IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NUMBER:33022/09

WHICHEVER IS NOT APPLICABLE
YES/NO.
OF INTEREST TO OTHER JUDGES: YES/NO.
REVISED. amended oder
19 [illegible] 09
DATE SIGNATURE

In the matter between:

STANDANRD BANK OF SOUTH AFRICA LIMITED — APPLICANT/PLAINTIFF

And

FREDA HUGOLENE KAPP — 1st RESPONDENT/DEFENDANT

UNIT 1 333 SAUNDERS CC (REG NO: 2002/17355/23) — 2nd RESPONDENT/DEFENDANT

ELECTOPOS 190 (PTY) LTD (REG NO: 1996/013678/07) — 3rd RESPONDENT/DEFENDANT

JUDGMENT

TLHAPI, AJ

[1] The applicant ('plaintiff') instituted action against the respondents ('defendants') for:

"(a) Payment of the sum of R44 076.63 in respect of Claim A;

(b) Interest thereon at the rate of 14% per annum, calculated daily and compounded monthly in arrear, from 25 February 2009 to date of final payment, both dates inclusive;

(c) Payment of the sum of R719 743.23 in respect of Claim B;

(d) Interest thereon at the rate of 14% per annum, calculated daily and compounded monthly in arrear, from 25 February 2009 to date of final payment, both dates inclusive;

(e) Costs of suit;"

[2] The defendants entered appearance to defend and plaintiff brought an application for summary judgment and the application was duly served on the defendants. The first defendant filed an affidavit resisting summary judgment. The plaintiff agreed to an order granting the first defendant only, leave to defendant and costs in the cause. The liability against the second and third defendants arose out of duly executed deeds of suretyship dated 4 March 2004 and each bound themselves as sureties and co-principal debtors 'for the payment when due of all the present and future debts of any kind' to the plaintiff. In terms of the suretyship, debts which had become due and payable were recoverable from the second and third defendants jointly and severally without plaintiff having to first recover from the first defendant.

[3] According to the first defendant, action was premature and the debt had not become due with regard to her, therefore the plaintiff could not recover in terms of the suretyships from the second and third respondents for the following reasons:

1. the deponent to the application Anthony Lorcan Kennedy ('Kennedy') was not in a position to verify the causes of action in that he did not have

personal knowledge of the claims;

2. in its particulars, plaintiff failed to disclose whether the agreement to lend and advance monies (claims A and B) were entered into orally, in writing, tacitly or in any other manner and, that the cause of action had not been described with sufficient clarity in order for plaintiff to consider her defence;

3. that Winnie Gladness Gumede (Manager, Priority Legal Customer Debit Management) of the plaintiff did not 'have personal knowledge of the account and/ or authority' to sign the certificates of balance in that she was not employed at the Boksburg Branch where the bank account in respect of claim A was held nor at the Fourways Crossing Branch where the bank account in respect of claim B was held;

4. Winnie Gladness Gumede's authority to sign the certificates of balance was negated by Kennedy's averment that 'all files, documents and records pertaining to this matter' were in his possession and control;

5. the certificate issued by the collections manager Vinsin Moonusamy in compliance with section 129 read together with section 130 of the National Credit Act 34 of 2005 ('the Act') had been signed prior to the issue of summons and his authority to issue such certificate was negated by

Kennedy's averment that 'all files, documents and records pertaining to this matter' were in his possession and control;

6. without making the required allegation in its particulars, plaintiff had annexed to such particulars, letters which purported to be in compliance with the Act; furthermore plaintiff had failed to send the said letters by registered post to the chosen *domicilium citandi et executandi;*

7. the postal address to which the notices had been sent, was the postal address of a business Ocean Marine, which first defendant conducted as a sole proprietor, plaintiff was aware that the first defendant had ceased trading during May 2008 and had known that the postal address to which the letters had been sent by registered post had not been used by her; she denied having received such notice;

[4] It is trite that this is an extraordinary and stringent procedure which places great limitations on the defendant in that it allows the court to give a final judgment without going to trial. It does not follow therefore, that the application should succeed in all instances where it has not been opposed. The court must satisfy itself that the application prima facie, conforms to the requirements of Rule 32 of the rules of court. In this instance the second and third defendant's did not file any affidavit resisting summary judgement and the first defendant's affidavit resisting summary judgement does not state that she was authorised by resolution to oppose the application on their

behalf.

[5] In resisting summary judgment the defendant should have a bona fide defence to the action and is required to 'disclose fully the nature and grounds of defence and material facts relied upon'. In exercising its discretion to grant the application the court must be satisfied that the claim is technically clear and correct and, that the defendant had failed in its opposing affidavit to present facts which would enable the court to conclude that there was a 'fairly triable and arguable case' or reasonable probability that the defendant would properly defend its case. **Visser v Incorporated General Insurance Ltd 1994 (1) SA 472 (T) at 478 H; Gulf Steel (Pty) Ltd v Rack-Rite Bop Ltd and Another 1998 (1) SA 679 (O) at 683 H-J and 684 A.**

[6] It was submitted that plaintiff's right to proceed against the second and third defendants derived from the written deeds of suretyship. The second and third defendants bound themselves not only as sureties but also as co-principal debtors. It is trite that by so doing they renounced the benefits ordinarily available to sureties as against a creditor. They were debtors, who in terms of the suretyship, ' the bank could proceed without prior excussion of the principal debtor', the first defendant, **Neon and Cold Cathode Illuminations v Ephron 1978 SA 463 (A) at 471 C-E.**

[7] The notice in terms section 129 (read together with section 130) of the National Credit Act was sent by registered post on 10 April 2009 to the postal

address given on the suretyship. There is no proof or reason given by the second and third defendant that the notice had not reached them.

The suretyship bears a stamp of the plaintiff's East Rand Credit Division and not in particular the Boksburg or the Fourways Crossing branches. There is no reason in my view, to assume that Kennedy who is stationed as a manager in the legal Customer Debt Management, Personal and Business Banking Credit section of the plaintiff and, who has offices in Johannesburg would not be in a position depose to the affidavit. He states that the facts were within his personal knowledge and that all files, documents and records relating to this matter were in his possession.

Furthermore, the certificates of balance are meant to assist the court in determining whether the plaintiff's claim was easily ascertainable, for a liquidated amount in money and falling within the provisions of Rule 32. The plaintiff has in my view complied with the rule.

[8] In the premises, the following order is made:

1. The first defendant is granted leave to defend, costs in the cause;
2. The application is granted against the second and third defendants with costs.

TLHAPI, V

(ACTING JUDGE OF THE HIGH COURT)

FOR THE PLAINTIFF/APPLICANT : NEWTONS INC;
NEW MUCKLENEUK, PRETORIA

FOR THE DEFENDANT : EDELSTEIN-BOSMAN INC;
NEW MUCKLENEUK, PRETORIA