



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 1720/15

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

2/4/2015

IN THE MATTER BETWEEN:

ABSA BANK

PLAINTIFF

AND

P GIACINTI

1ST DEFENDANT

M GIACINTI

2ND DEFENDANT

J U D G M E N T

KUBUSHI, J

[1] This is an application for summary judgment.

[2] The plaintiff's claim against the 1st and 2nd defendants, jointly and severally liable, the one to pay, the other to be absolved, is for payment of the amount of R1 386 081, 15.

[3] The amount represents the balance of an amount lent and advanced as well as agreed upon debits charged by the plaintiff to Moda Tiles Fourways CC (in liquidation) (the principal debtor), on a cheque account.

[4] The 2nd respondent (with the written consent of the 1st defendant) bound their joint estate as surety and co-principal debtor for the due fulfilment of the principal debtor's obligations towards the plaintiff. As security for such debt the 1st and 2nd defendants registered three mortgage bonds in favour of the plaintiff.

[5] The aforementioned amount is due and payable by virtue of the fact that the principal debtor failed to make payments as agreed with the resultant consequence that the full amount outstanding became due and payable.

[6] The 1st and 2nd defendants having entered appearance to defend the summons issued against them by the plaintiff, the plaintiff has now applied for summary judgment.

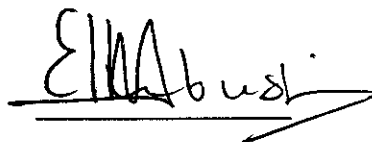
[7] The 1st and 2nd defendants are opposing the application for summary judgment and have raised a number of technical defences. Without going into all these defences, it is my view that the summary judgment application should be dismissed and the defendants be granted leave to defend this matter.

[8] My view is based on the application itself, which is defective in that it does not verify the cause of action against the defendants. The plaintiff's cause of action is based on surety signed by the 2nd defendant with the consent of the 1st defendant. The surety binds the joint estate of defendants. However, the founding affidavit refers to the 1st and 3rd defendants instead of the 1st and 2nd defendants. It is evident from the papers that there is no 3rd defendant cited by the plaintiff. The contention by the plaintiff's counsel that a case has been made against the 1st defendant is not sustainable as well. This is so because the 2nd defendant signed the surety binding the joint estate of the defendants. The 1st

defendant consented to such surety, which, was signed by the 2nd respondent and not by the 3rd respondent.

[9] In the premises I have to make the following order:

- (a) The application for summary judgment is dismissed.
- (b) The 1st and 2nd defendants are granted leave to defend the action against them.
- (c) Costs are costs in the main action.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE

• 20 MARCH 2015

DATE OF JUDGMENT

• 02 APRIL 2015

APPLICANT'S COUNSEL

• ADV. ASL VAN WYK

APPLICANT'S ATTORNEY

• TIM DU TOIT ATTORNEYS

RESPONDENT'S COUNSEL

• ADV. WJ VAN WYK

RESPONDENT'S ATTORNEY

• SNAIL ATTORNEYS @ LAW