

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

**CASE NO: 32325/2017**

**1/3/2018**

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

**BUSINESS PARTNERS LIMITED** : **Plaintiff/Applicant**  
(Registration number: 1981/000918/06)

And

**RAJNATOWERS** : **1<sup>st</sup> Defendant/1<sup>st</sup> Respondent**  
(Identity number:[....])

**BIO INDUSTRIAL SERVICES (PTY) LTD** : **2<sup>nd</sup> Defendant /2<sup>nd</sup> Respondent**  
(Registration number: 2012/024095/07)

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**JUDGEMENT**

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**A. INTRODUCTION**

1. This is an opposed summary application based upon two claims of R3 304 899.99 (three million three hundred and four thousand eight hundred and ninety-nine rand and ninety nine cents) and R1 035 657.47 (one million and thirty-five thousand six hundred and fifty-seven rand and forty-seven cents) against the respondents. The respondents are sued in the capacities as sureties and co-principal debtors *in solidum* with Bio Prop Invest (Pty) Ltd ("the principal debtor").

**B. FACTS**

2. The principal debtor concluded two loan agreements with the applicant on 4<sup>th</sup> December 2014 and the respondents stood as sureties and co-principal debtors *in solidum* with the principal debtor for those loans in

terms of the suretyship agreement.

3. The principal debtor defaulted on the loans and after it was called up to bring the arrears up to date during May 2016, not all arrears were paid. As a result, the principal debtor was liquidated on 30 November 2016.
4. The respondents were served with summons and filed Notice of appearance to Defend the action.
5. It was the Notice of Appearance to Defend that led to the applicant applying for summary judgement.
6. In their opposing affidavit, the respondents aver that they have a defence to the claim by the applicant. They contend *inter alia*, that after being called upon to bring the arrears of the principal debtor's account up to date during May 2016, they were granted an extension to repay the arrears with no specific date by when the arrear payments were to be made. They further aver that the extension or rather the indulgence to repay the arrears amounted to variation of the loan agreements.
7. The respondents further contend that the claim by the applicant is not for a liquidate amount nor is it based upon a liquid document because:-
  - 7.1. It is based on suretyship agreement in respect of loan agreements breached by the principal debtor;
  - 7.2. The suretyship undertakings by the respondents do not record their liability in any specific amount of money;
  - 7.3. The suretyship record that a certificate signed by a manager or accountant of the applicant as to the amount of debt and the date for payment of such accounts shall be prima facie proof of the contents thereof, and the surety's indebtedness in terms of the suretyship.
  - 7.4. The certificates of balance are not supplemented by any statements of account or any other means of calculating the quantum;
  - 7.5. Nowhere in the suretyship is it recorded that the certificate of balance shall be deemed a liquid document.
  - 7.6. The second respondent owns an immovable property which was used as security for the obligations of the principal debtor and the property is valued at R4 053 109.09 (rand four million and fifty-three thousand one hundred and nine and nine cents).The second

respondent passed a mortgage bond in favour of the applicant:

- 7.7. Following the liquidation of the principal debtor, the mortgaged property is in the hands of the liquidators who will sell it and pay the proceeds of sale to the applicant as a secured creditor:
- 7.8. As a consequence of the disposal of the property and payment of the proceeds thereof to the applicant, the applicant's actual claim against the respondents cannot be properly quantified and this places the quantum of claim in dispute.
- 7.9. The liquidators of the principal debtor have not agreed to provide the respondents with the details of the applicant's claim against the estate of the principal debtor.

8. In his submission on behalf of the applicant, Mr Alli has provided a sequence of events to demonstrate that the so-called variation was in fact an indulgence which did not amount to variation of the repayment terms of the loan agreements.

#### **C. THE ISSUE FOR DETERMINATION**

9. The issue for determination is whether or not the respondents have made out a defence in their opposing affidavit.

#### **D. LEGAL PRINCIPLES**

10. The summary judgment process is regulated by the provisions of Rule 32 of the Uniform Rules of this Court.
11. Rule 32(3)(b) provides as follows:-

"(3) Upon the hearing of an application for summary judgment the respondent may-

(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he 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."

12. A respondent in a summary judgement application needs to set out facts which, if proved on trial, will constitute an answer to the applicant's claim.<sup>1</sup>
13. It will suffice if respondent swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing.<sup>2</sup>
14. The respondent is not at this stage required to persuade the court of the correctness of the facts or that there is a balance of probabilities in favour of one party or other.<sup>3</sup>
15. In **Mowschenson and Another v Merchantile Acceptance Corporation of SA Limited**<sup>4</sup> the following was said by Court:-

"the proper approach (to summary judgement applications) appears to me to be one which keeps the important facts in view that the remedy for summary judgement is an extra-ordinary remedy, and very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the court to the respondent (see the case of Symington and Cob Supra). This can only be done if there is no doubt but that the applicant has an unanswerable case..."<sup>5</sup>

16. If there is nothing inherently incredible in the respondent's answer and if that answer, if proved, would support a defence that is good in law, the court will be obliged to dismiss the application and give the respondent leave to defend the action:-<sup>6</sup>

17. In **Shepstone v. Shepstone**<sup>7</sup> the following was held by court:-

"...a respondent may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial. If there is doubt whether the respondent

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<sup>1</sup> See Breintenbach V. Fiat 1976 (2) SA 226 at 2288.

<sup>2</sup> See Arend V. Astra 1974 (1) SA 298 (C) at 303 -304

<sup>3</sup> See Tesven CC and Another v. S.A. Bank of Athens 2000 (1) SA 268 SCA

<sup>4</sup> 1959(3) SA 362 (W) at 366 E - 367 8

<sup>5</sup> See also Kroonklip Beleggin (Edm s) Beperk v Allied Minerals Limited 1970 (1) SA 674 (T) at 678 and City Bank NA, SA Branch v. Paul NO and Another 2003 (2) All SA 484 (T) at 502

<sup>6</sup> See Mowschenson and another v Mercantile acceptance corporation of SA Limited (supra)

<sup>7</sup> 1974 (2) SA 462 (N) At 466 - 467

has a bona fide defence, caused by a defective affidavit, the benefit of the doubt ought to go to the respondent. (See: JNO G Teale and Sons (Pty) Ltd v. Vrystaatse Plantediens (Pty) Ltd 1968 (4) SA 371 (0)).

18. In **Graha v Pupkewitz & Sons (Pty) Ltd**,<sup>8</sup> the court considered a cause of action consisting of a deed of surety and the allegation that goods were sold and delivered for a certain amount and held as follows:-

"... it is a cause of action which is indicated with a minimum of particulars. It may not be excepiable but shows an inherent secrecy which places the respondent in an unfavourable position should he wish to defend the action...It is true that his defence does not comply with the requirements of Rule 32 (3), viz a complete statement of the nature and grounds of the defence, but this lack ought, in the present case, I think, be judged in the light of his impotence by the formulation of its cause of action by the plaintiff. Because of the particular nature of the combined facts which were before the court a quo. I think this is pre-eminently a case where the court a *quo* ought to have exercised its discretion, and given the defendant the opportunity to request further particulars and defend the action."

## **E. REASONS FOR THE JUDGMENT**

19. In this case, it is averred that an indulgence was extended to the principal debtor to bring arrear payments up to date. The respondents contend that this indulgence amounts to variation of the loan agreements. It is not necessary at this stage to inquire as to the correctness of this assertion. It is sufficient that if this assertion is established at trial, it may constitute a valid defence to the applicant's claim.
20. It has been contended that other than the certificate of balance issued by the applicant, there are no supplementary statements of account, upon which the certificate of balance is based. This lack of the statement of account and the fact that the suretyship agreement itself provides for unlimited liability of the respondent creates a prejudice for the respondents to not can establish factually the true balance due to the applicant.
21. The respondent contend further that the liquidators of the principal debtor

was not willing to share information with the respondents and to allow them access to the books of the estate of the principal debtor to establish the statement of accounts.

22. It appears apparent from the affidavit resisting the application for summary judgment that indeed the liquidation and distribution account of the estate of the principal debtor has not been concluded. Consequently, the respondents will be disadvantaged as they claim the value of the bonded property is more than R4 million.
23. I am of the view that it will not be in the interest of justice that the respondents be denied the opportunity of requesting further particulars in preparation of trial to verify the precise quantum that the applicant is entitled to claim taking into account the set-off from the proceeds of sale of the property secured by a mortgage bond in favour of the applicant.
24. Consequently, I am of the view that the respondents should be granted leave to defend the claim.
25. It is not necessary at this stage to deal with the full merits of the case submitted on behalf of the applicant's counsel Mr Alli.

### **ORDER**

26. The application for summary judgment is hereby dismissed and the costs will be in the main action.

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M.L. SENYATSI AJ

For: Plaintiff /Applicant:

MR N ALLI  
INSTRUCTED BY  
MENDELOW - JACOBS ATTORNEYS  
MELROSE NORTH, JOHANNESBURG

For: Defendants/Respondents:

MR D MILNE  
INSTRUCTED BY

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