IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case No. 4609/2022

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD	**APPLICANT**
(Registration number:1962[…])	
And	
FRANK DE VILLERS THERON N.O.	**1ST RESPONDENT**
(Identity number: 6[…])	
KARIEN THERON N.O	**2ND RESPONDENT**
(Identity number: 7[…])	
BETA TRUST ADMIN (PTY) LTD	**3RD RESPONDENT**
(Registration number:2012[…])	
FRANK DE VILLIERS THERON	**4TH RESPONDENT**
(Identity number: 6[…])	
KARIEN THERON	**5TH RESPONDENT**
(Identity number: 7[…])	

CORAM: MAJOSI, AJ

HEARD ON: 18 APRIL 2024

DELIVERED ON: 07 MAY 2024

JUDGMENT

INTRODUCTION

[1] This is an opposed application for summary judgment in terms of Rule 32 of the Uniform Rules of Court wherein the Applicant seeks an order against the First three Respondents jointly and severally for an amount of R 1 058 531.25, the one paying, the other to be absolved. Summary judgment is also sought against the Fourth and Fifth Respondents for an amount of R 1 000 000.00 as they are guarantors of the debt of the first three Respondents.

II PARTIES

[2] The Applicant is a company with limited liability and bank duly registered and incorporated in accordance with the laws of the Republic of South Africa with its registered office in Johannesburg. It is also a registered credit provider.

[3] The First Respondent is a major male person cited in his capacity as trustee of the Theron Family Trust with registration number IT 474/94. The Second Respondent is a major female cited in her capacity as trustee of the Thereon Family Trust with based in Bloemfontein, Free State.

[4] The Third Respondent is Beta Trust ADMIN (PTY) Ltd, NO, a private company duly registered and incorporated with the laws of the Republic of South Africa cited in its capacity as trustee of the Theron Family Trust. The Fourth and Fifth Respondents are cited in their personal capacities and as guarantors of the guarantee agreement.

III BACKGROUND

[4] On 30 March 2019, the Applicant concluded a written agreement with the First, Second and Third Respondents wherein a credit overdraft facility of R 500 000.00 was extended with interest. The Fourth and Fifth Respondents jointly and severally, guaranteed this debt with a maximum aggregate of R 1 000 000.00 with an additional agreement.

[6] The First, Second and Third Respondents failed to service their debt in monthly instalments and the Fourth and Fifth Respondents also failed to make payments as the guarantors of the debt. Despite lawful demand, the Respondents failed to make payments and the Applicant issued summons to recover the money due and payable for the above-mentioned debts.

[7] A notice of intention to defend was filed and after a plea was filed on behalf of the Respondents, the Applicant's filed an application for summary judgment. The Applicant's Manager for Business Lending Collections and Business and Commercial Banking deposed to an affidavit verifying the cause of action together with the amount claimed and alleged that the Respondents did not raise any issue for trial that would persuade the court not to grant summary judgment.

[8] The Respondents filed affidavits resisting summary judgment and assailed the application for various reasons. Firstly, that the affidavit in support of summary judgment failed to allege that the deponent personally verified the cause of action. Secondly, that the National Credit Act (NCA) is applicable to the agreements. Lastly, that the Trust is not defined as a juristic person and did not sign the credit facility agreement nor did it take a resolution to apply for debt or consent that the debt be extended.

IV DISCUSSION

Rule 32 of the Uniform Rules of Court

[10] Rule 32 sets out the grounds upon which a court may grant summary

judgment and directs that a defendant must either provide security to the satisfaction of the court or file an affidavit within the prescribed time frames wherein they fully disclose the nature and grounds and material facts relied upon for resisting summary judgment.[1]

[11] In Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 9 2009 (5) SA 1 (SCA), Navsa stated the flowing at paragraph 32:

> 'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of

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[1] (1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only -

> (a) on a liquid document;
>
> (b) for a liquidated amount in money;
>
> (c) for delivery of specified movable property; or
>
> (d) for ejectment;

together with any claim for interest and costs.

(2)(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

> (b) The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.
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> (c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may -

> (a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or
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> (b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant 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.

successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment."

[12] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 JDR 0747 (WCC) 2020 JDR 0747, Binns-Ward J said the following at para 13:

" Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application... "

Affidavit in support of summary judgment

[13] The Respondents contend that the deponent of the founding affidavit does not have direct or personal knowledge to enable her to positively swear to all the facts or that she personally verified the Plaintiffs cause of action and the amount claimed for as required by Rule 32(2).[2]

[14] The Applicant averred that the deponent is employed as a Manager

[2] Respondents' Opposing affidavit, para 17- 18.

Business Lending Collections and that as part of her duties ,she has, in her control, all of the records and documentation relevant to the respondents case including all agreements entered into with the respondents including the guarantees signed by the fourth and fifth respondent, all payments made by the respondents and all records showing the failure of the respondents including the guarantors, in paying the debt.

[15] In addition to this, she also has access to all balances relating to the debt of the respondents hence she was able to verify the cause of action as stated in the summons and account for all amounts due and payable together with interest due not only in the credit facility agreement, but also the guarantor agreement.[3] and has also attached her letter of authority confirming same.

[16] In my view, having regard to the founding affidavit as well as the deponent's letter of authority[4] confirming that by virtue of her position, she personally accessed the above-mentioned documents but she is also deposed to an affidavit specifically relating to litigation involving Applicant and the Respondents, I am satisfied that she has sufficient knowledge to swear positively to the facts and was able to verify the Plaintiffs cause of action.

Resolution

[17] The Defendants allege the Third Respondent was not part of the meeting of the trustees that resolved to take out a credit facility of R 500 000.00 and there was also no formal meeting between the trustees of the Theron Family Trust hence there was no resolution taken in that regard.[5]

[18] The Applicant argued that a Trust is a legal personality that requires all appointed Trustees to act together and the respondents were thus required to provide it with a resolution to that effect which was indeed done as per the resolution provided which was signed on the 30 of March 2019.[6]

[3] Founding affidavit, para 4-17.
[4] Annexure SJ1, Letter of authority of Mbali Mazibuko.
[5] Opposing affidavit para 11-14 and Respondents heads of argument, para 4.
[6] Indexed bundle, P 41.

[19] The Respondents' assertion that there was no resolution taken cannot be accepted for several reasons. Firstly, the papers reveal the said resolution was signed on the very same date when the agreement for the credit facility was signed which is coincidently the same date on which the guarantee agreement was also signed. Secondly, clause 10 of the credit facility agreement[7] unequivocally states that the provision of authorizing or supporting resolution is suspensive condition to the agreement. In other words, if this is not provided, credit would not be extended. This was known even before they signed the agreement.

[20] Thirdly, though the Respondent's indicated that the resolution was taken in the absence of the Third Respondent, if one looks at their plea in the main action and their opposing affidavit, specifically paragraph 11 thereof, they do not deny that the third respondent is also a member of the Theron Family Trust but covertly do not disclose who are its members. In my view, this line of argument is not only opportunistic but supports the Applicants assertion that the first and second respondents as trustees, intended to bind the Third Defendant as per the signatures appearing on the resolution provided to the Applicant.[8]

Denial of the breach and Liquated claim

[21] The Respondents deny that they are in breach of the agreement or that the certificate of balance provides an easily calculable amount as per the requirements of Rule 32(1) as there is no specific breakdown of the capital amount and the interest due and payable and contend that the credit was unilaterally extended without their knowledge.

[22] The Applicant in turn avers that clause 18.14 of the overdraft agreement states that a certificate of balance to that effect will be sufficient to prove the claim,[9] the loan amount and interest thereto which is in any event contained in the agreement. I agree with the Applicant for three reasons. Firstly, Respondents have admitted in paragraphs 29.1 and 34.1 of their opposing affidavits that an overdraft

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[7] Ibid P 22.
[8] Slipknots Investments v Du Tait 2011(4) SA 72 (SCA).
[9] Applicants heads of argument. Para 5.

facility of R 500 000.00 was indeed applied for as per the agreement and that they are indeed in arrears with the repayments thereof. This in itself together with clause 18.14 reveals that the Respondents argument in that regard does not suffice and cannot stand as a defence.

[22] Secondly, the signed agreement entered into on the 30 of March 2019 specifically states that the principal debt will be the amount of R 500 000.00 and that it will be subject to a variable interest rate.[10] This is over and above the certificate of balance indicating the amount due for the credit facility and the guarantee agreement. The agreement is thus undoubtedly based on a liquid document. Lastly, the assertion that the overdraft facility was extended without their knowledge cannot be accepted either. The guarantor agreement as signed by the Fourth and Fifth Respondents, who are coincidentally listed as Trustees of the Theron Family Trust, bound themselves jointly and severally to pay the debt (R 1 000 000.00) upon written notice and demand when the debt becomes due and payable. This much is contained in paragraph 1.2 of their agreement.

Juristic persons and the National Credit Act

[23] The last defence raised in resisting summary judgement is that that the trust is not a juristic person and the National Credit Act is applicable to the agreements and that the Applicant failed to conduct a credit risk assessment and may have extended reckless credit and referenced sections 81(1)(b) and section 81(2) of NCA.[11]

[24] The Applicant in its founding affidavit was specific to state National Credit Act is not applicable to the said agreements as they are specifically excluded in terms of section 4(1)(a)(i) of the NCA and the first three respondents (consumers) are juristic persons whose asset value or annual turnover exceeded R 1 000 000.00. Also, in terms of section 4(1)(b) of the Act, the debt exceeds and amount of R 250 000.00.[12]

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[10] Indexed bundle Overdraft agreement clause 1, 4 and 5.
[11] Opposing affidavit, para 29 -30.
[12] Founding affidavit 19- 28.

[25] I am not in agreement with the Respondents when they state that the Applicant made a bald allegation that the NCA is not applicable. The first Three Respondents contracted in their official capacities as trustees of the Theron Family Trust and same can be classified as a juristic person as defined in section 1 of the NCA. Furthermore, the credit facility amount concerned is for an amount of R 500 000.00, which automatically places it in the category of a large agreement. In my view, the NCA is not applicable to this agreement due the credit facility amount and there can be no defence of reckless credit being extended.[13] The Respondents in any event did not dispute that the amount concerned is over the threshold value as determined by the Minister.

[26] The further challenge with the Fourth and Fifth Respondents is that they bound themselves as guarantors to the main agreement. It important to note at this stage, that their liability would only arise should the first three respondents(consumers) fail to repay or settle the debt. In my view, section 4(2)(c) of the NCA makes it clear to state a credit guarantee will only apply to the credit facility in respect of which the credit guarantee was granted.

[27] This therefore entails that should the NCA not be applicable to the main agreement, it can therefore not apply to the guarantee agreement as they (fourth and fifth respondents) did not actually receive the credit extended to the first three respondents and they cannot be considered to be co-principal debtors[14] and their assertions that the NCA is applicable must thus also fail.

[27] In light of the above, I hereby find that the Applicant has made out a case for summary judgment to be granted against all the Respondents and the defences raised thereto have no merit. To that end, the order below shall refer to the parties as they are cited in the main action to dispel any confusion pertaining to all parties concerned. It is trite that costs follow the result and I am not persuaded to deviate from this established principle and will order costs in favour of the Plaintiff (Applicant).

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[13] FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another 2009 (3) SA 384 (T), paras 9 -13.
[14] Ibid para 16 - 23.

V ORDER

[42] Accordingly, I make the following order;

1. The First, Second and Third Defendants are ordered to pay the Plaintiff the amount of R 1 058 531.25. jointly and severally, the one paying, the other to be absolved.

2. The Fourth and Fifth Defendants are ordered to pay the Plaintiff the amount of R 1 000 000.00. jointly and severally, the one paying, the other to be absolved.

3. Interest on the aforesaid amounts above the rate of 7.75% per annum from the 25 June 2022 to date of payment.

4. Costs on attorney and client scale.

MAJOSI OR, AJ

APPEARANCES:

On behalf of the Applicant	Adv. Z Nyezi
Instructed by:	c/o Symington and De Kok Attorneys
	BLOEMFONTEIN
On behalf of the Respondents	Adv. G.S.J Van Rensburg
Instructed by:	Huggett Retief Inc.
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