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

CASE NO: 86612/2014

14/7/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

21/07/2015
DATE

SIGNATURE

In the matter between:

NEDBANK LIMITED Applicant

and

TRU ESSENCE PRODUCTS (PTY) LTD First Respondent

SUBHASH PREMCHAND AGARWAL Second Respondent

JUDGMENT

Baqwa J

[1] This is an application for summary judgment against the first defendant for the payment in terms of an overdraft facility and against the second defendant for payment in terms of a suretyship agreement.

[2] The applicant/plaintiff seeks judgment for the outstanding amount of the overdraft facility together with interest against both defendants the one paying, the other to be absolved.

[3] It is common cause that the respondents have not only filed an appearance to defend and a plea to the plaintiff's summons but also an opposing affidavit to the application for summary judgment. In that affidavit they seek to incorporate the contents of their plea.

[4] Summarised, the defendants raise the following defences to the applicant's application:

4.1 The deponent's lack of personal knowledge.

4.2 The deponent's authority to depose to the affidavit in support of summary judgment.

4.3 Non-compliance with Section 129 of the National Credit Act 34 of 2005.

4.4 Denial of an oral agreement granting of the overdraft facility.

4.5 Putting in issue the amount claimed.

4.6 An allegation that the applicant placed a moratorium on repayments for a period of 6 months from October 2014.

[5] Rule 32 (3)(b) requires an affidavit from a defendant opposing summary judgment which fully discloses the nature and grounds for his or her defence and the material facts on which it is based. A defendant must satisfy the court that there is a **bona fide** defence to the action. Put differently, a defendant ought to comprehensively disclose the material facts upon which his or her defence is based.

[6] This calls for an analysis of whether the defences raised by the respondents satisfy the test referred to.

[7] The deponent states that he is employed by the applicant as the Legal Recoveries Manager of the Business Banking Department and that in that capacity he is authorised to depose to the affidavit in support of summary judgment. This is further confirmed on the Certificate of Balance. He also states that the relevant file is in his possession and under his direct control. The fact that he did not have personal dealings with the respondent therefore becomes irrelevant. A similar matter was dealt with by my brother, Mr Justice Tuchten in the unreported decision of **Standard Bank of South Africa Limited v Kroonhoek Boerdery CC and Others** NGHC Case no. 235054/2011 in which he held:

"*The question, I suggest, is not the general one whether the deponent can competently testify to all the documents with her employer bank but whether she can competently testify to those relevant to the case in question*"

[8] Personal knowledge may also be gleaned from the deponent's office or capacity. In **President of the Republic of South Africa and Others v M & G Media Ltd** Ngcobo CJ held:

The Supreme Court of Appeal held that a deponent's assertion that information is within his or her personal knowledge "is of little value without some indication, at least from the context, of how that knowledge was acquired." I agree. An indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit. The key question is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or knowledge alleged."

[9] It is also trite knowledge that companies and firms can also speak through representatives and a deponent who is an employee of a company can depose to an affidavit to enable a court to assess the evidence put before it in order to make a factual finding regarding the acceptability or otherwise of such evidence. **First Rand Bank v Beyer** 2011 (1) SA 196 (GNP).

[10] Regarding the applicability of the National Credit Act 34 of 2005 (NCA), the applicant pleads in its Particulars of Claim that the annual turnover of the first respondent was more than R1 000 000.00 alternatively that the agreement constitutes a large agreement. It is in any event quite obvious from the credit facility and the amount claimed that the agreement, which is not denied by the respondents, does constitute a large agreement which would **ipso facto** preclude the applicability of the National Credit Act.

[11] The respondents deny having received legal notice in terms of clause 20 of the deed of surety. The applicant submits and I accept that summons does constitute legal notice.

[12] The inadequacy of the respondent's response to the application becomes glaring when one considers the fact that the respondents allege that the overdraft facility was in terms of a written agreement with the understanding that the amount advanced would be repaid by the first defendant when the first defendant was able to do so. A mere production of such agreement by the respondents of such an agreement would have put paid to this application. Yet the respondents do not avail themselves of the opportunity by producing the said agreement. This cannot but bolster the submission by the applicant's counsel that the allegation is so far-fetched and improbable that it may be rejected outright.

[13] Regarding the amount claimed, correctness of Certificate of Balance and authority of signatories, clause 6 of the deed of surety reads as follows:

> "The nature and amount of my obligation, as well as the interest rate payable in respect thereof, shall be determined and proved by a certificate purporting to have been signed by a manager or accountant for the time being of any branch or the head office of Nedbank, whose capacity or authority it will not be necessary to prove.
>
> This certificate or other form of evidence, as the case may be, will upon the mere production thereof be binding on me and be proof of the contents of such certificate on the face of it and of the fact that such amount is due and payable in any legal proceedings against me, and will be valid as a liquid document against me in any competent court."

Upon perusal of the Certificate of Balance it is clear that it was signed by two managers. In terms of clause 12 of the deed of surety, the respondents renounced the legal exception of **errore calculi**. The respondents' attempt to escape liability by challenging the veracity of the Certificate of Balance can in these circumstances not succeed.

[14] Further, it is established law that a defendant who glibly denies knowledge of his indebtedness or its extent or the correctness of the amount claimed does not disclose a **bona fide** defence. See **Jacobsen van den Berg SA (Pty) Ltd v Tritan Yachting Supplies** 1974 (2) SA 584 (0).

[15] The respondents plead that by mutual agreement by the parties the applicant placed a moratorium on the repayments for a period of 6 months from October 2014 and that as a result the action is premature. This is a **contradictio in terminis** in that in the respondents' plea they allege that the parties agreed that the first respondent will make repayments when it was able to do so. Through the respondents' own **ipsissima verba** the credibility of their allegations is put into serious jeopardy. In any event, no documentation is provided to support these bald statements.

[16] In **Breytenbach v Fiat SA (Edms)** Bpk 1976 (2) SA 226 (T) it was held that a bald, vague or laconic affidavit is indicative of the fact that the defendant wishes to avoid the dangers inherent in the presentation of a fuller or clearer exposition of his defence.

[17] Regarding the denial of signing the surety agreement and the denial that the agreement is authentic or regular; it is significant that the respondents on the one hand deny the deed of surety yet, seek to rely on certain clauses thereof such as seeking to rely on clause 20 thereof. This further speaks to the ambivalence that is notable in the respondents' plea and opposing affidavit which cannot but put the credibility of the statements therein in question. The applicant's counsel submits and I accept that this defence is also without merit.

[18] Having considered the documents filed and the submissions by counsel I come to the conclusion that the respondents have failed to disclose a **bona fide** defence and that they have entered appearance to defend solely for the purpose of delay.

[19] In the result an order is granted as follows:

Summary judgment is granted in favour of the applicant against the first and second respondents for:

(a) Payment in the sum of R3 481 576.84.

(b) Interest on the above amount at the prevailing prime lending rate as applicable from time to time, which rate is currently 9.25% per annum calculated from 18 October 2014 to date of final payment, both days inclusive.

(c) Attorney and client costs to be taxed.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Heard on:	14 July 2015
Delivered on:	14 July 2015
For the Applicant:	Adv. JH Roelofse
Instructed by:	JF van Deventer Incorporated
For the First Respondent:	Adv. TR Harris
Instructed by:	Dev Maharaj & Associates