the applicant's founding affidavit, Ms KJ Cawood attached a certificate of Indebtedness issued by her *in* the amount of R2 911 156,88 plus interest calculated at the rate of 9,5% from 30 October 2015.

[5] On 2 December 2015 the applicant issued a simple summons for recovery of this debt against the respondents based on the suretyships but at the stage after an application for summary Judgment was filed the applicant withdrew the action proceedings and issued this application on 13 April 2106. The liquidator sold the encumbered property of Astradeals for R2 793 000.00 and a provisional dividend of R950 000 had been received by the applicant on 31 October 2017.

THE ISSUES

[6] Aside from the points in limine and application to strike out dealt with below, the main disputes raised by the respondents were that the third agreement dated 3 February 2010 was a new facility under which only R1 329 079.99 was advanced and that the suretyships were limited to the indebtedness of Astradeals as from 3 February 2010 . The parties intended that the respondents would not be liable for any debts of Astradeals prior to 3 February 2010. Conditional rectification of the suretyships was sought in the event of the rt not upholding this interpretation. The first respondent had no knowledge of the first *and* second facility agreements as he was not a member of Astredeals when those agreements were signed. He became a member of Astrodeals from 31 August 2008.

[7] The indebtedness and amount due by the respondents was in dispute. First respondent alleges that more than the mount of R R132 079. 99 has been repaid and that since March 2010 to October 2014 Astradeals repaid R2 402 531.20. This allegation is valueless because on 3 May 2015 the first respondent admitted indebtedness of Astradeals in the amount of R 2 735 347.33 plus interest. On 29 October 2015 Ms Cawood signed a

certificate of indebtedness of Astradeals in the sum of R2 911 156, 88. No contradictory evidence of the balance due as at that date has been submitted by the respondents.

[8] The. applicant attached recent statements to the supplementary replying affidavit reflecting an opening balance of R3 3 0 907.95 as at 19 February 2017. Ms Cawood set out the outstanding capitalised interest from February to November 2017 and after adjustment for the provisional dividend the capital sum claimed is now R2 869 15746. An interest adjustment in favour of the applicant was also included in the amount of R70 000 arising from interest on the liquidation administrative costs still to be decided by the Master .

[8] In the supplementary answering affidavit the first respondent stated that a provisional dividend of R950 000.00 was made on 31 October 2017. A further payment of R20 6 923.50 is still to be made by the liquidator of Astradeals to the applicant. Leaving aside the correctness of this evidence, it was pointed out by Ms M Riley on behalf of the applicant that the respondents were not only sureties but were co-principIe debtors and this has the legal consequence that the benefits of excussion and division are renounced by a surety. *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A). Thus respondents cannot rely on payments to be made out only payments actually made. The applicant confirmed in its supplementary replying affidavit that no payments were m de after 31 October 2017.

NATIONAL CREDIT ACT

[9] The respondents contended that the facility agreements were subject to the National Credit Act 34 of 2005 (the NCA) was applicable to the facility agreements and further that the parties had agreed that the NCA would be applicable. The applicant denied any such agreement and further submitted that the NCA excluded juristic persons with a monetary asset value of or annual turnover of more than R1 000 000.00 and where the agreement is considered a large agreement ie in excess of R250 000. Further it was decided that contacting parties cannot bind a court by

agreeing to incorporate provisions of the NCA into *an* agreement which is not within the purview of the statute. *RMB Private Bank a division of First Rand Bank limited v Kaydez Therapies CC {in liquidation)* & *two others* 2013 (6) SA 308 (GSJ). These submissions are. unassailable and this defence is rejected.

IN LIIMINE, STRIKING OUT AND RULE 35 (12) APPPL!CATIONS

[10] The respondents raised several points in limine. The issue of non joinder of the second respondent was resolved and the other points were abandoned. The remaining issue was the lack of personal knowledge of the cause of action by Ms Cawood. This point is associated with the defence on the merits of hearsay. The first respondent stated that he had never met her and she had, no personal knowledge of or the transactions in this case. Ms Cawood stated in the applicant's founding affidavit that she was the authorised recoveries manager and in paragraph 2.2 that she obtained personal knowledge by -

' perusing the records and documentation referred to...which books and records are under my control... In addition and by virtue of my capacity aforesaid, I have unfretted [sic] access to the Applicant's electronic records and its relevant transaction files. have acquainted myself with all the relevant documents records and notes ... '

[11] It appears from documents annexed to her founding affidavit that she also was the deponent in the liquidation application against Astradeals in which she stated that she had acquainted herself with the documents end records of the applicant. It is common cause that she deposed to tr1e affidavit in support of summary judgment against Astradeals. In her replying affidavit she stated that she had also gleaned information from discussions with her colleagues who were involved in this matter. The respondents applied to strike out paragraphs 3 to 41 of the founding affidavit (of total 41 paragraphs) and paragraphs 2 to 29 of the replying

affidavit (of total 29 paragraphs). It was shown in a detailed spreadsheet submitted on behalf of the applicant that most of the allegations in the applicant's founding affidavit were either admitted or the defendants pleaded no knowledge. The authenticity of the third facility agreement and the three suretyships signed by the first respondent were admitted. Neither were the applicant's bank statements for Astradeals during the period 1 February 20,0 to 19 May 2015 challenged.

[12] The applicants cited *Shackleton Credit Management v Microzone Trading 88 CC* 2010 (5) SA 112 KZP- where the ·following principles were expressed in the context of summary judgment: The requirement of a person who can swear positively to the facts precludes information that the person obtains from another source or documents; the deponent in a corporate entity is not expected to have personal knowledge of every fact and can legitimately rely on company records in possession of the company to swear positively to at least certain of the relevant facts. However the cases do not go so tar to suggest that the deponent to an affidavit in support of summary judgment can have n9 person ! knowledge whatsoever and rely exclusively on the perusal of the records and documents in order to verify the cause of action and the facts giving rise to it.

[13] Further reliance was placed on *First Rand Bank v Huganel Trust* 2012 (3) SA 167 WCC, which also dealt with summary judgment, where it was stated that there will be cases where some further personal knowledge is required beyond examination of the documents by reason of the nature of the defence raised, if the defendants if proved could constitute a valid defence.

[14] The applicant submitted that in addition to familiarizing herself with the documents and records of the applicant pertaining to this case, Ms Cawood was actively involved in the litigation with Astrodeals in which she deposed to both the liquidation and summary judgment application . The authorities of *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 .AD ; *Barclays National Bank Ltd v Love 1975* (2) SA 514 D and Rees v

Investec Bank 2014(4) 220 SCA 15 were cited to the effect that a deponent can acquire personal knowledge of the debtor's financial standing in the ordinary course of duty in the bank that employs the deponent. The information set out in the affidavit must support this conclusion. First hand knowledge of every fact is not required. *Standard Bank of South .Africa L.td v Secatsa (Pty) Ltd* 1999 (4) SA 229 (C). These authorities deal with summary judgment proceedings which are not quite the same as motion proceedings. To my mind more leeway can be allowed in motion proceedings in affidavits claiming personal knowledge of the cause of action because of the opportunity of the applicant to reply to a challenge regarding personal knowledge and also the possibility of referring material disputes of fact to oral evidence or trial.

[15] It is inconceivable in the course of a transaction history spanning since *2007,* that every official of the bank who had personal dealings with the debtor must make an affidavit. Indeed this well nigh an impossibility in large institutions which invariably have a turnover, of persons who may individually or in teams deal with a client from time to time as well es contingencies such by employees leaving or passing away. Of consequence is that the respondent has not raised any defences which require any knowledge beyond what she has deposed to and the documents which she has attached. The deponent therefore cannot be said to know nothing about the cause of action. It can be reasonably inferred that she has sufficient personal knowledge from her experience in the Astrodeals litigation together with a familiarity of the facility agreements and suretyships.

[16] The authenticity of any of the documents underpinning the cause of action have not been seriously disputed by the respondents. It is trite that that it is not necessary to prove an admitted fact. The. indebtedness of the Astrodeals is presented inter alia by bank statements which are admitted and also in the first respondent's settlement agreement. The court can relax the strict application of hearsay in terms of the statutory discretion and this is an appropriate case to do so. There is no aspect of the applicant' s affidavits that can be regarded as inadmissible even if

constituting hearsay and the striking out application on the basis of lack of personal and inadmissible hearsay is dismissed.

[17] The respondents served a Rule 35 (12) notice dated 15 August 2016 on the applicant calling for the inspection of the books and records referred to by her in paragraph 2.2 of her affidavit referred to above. This notice was disregarded by the applicant. A further Rule 35 (12) notice dated 22 February 2108 was delivered by the respondents containing 21 specified items mainly based on paragraph 2.2 of her affidavit. The respondents relied on Rule 35 (12) provides that the consequences of not complying with Rule 3S (12) are that the applicants may not use such documents save with the leave of the court. The applicant contended that it has attached neither all the documents it relies upon and that the respondents have not shown why the further documents are required nor any prejudice by non compliance by the applicant. Indeed the disputes raised and defences on the merits required no additional documentation. it was also argued that the notices required the full documentation which formed part of the facility agreements which were not attached. No attempt was made to show what assistance this would be. No further steps to enforce the first rule 35(12) application were taken until a few weeks before the hearing. The notices were frivolous and unnecessary and were not shown to be reasonably required to defend this application. The striking out of the documents to the extent that they are already on record is refused and the applicants are granted leave to use them. Costs are awarded on an attorney and client scale for the Rule 35(12) application.

THE FACILITY AGREEMENTS

[18] An amount of R 2 000 000 .00 was advanced by the applicant to Astradeals in terms of the first credit facility agreement repayable over 120 months and the previous members of Astradeals signed suretyships. The second facility agreement states that the sum advanced is R2 875 000.00 also payable over 240 months. The previous members of Astrodeals again signed suretyships A covering security bond over property registered in

the name of Astradeals was registered in favor of the applicant on 4 March 2008 pursuant to this advance. The third credit facility agreement states that the facility sum is R3 900 000.00 payable over 120 months. The three suretyships were signed by the first respondent as stated above. Nowhere in this document does it state that the sum advanced is R1 329 07 9. 99 as alleged by the respondents. Nor does the second agreement stipulate that the advance is R875 000 (being the additional amount to the first advance). Each advance after the first is clearly cumulative of previous facilities and do not stand in isolation as separate loans. Thus the second and third agreements cannot be seen as new loan facilities but rather are extensions of the prior facilities.

THE SURETYSHIPS AND RECTIFICATION

[19] Clause 1.1 of the suretyships reads:

' the due and punctual payment by the debtor to the Bank of II and any sums of money which may now be, or which may hereafter become, owing by the debtor to the Bank in terms of the RMB Private Bank Single Credit Facility Loan agreement/s entered into or about to be entered into by the Bank and the debtor...'

This provision is plain and unambiguous. It refers to all any sums of money owing presently and in terms of the facility agreements entered into between the parties. There is no express provision excluding or including any previous agreements from the suretyships. The wording ' agreement/ s' is sufficient to convey an inclusive meaning. The applicant denies that any understanding existed that the suretyship was limited to the loan agreement and debts after but not before 3 February 2010. There is nothing in the context of this suretyship to alter the meaning. The nature and purpose was the same as the suretyships given by the first respondent's predecessors as security for the first and second credit facility agreements. There is no space for rectification of the suretyships.

No basis in evidence was produced by the respondents of a common intention for the suretyships to reflect any other terms than those recorded. The applicant rejected this notion completely. Nor is there any inherent commercial rationale for such a rectification. No genuine dispute of fact arises.

PREJUDICIAL CONDUCT

[20] The respondents complain of a wrongful and negligent payment instructed to be made on instructions of the applicant to the municipality for rates and municipal charges in relation to the sold property in the sum of R1 004 548.40. The applicant explains that this was an administrative fee paid to the liquidator to facilitate the transfer. This amount has been credited to the applicant and there is no prejudice to the respondents. Prejudicial conduct by the applicant was also based on the failure of the applicant to assess the affordability of debtor's monthly instalments. However the credit facility agreements state that the amount repayable is inserted to assist the debtor to determine whether he is able to afford the credit. Thus the debtor must also bear responsibility. This point has no substance as a defence to the suretyships.

CONCLUSION

[22] Th applicant has proven that the first credit facility agreement was extended twice by simply increasing the credit limit incrementally and the third· agreement did not constitute a separate and new credit facility . The suretyships were plainly as a covering security for all the Indebtedness of Astradeals existing at as 3 February 2010. The applicant is entitled to the sum of R2 869 157.46 which includes capitalized interest from February to November 2017.

ORDER

[23] An order is made in terms of the draft Order marked "XY".

L. NOWOSENETZ

ACTING JUDGE OF THE HIGH COURT

CASE NO: 29137 / 20 16

HEARD ON: 15 MARCH 2018

FOR THE APPLICANT/ APPELL.ANT / PLAINTIFF ; ADV. M RILEY

INSTRUCTED BY: FRANS RABIE ATORNE;YS

FOR THE RESPONDENT /DEFENDANT: ADV. C WOODROW

INSTRUCTED BY: RORICH WOLMARANS & LUDERITZ INC

DATE OF JUDGMENT: 19 MARCH 2018

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

On this 15th day of March 2018 before the Honourable Mr Justice Nowosenetz AJ

Case No: 29137/ 2016

In the matter between:

FIRSTRAND BANK LIMITED **Applicant**
(REG.NO: [….])

and

ANDRE GEORGE DU PLESSIS **First Respondent**

(ID. NO: [….])

JORPE (PTY) LTD **Second Respondent**
(REG NO: 1997/016214/07)

JORPE TURNKEY PROJECTS CC **Third Respondent**
(REG NO: [….])

DRAFT ORDER

Having read the papers and after hearing counsel, judgment is granted against the First and Third Respondents jointly and severally , the one paying the other to be absolved , which liability will be joint and several with any claims proven to and paid by liquidators of the Second Respondent, as follows:

1. Payment in the amount of R2 869 157.46;

2. Interest on the aforesaid amount at the rate of 9.75% per annum , calculated from 15 February 2018 to date of payment;

3. Costs of the application on the scale as between attorney and client.

BY ORDER

REGISTRAR

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

On this 15th day of March 2018 before the Honourable Mr Justice Nowosenetz AJ

Case No: 29137/2016

In the matter between:

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and

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(ID. NO: [….])

JORPE (PTY) LTD **Second Respondent**
(REG NO: [….])

JORPE TURNKEY PROJECTS CC **Third Respondent**
(REG NO: [….])

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3. Costs of the application on the scale as between attorney and client.

BY ORDER

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