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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: 10690/2023

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

WESSEL JACOBUS JOHANNES VAN STADEN First Defendant
(ID: 560[...])

ANNA MARIA MAGDALEN VAN STADEN Second Defendant
(ID: 590[...])

Coram: Gassner AJ

Heard: 21 May 2024; supplementary submissions on 24 May 2024

Delivered: 28 May 2024 (by email to the parties and released to SAFLII)

JUDGMENT

GASSNER, AJ

Introduction

[1] This is an opposed application for summary judgment.

[2] The plaintiff, The Standard Bank of South Africa Limited ('Standard Bank'), entered into a home loan agreement ('the loan agreement') with the trustees of the Daenedes Family Trust ('the trust') on or about 17 May 2007 in terms of which it advanced to the trust a loan in the amount of R1 720 000 ('the loan') repayable in 240 monthly instalments together with interest thereon. The loan was secured by way of a mortgage bond, executed by the trust as mortgagor, for an amount of R1 720 000 and an additional sum of R430 000, registered over Erf 9[...] Cape Town at Newlands ('the property').

[3] On 19 July 2007 the first defendant, a co-trustee of the trust, executed a deed of suretyship in favour of Standard Bank in terms of which he bound himself as surety and co- principal debtor for any debts that the trust may owe to Standard Bank ('the suretyship').

[4] The suretyship records that (i) the defendants are married in community of property and (ii) the second defendant consented to the first defendant binding himself as surety and co-principal debtor for the indebtedness of the trust to Standard Bank.

[5] The trust was sequestrated, according to the first defendant, during approximately 2010/2011. In terms of the suretyship the defendants renounced the benefits of excussion (clause 3). Further, in terms of clause 10.1, as read with clauses 12.6 and 12.7, the trust's insolvency did not terminate the defendants' liability in terms of the suretyship.

[6] Standard Bank claims payment from the defendants, as surety and co-principal debtor, in the amount of R1 446 961.97 as well as interest thereon from 2 July 2020 at the rate of 8.55% per annum calculated daily and capitalised monthly ('Standard Bank's claim').

[7] Standard Bank provided a certificate of balance in terms of clause 15 of the suretyship as proof of the amount claimed from the defendants.

The defendants' plea

[8] The defendants have raised a special plea of prescription and have further pleaded over on the merits. In the plea on the merits the defendants (i) deny that they are parties to the loan agreement, (ii) admit signing the suretyship, (iii) deny that the consent of spouse has been completed and signed, (iv) deny that Standard Bank explained the contents of the suretyship (v) deny reading the suretyship and understanding its contents and (vi) plead non-compliance with the National Credit Act 34 of 2005 ('the NCA') and the extension of 'reckless credit'.

The affidavit opposing summary judgment

[9] In the affidavit opposing summary judgment, deposed to by the first defendant, the defendants' plea on the merits is not dealt with in any detail. All the first defendant states regarding the plea, is the following:

'3. *I deny that –*

3.1 *I do not have a bona fide defence to the Plaintiffs claim herein; and*

3.2 *My defences as pleaded do not raise a triable issue between the Plaintiff and me.'*

[10] The first defendant further alleges in the opposing affidavit that he has been discharged as surety because the principal obligation has been terminated in the following circumstances:

10.1 After the trust was sequestrated the first defendant and Mr de Oliveira, in their capacity as trustees of the trust, attended the first creditors meeting, convened by the joint liquidators.

10.2 The liquidators advised the trustees that the property was going to be sold and that *'the proceeds would be paid to [Standard Bank] in settlement of the trust's indebtedness to the Plaintiff.'*

10.3 In April 2016 the property was sold for R2 910 000.

10.4 As the plaintiff received the proceeds of the sale of the property, the underlying debt has been settled in its entirety.

10.5 During the meetings of creditors, Standard Bank did not communicate that it would proceed against the first defendant in terms of the suretyship.

10.6 The mortgage bond over the property in favour of Standard Bank has been cancelled.

10.7 Given the accessory nature of a suretyship, on cancellation of the mortgage bond the obligations of the trust to the plaintiff were extinguished.

The plea of prescription

[11] The defendants pleaded that Standard Bank's claim has prescribed inasmuch as the debt arose on 22 April 2016 when the property was sold and the mortgage bond was cancelled giving rise to a three year prescription period instead of thirty years applicable to debts secured by a mortgage bond. In essence, the defendants plead that the cancellation of the mortgage bond destroyed the security and altered the prescription period to three years as for any other debt.

[12] During argument the defendants' counsel, Mr Banderker, did not press the prescription defence. Given the SCA's decision in *Botha v Standard Bank of South Africa Limited* 2019 (6) SA 388 (SCA) this concession, in my view, was well made. In *Botha* the court held that the cancellation of a mortgage bond, after a mortgage debt is due and prescription has begun to run, does not have the effect of changing the prescription period of the debt from thirty years to three years. In that case, the principal debtor registered several mortgage bonds over his property in favour of the bank to secure the loan and his indebtedness to the bank arising from a home loan agreement. The principal debtor's wife bound herself in favour of the bank as surety and co-principal debtor. When the principal debtor was sequestrated the bank sought

to recover the full outstanding balance then owing to it from the insolvent estate. After the property was sold to a third party and the bonds were cancelled, a balance of approximately R1.2 million was still owing by the principal debtor. The court confirmed that if the debt was due before the bond was cancelled (as is the case in the present matter) it would be classified as a debt secured by a bond and the thirty year period of prescription was applicable in terms of section 11(a)(i) of the Prescription Act 68 of 1969. Accordingly, the SCA upheld the court a quo's judgment against the surety for the shortfall of the debt previously secured by mortgage bonds over the principal debtor's immovable property.

[13] In the present matter clause 14 of the suretyship provides that the prescription period for the principal debt and the surety obligation overlap. The clause reads as follows:

'If the Bank's claims against me/us are at any time due to prescribe (become unenforceable because of the lapse of time) before the Bank's claims against the Debtor prescribe, I/we agree that the claims against me/us will prescribe on the same day as the claims against the Debtor prescribe.'

[14] In light of *Botha* and the specific provisions of the suretyship the defendants' special plea of prescription is unsustainable in law and does not constitute a *bona fide* defence.

Reckless credit

[15] In paragraph 11 of the plea the defendants plead the following regarding the NCA:

'It is vehemently denied that there was due and proper compliance with the various provisions of the National Credit Act and the Plaintiff is put to the proof thereof in that:

11.1 *The Defendants had never submitted proof of income to the Plaintiff;*

11.2 *The Defendants were never subjected to a credit scoring affordability test;*

11.3 *The Defendants were never assessed as being able to pay the debt of the principal debtor.*

Accordingly it is pleaded that the extension of credit to the principal debtor where the Defendants have bound themselves to being personally liable for the debtors of the principal debtor in the event of the principal debtor not being able to pay the debt or being in breach of the debt, is tantamount to reckless credit being extended as contemplated in the National Credit Act.'

[16] The NCA defines reckless credit to mean '*the credit granted to a consumer under a credit agreement concluded in circumstances described in section 80.*' Section 80 in turn provides that a credit agreement is reckless if the necessary affordability and credit history assessments were not done.

[17] The NCA came into effect on 1 June 2007. The loan agreement was concluded on 17 May 2007 before the implementation of the NCA. The suretyship, however, was executed on 19 July 2007 after the NCA came into effect.

[18] Part D of the NCA, more particularly sections 78 - 88, deal, *inter alia*, with over- indebtedness and reckless credit. Item 4(2) of the transitional provisions, set out in schedule 3, provides that the provisions of the NCA only apply to pre-existing agreements to the extent indicated in the table which specifically excludes provisions relating to reckless credit. It follows that the provisions of the NCA relating to reckless credit did not apply to the pre-existing loan agreement in this matter.

[19] The question arises whether the reckless credit provisions of the NCA nevertheless apply to the suretyship inasmuch as it was executed after the NCA came into force.

[20] The NCA does not make specific reference to suretyships but to 'credit

guarantees' as defined in section 1 with reference to section 8(5) of the NCA which reads as follows:

'An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.' (The agreements referred to section 8(2) are not relevant in the present matter).

It is well established that a credit guarantee, as contemplated in section 8(5) of the NCA, encompasses a suretyship (see *Structured Mezzanine Investments (Pty) Limited v Bestvest 153 (Pty) Ltd* 2013 JDR 0862 (WCC) paras 27 - 33; *The Standard Bank of South Africa Ltd v Essa and Others* (18994/2009) [2012] ZAWCHC 265 paras 13-17).

[21] In terms of section 8(1) of the NCA a credit guarantee constitutes a credit agreement for the purposes of the NCA. Section 4 of the NCA sets out in subsections 4(1){a} - (d) categories of credit agreements which are exempt from the provisions of the NCA. Section 4(2)(c) provides that the NCA applies to a credit guarantee *'only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.'* As mentioned earlier, the NCA provisions regulating over-indebtedness and reckless credit (sections 77 - 88) do not operate retrospectively in respect of the loan agreement in the present matter which existed before the NCA came into force. It follows that in terms of section 4(2){c} of the NCA the suretyship is similarly exempt from the reckless credit provisions of the NCA (see *Standard Bank of South Africa Ltd v Essa* supra para 17; *First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) .SA 384 (T) paras 16 - 24; *Nedbank Ltd v Wizard Asset Holdings (Pty) Ltd and Three Others* 2010 (5) SA 523 (GSJ) para 4; *Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd* 2011 (1) SA 575 (SCA) para 8).

[22] Inasmuch as the provisions of the NCA dealing with reckless credit do not apply to the suretyship, the defendants' plea based on reckless credit does not

constitute a valid defence in law.

The remaining defences

[23] In terms of Rule 32(3)(b) an opposing affidavit resisting summary judgment must '*disclose fully the nature and grounds of the defence and the material facts relied upon therefor.*' The purpose of the opposing affidavit is to demonstrate that defendant has a '*bona fide defence to the action.*' (See *Breff.enbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B - H; *Tumileng Trading v National Security and Fire* 2020 (6) SA 624 (WCC) paras 24 and 25). As Binns-Ward J pointed out in *Tumileng* when discussing the post-amendment summary judgment regime, in some cases the defendant can be expected to engage with the plaintiff's averments in the broader supporting affidavit contemplated in terms of the amended Rule 32(2)(b) (*Tumileng* at 635E - F and 6351). (See also *Volkswagen Financial Services v Pi/lay* 2022 (5) SA 639 (KZP) para 38).

[24] The allegations in the defendants' plea that the necessary spouse's consent to the suretyship was not obtained is evidently incorrect as on the face of the suretyship the spouses consent form was completed and signed. In this regard it is noteworthy that the defendants did not plead that the signature appearing on the spousal consent form was not the signature of the second defendant but merely asserted that the consent form was not signed nor completed.

[25] In my view, the bare assertion in the plea that the provisions of the suretyship were not explained to the defendants and that they did not understand them, absent any material facts in the opposing affidavit regarding the circumstances under which the suretyship was signed, falls far short of the requirements of Rule 32(3)(b) having to fully disclose '*the nature and grounds of the defence and the material facts relied upon therefor.*' Ms Francis, the plaintiff's counsel, highlighted in argument that the first defendant was not a disinterested surety. He was a co-trustee of the principal debtor. It was a condition of the loan agreement that the first defendant would execute a suretyship in favour of Standard Bank (as per the special conditions of the loan agreement). As such the first defendant was '*the typical surety in modern society*' referred to by Scott JA in *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA) at

6611 - 662 who binds himself as co-principal debtor for an 'entity' in which he was involved to obtain credit for it. The first defendant confirmed in the opposing affidavit that when the trust was sequestrated his co-trustee and he attended credit meetings in their capacity as trustees. There is no suggestion in the first defendant's opposing affidavit that Standard Bank's claim against the trust was disputed or that the first defendant did not have an understanding of the personal security he provided for the loan. Further, the plaintiff's allegations in the supporting affidavit that its agent explained the terms of the suretyship to the first defendant was not traversed in the first defendant's opposing affidavit. In the circumstances, I am of the view that a bald allegation that the first defendant did not understand the provisions of the suretyship does not comply with the provisions of Rule 32(3)(b).

[26] It is also not a valid defence in law not to have read the suretyship in that as a general rule a surety is bound by the provisions of the suretyship which he has signed, even in circumstances where he alleges that he failed to read the deed of suretyship (see *Airports Company SA Ltd v Masiphuze Trading (Pty) Ltd and Others* (1120/2018) [2019] ZASCA 150; *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) paras 11 - 12). As the defendants have not alleged a *iustus error* which may call into question the enforceability of the suretyship, they are bound by the suretyship.

[27] The additional defences the first defendant raises in the opposing affidavit, summarised in paragraph 10 above, were not raised in the defendants' plea. Given the drastic remedy of summary judgement, I will nevertheless consider whether these constitute *bona fide* defences.

[28] *Botha*, referred to earlier in dealing with the prescription plea, is clear authority to the effect that the cancellation of a mortgage bond securing a loan in respect of which a surety bound himself as co-principal debtor does not extinguish the suretyship obligation. The creditor remains entitled to proceed against the surety for payment of any balance which remains outstanding on the mortgage bond. It follows that the first defendant's argument that on cancellation of the mortgage bond the surety was extinguished does not constitute a valid defence in law.

[29] The first defendant also seems to rely on a tacit understanding (although this is not clearly set out in the opposing affidavit) that Standard Bank would not proceed against the surety as it did not expressly convey during the sequestration process that it would claim any shortfall from the surety. The express provisions of the suretyship, however, preclude the first defendant from relying on such a tacit understanding. Clauses 12.6.2 and 12.6.3 stipulate that the suretyship liability will only end when Standard Bank cancels the suretyship in writing or gives the surety a written release. In the circumstances, any silence on the part of Standard Bank during the sequestration process regarding its intention to proceed against the surety does not constitute a valid release of the first defendant's suretyship obligation.

[30] There seems to be some suggestion in the opposing affidavit that the realisation proceeds of the property which were paid to Standard Bank in 2016 should have been sufficient to pay the balance outstanding on the mortgage bond in full. The plaintiff has produced a certificate of balance in support of the amount outstanding. In terms of clause 15 of the suretyship the defendants have to prove that the debt and interest specified in the certificate of balance were incorrect and more specifically, the mortgage bond indebtedness at the time the property proceeds were received. The mortgage bond was registered in 2007 and the property proceeds were only received in 2016. Substantial interest and arrears could have accumulated during that period. The trust was also liable for any legal costs that Standard Bank may have incurred to enforce the mortgage bond. Given the first defendant's involvement in the sequestration process as co-trustee, he must have sufficient knowledge and access to information about the approximate capital and interest owing on the mortgage bond when the realisation proceeds of the property were received. Notwithstanding such personal knowledge, the first defendant has failed to set out any particulars regarding the capital and accrued interest owing on the mortgage bond in 2016 before the net realisation proceeds of the property were received from which the court could consider whether his contention regarding payment has any factual basis. Given the lack of disclosure regarding the mortgage bond indebtedness before the sale proceeds were received, I am of the view that the vague allegations the first defendant made, belatedly, in the opposing affidavit that the debt has been settled, does not constitute a *bona fide* defence.

[31] In light of the above, I conclude that the defendants have failed to establish a *bona fide* defence to Standard Bank's claim.

[32] It is so that the court has a general discretion to refuse summary judgment even if the opposing affidavit does not measure up fully to the requirements of Rule 32(3)(b). However, having regard to facts involved in this case, the specific provisions of the loan agreement, the mortgage bond and the suretyship as well as the sketchy and vague opposing affidavit, I am of the view that this is not an appropriate case to exercise such a general discretion in favour of the defendants.

Conclusion

[33] In the circumstances, I grant summary judgment.

[34] I make the following order:

Summary judgment is granted against the defendants, jointly and severally, the one paying the other to be absolved, in favour of the plaintiff, as follows:

1. payment of the amount of R1 446 961.97;
2. interest on the amount referred to in paragraph 1, calculated daily and capitalised monthly at the rate of 8.55% per annum from 2 July 2020 to date of payment;
3. the defendants to pay the costs on the scale as between attorney and client.

GASSNER, AJ

Appearances:

Plaintiff's Counsel:	Advocate Chloe Francis
Instructed by:	Stauss Daly Attorneys

Defendants' Counsel: Advocate M S Banderker
Instructed by: Elmes & Elmes Attorneys