

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 42653/2021

- 1. REPORTABLE: NO
- 2. OF INTEREST TO OTHER JUDGES: NO
- 3. REVISED: NO

DATE: 19 JUNE 2024

[Redacted Signature]

SIGNATURE OF JUDGE:

In the matter between:

NEDBANK LIMITED

Applicant

and

IVAN MARX

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 19 June 2024.

Summary:

ORDER

1. The application for summary judgment is dismissed.
2. Costs of the application shall be costs in the main action

JUDGMENT

K. STRYDOM, AJ

INTRODUCTION

1. This opposed summary judgment application raised interesting legal arguments relating to laudable measures taken collectively by Government and banks during the Covid-19 pandemic to assist small to medium size businesses. The Covid 19 loan scheme demonstrated how, during periods of immense adversity, public and private enterprises in South Africa could work together towards the common good.
2. With the pandemic now in the rear-view mirror, the proverbial chickens have come to roost for those who made use of the erstwhile altruism of those private profit driven institutions. The Respondent, having signed surety for such a loan obtained by the principal debtor (a closed corporation now in liquidation) is now held liable for the debt by the Applicant.
3. However, these being motion proceedings, true to form, there are points in limine raised that need to be disposed of before the Court is called upon to delve into the substantial arguments of this matter.

POINT IN LIMINE

4. The Respondent has taken issue with the virtual commissioning of the affidavit in support of summary judgment, as well as the assertion that the deponent had “personal knowledge” of the facts contained therein.
5. As to the latter, the Respondent impugns the assertion that the deponent has personal knowledge of the facts stated on the basis that the due amount and the interest rate applicable differs between the particulars of claim and those stated in the summary judgment application. I am satisfied that these differences are not material. The amount claimed in the particulars of claim is the total amount due by the principal debtor, whilst that in the summary judgment application constitutes the upper limit of liability of the Respondent in terms of the suretyship agreement. Similarly, the differences in interest rate are due to the lapse of time between the issuing of summons and the application for summary judgment. None of these issues are

material, nor do they affect the underlying causa of the claim. This objection is meritless and stands to be dismissed.

6. The objection to the virtual commissioning of the affidavit, on the other hand, requires a more in-depth analysis.
7. It is common cause that the affidavit was commissioned virtually or “remotely”; i.e the Commissioner of Oaths and the deponent were not physically in each other’s presence, but were “face to face” via an on-line platform when the oath was taken and the commissioning was done.
8. Regulation 3(1) of the *Regulations Governing the Administering of an Oath or Affirmation*, requires that the deponent sign the affidavit in the presence of the commissioner. Having last been updated in 1982, it is no wonder that it does not contemplate virtual platforms as being “in the presence of”.
9. It was, in fact the Covid-19 pandemic that brought the utility of virtual platforms to conduct business, social communication and even, court proceedings, firmly within the sphere of universal experience. It is within the context of that pandemic that Goossen AJ wrote the judgment in the, now much abused, matter of *Firststrand Bank Limited v Briedenhann*¹ (“*Briedenhann*”).
10. The Applicant referred to the following passage in *Briedenhann*:

[57] There can be no doubt that the evidence placed before me establishes that the purposes of Regulation 3(1) have been met. To refuse to admit the affidavits would, of course, highlight the importance of adhering to the principle of the rule of law. That point is, I believe, made plain in this judgment. To require the plaintiff to commence its application for default judgment afresh upon affidavits which would contain the same allegations but which are signed in the presence of a commissioner of oaths would not, in my view, be in the interests of justice. There is after all no doubt that the deponents did take the prescribed oath and that they affirmed doing so. It would therefore serve no purpose other than to delay the finalisation of this matter with an inevitable escalation of costs, not to receive the affidavits. In the circumstances, I accept the affidavits deposed to in the manner described in this judgment as complying in substance with the provisions of the Regulations.” [Underlining my own]

¹ *Firststrand Bank Limited v Briedenhann* (3690/2021) [2022] ZAECQBHC 6; 2022 (5) SA 215 (ECG) (5 May 2022)

11. On the strength of this passage this Court was “...urged to similarly exercise its discretion to accept the affidavit which was commissioned correctly in all respect, save for the fact that the deponent and commissioner had contact with each other virtually, rather than physically.”²

12. I have underlined the aspects of the passage that would have to be ignored in order to accede to the Applicant’s request.

13. This is the second judgment, emanating from the same opposed motion roll, where I have been called upon to address the Applicant’s mis-conceived selective reliance on *Briedenhann* as authority for accepting their failure to comply with a *legislative* provision, by employing my *judicial* discretion. Goossen AJ was at great pains to point out that it is not open for litigants to choose to not comply with legislation and neither should Courts encroach the sphere of the legislative branch:

“[51] The advantages of the system used by the plaintiff are, however, not a basis upon which an existing Regulation may be ignored. It is, in my view, not open to a person to elect to follow a different mode of oath administration to that which is statutorily regulated. That is true even if in doing so every effort is made to substantially comply. The regulations stipulate that the declaration is to be signed in the presence of the commissioner. Unless that cannot be achieved, the Regulations must be followed. The fact that the Regulation is directory does not mean that a party can set out to achieve substantial compliance with such regulation rather than to comply with its requirements.

.....

[55] I have no doubt that, in the present case, regulations can be framed to bring them in line with the broader objects of ECTA and to facilitate the use of technologies such as LexisSign.These are matters well beyond the province of a court and are best left to the legislature.’
[Underlining my own]

14. On what basis then did Goossen AJ exercise his discretion in favour of accepting such a non-compliant affidavit? The judgment very clearly explains that, as will all discretions, it was exercised judicially based on evidence and particulars facts before him:

² Applicant’s Heads of Argument para 7.12 CL000-13

“[52]....When a court is asked to exercise its discretion to condone non-compliance, the reasons advanced for such non-compliance are plainly relevant. I doubt that a court would readily accept that an affidavit substantially complies with regulated formalities in circumstances where the non-compliance is as a result of a deliberate choice. In my view, to do so would countenance a situation of self-help”

15. In *Briedenhann*, the Applicant had deposed to an affidavit explaining the decision to employ a virtual platform to commission the affidavit, as well as the method and reliability of the virtual thereof. The Court accepted that the decision to employ virtual commissioning was *bona fide* and “...motivated by a desire to support broader efforts at digitalisation and in the interests of combatting the spread of the Covid 19 virus.”³

16. That was in 2022. In the interceding two years, litigants have cherry-picked from the *Briedenhann* judgment those portions that support their election to disregard legislation, whilst ignoring the various injunctions by Goossen AJ that this is impermissible. To, two years later, still rely on a business model that was held to be impermissible, can hardly be considered to be *bona fide*. To add insult to injury, no explanations are proffered as to why there was non-compliance and Courts are simply, during argument, requested to rubber stamp a party’s election to disregard legislation. Without placing facts and evidence before Court upon which it could exercise its discretion, the Court is essentially asked to usurp the functions of the legislature under the guise of judicial discretion.

17. It is worthwhile to note that earlier this year, the company who had hosted the virtual commissioning platform used in *Briedenhann*, LexisNexis, had brought an application in this division for a declaration that the Act and Regulations must be broadly interpreted, and that that the administration of oaths by a virtual platform therefore accords with the provisions of

³ *Briedenhann* para 53

Regulation.⁴ Having also considered *Briedenhann*, in dismissing the application, Swanepoel J held that:

[19]..... to find for applicant would require me to ignore the clear meaning of the words in the Regulations. In so doing I would be 'crossing the divide between interpretation and legislation', as Wallis JA warned of in Endumeni. It is not for a Court to impose its view of what would be sensible or businesslike where the wording of the document is clear."

18. The current position regarding virtual commissioning is therefore:

- 18.1. Virtual commissioning of affidavits is impermissible and not sanctioned in term of legislation.
- 18.2. Courts have a discretion to accept non-compliant affidavits, but such discretion must be exercised judicially based on the facts particular to each case as presented.
- 18.3. Once the facts of each case justify the exercise of such a discretion, whether or not there was substantial compliance with Regulation 3(1) is but one of the factors that a Court may consider in deciding whether to exercise its discretion in favour of a non-compliant party. On the other hand, a party's election to disregard legislation ("self help") or lack of *bona fides* in doing so are examples of factors that would count against favourably exercising such a discretion.

19. *In casu*, no evidence was presented as to the reasons for, methodology used or the reliability of the virtual commissioning. There are simply no facts before me upon which to exercise my discretion. As a result, the non-compliant affidavit is not accepted and the application itself is therefore not properly before Court in terms of Uniform Rule 32.

20. The application stands to be dismissed on this basis alone. I will, however, briefly address some of the salient arguments raised relating to the defence raised by the Respondent.

⁴ *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Correctional Services* (2023-010096) [2024] ZAGPPHC 446 (29 April 2024)

RESPONDENT'S DEFENCE TO THE MAIN ACTION

21. On the 12th of May 2020, in midst of the devastating COVID 19 pandemic, the Banking Association of South Africa ("BASA"), National Treasury ("Treasury") and the South African Reserve Bank ("SARB") made the following joint announcement:

"The Covid-19 loan guarantee scheme announced by President Cyril Ramaphosa in April will operate from today, 12 May 2020. The initial set of participating banks (Absa, First National Bank, Investec, Mercantile Bank, Nedbank and Standard Bank) are ready to accept loan applications from eligible businesses which bank with them. The activation of the loan guarantee scheme follows the finalisation of legal details by National Treasury, the South African Reserve Bank and the Banking Association South Africa. The loan guarantee scheme is an initiative to provide loans, guaranteed by government, to eligible businesses with an annual turnover of less than R300 million to meet some of their operational expenses. Funds borrowed through this scheme can be used for operational expenses such as salaries, rent and lease agreements, contracts with suppliers, etc. Government and commercial banks are sharing the risks of these loans. Initially, the National Treasury has provided a guarantee of R100 billion to this scheme, with the option to increase the guarantee to R200 billion if necessary and if the scheme is deemed successful. Eligible businesses should contact their primary or main banker."

22. Laziways Travels CC ("the principal debtor"), represented by the Respondent, took advantage of the offer and obtained a loan from the Applicant to the value of R352 905,00. The Respondent also signed a surety agreement in his personal capacity.

23. On the 25th of February 2021 the principal debtor was voluntarily liquidated. The Applicant instituted action for recovery of the loan amount due against the Respondent on the basis of the suretyship he provided. In alleging misrepresentation, the Respondent avers that he was led to believe that the loan was guaranteed by Treasury and that the Applicant had to look to Treasury first in the event of default. Naturally, the Applicant alleges that it has not made the misrepresentation and that it was, in terms of the Covid 19 loan scheme, not obliged to recoup losses from Treasury only, but could opt to rely on the suretyship agreement alone.

24. In support of his argument regarding misrepresentation, the Respondent attached to his plea, the aforementioned announcement and a document entitled "*Answering your questions about*

the Covid 19 loan guarantee scheme” which had accompanied the joint media statement and was authored by BASA, Treasury and SARB. In terms thereof, losses would be dealt with as follows:

“Commercial banks and the National Treasury share the risks of the scheme. The South African Reserve Bank takes no financial risk in the scheme as its loans to banks are guaranteed by the National Treasury. Losses will be allocated as follows:

- a. The net margin on the loan portfolio (approximately 2 percentage points) is pooled as the first loss buffer.*
- b. The 0.5 percentage point credit premium charged by the National Treasury is the second loss buffer.*
- c. Banks will take the third loss, up to 6 percentage points of the amount loaned by that particular bank in terms of the scheme.*
- d. After that, losses will be borne by the National Treasury.*

If a customer defaults on the loan, banks can claim on the guarantee from the Reserve Bank, which will in turn claim the funds from the National Treasury, but only after banks have followed the allocations outlined above and their standard recovery processes. If a bank initiates such a claim, the Reserve Bank will require an independent audit to ensure that sound lending practices were applied....”

25. In the affidavit opposing summary judgment, the Respondent states that:

“23. As a result of this media statement, I approached the Applicant to apply for a loan.

24. I informed the Applicant of the fact that I am applying for this loan solely because of the understanding that the Applicant reached an agreement with the Government and that I would not be liable for repayment in the event that Laziwayz Travels CC defaulted on the loan.

25. The representative for the Applicant did not correct me and indicated that it was indeed the position with this specific scheme. I was never informed that the Applicant would come after me when a guarantee was provided for billions of rands by the Government.

26. If the Applicant explained to me that I could in any way be held liable for a debt effectively enticed and guaranteed by the Government, I would never have signed the documentation.

27. My understanding of a guarantee is that it is a primary obligation to perform in the circumstances, and accordingly the obligation of the business that actually loaned the money, as well as my personal obligation in terms of the surety would be secondary.”

26. The loan agreement is entitled “Covid 19 term loan” and confirmed that *“the context in which the facility is made available is pursuant to the implementation of a funding scheme between*

National Treasury, SARB and certain commercial banks, including Nedbank..” However, save for that reference to the Covid 19 loan guarantee scheme, the remainder of the agreement gives no indication regarding the guarantee by Treasury, nor what the exact terms of the agreement between Nedbank, SARB or Treasury were regarding the methodology for the recoup of losses in the event of default.

27. Counsel for the Applicant argued that the Applicant had a choice whether to, upon the principal debtor’s default, it would recoup its losses on the basis of Treasury’s guarantee or on the basis of the Respondent’s suretyship. It elected to pursue the suretyship route. Whether, within the context of the Covid 19 Scheme this is the correct route for debt enforcement, is not borne out of the wording of the contracts, nor per the particulars of claim or the affidavit in support of summary judgment. During argument, Counsel for the applicant submitted that the media statement relied on by the Respondent used the wording “*..if a customer defaults on the loan, banks can claim on the guarantee...*” as indicative of this choice. However, this statement is made in a document aimed at generally informing the public as to how the scheme would work. Within the context of the entire paragraph, I am unable to discern whether exact legal consequences should arise from the use of the word “can” as would have from the word “should” in a legal contract. Furthermore, the media statement refers to three so-called “loss buffers” before National treasury would bear the losses.

28. To add further confusion, the complete sentence in the statement reads: “*If a customer defaults on the loan, banks can claim on the guarantee from the Reserve Bank, which will in turn claim the funds from the National Treasury, but only after banks have followed the allocations outlined above and their standard recovery processes.*” [Underlining and emphasis my own]. This could either be understood to mean that the banks have a exclusive option to elect their methodology for debt collection or that the three loss buffers must be applied in conjunction with the standard debt recovery processes.

29. It is therefore unfortunate that the Applicant, who would be in possession of the legal instruments underlying the Covid 19 loan scheme, did not make use of the opportunity to clarify the correct

legal position in either the particulars of claim or the affidavit in support of the summary judgment. On personal perusal of the loan agreement as well as the suretyship agreement, these documents also provided no clarification

30. That being said, however, the definitive application of the Covid 19 loan scheme, in terms of the legislative context thereof or legal agreements between SARB, Treasury and Nedbank, is not germane to the nature of the defence raised by the Respondent. He alleges he understood differently and informed the Applicant's representative of his understanding when he signed the suretyship agreement. The representative, so being made aware of his misperception, then failed to correct him before he bound himself as surety.

31. The Applicant refers to the elements required for a valid defence premised on misrepresentation as set out in *Novack v Comair Holdings Ltc*, namely (1) a representation; (2) which was false; (3) which was made by the defendant or the defendant's agent; (4) which is material; (5) which was intended to induce the claimant to enter into the transaction; and (6) did induce the contract (causation).

32. It argues that as it did not author the media statement, the third requirement has not been met, as it was not its agents that made the representation. The Respondent's defence however is that on the basis of the media statement (which lists the Applicant as a participating bank) it approached the Applicant's agents, who then failed to correct his misperception. The question of who authored the media statement is therefore irrelevant. I do however note that the Applicant does not disavow the statement, its content or that it was a participating bank.

33. Insofar as the alleged failure by the Applicant's agents to correct the Respondent's unilateral misdirection is concerned, I am of the view that the context and uncertainties relating to the exact nature of the Covid 19 loan guarantee scheme, the defence raised may well fall within the narrow scope of unilateral mistakes that could, if proven, vitiate an agreement reached:

34. In the matter of *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) at paragraph [9], the SCA held:

".... The respondent's mistake is a unilateral one. Referring to the mistake of the kind the respondent laboured under, it was said in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*:

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered but where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded.'" [Underlining my own]

35. In *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (2000 (1) SA 167 (W) at 175, the Court also confirmed the existence of a defence based on unilateral mistake:

*"The furthest the courts will go on a principle approach is to identify the issue as one of iustus error. See *Sonap Petroleum (SA) (Pty) v Pappadogianis*. For the rest the approach is casuistic. It involves a consideration of the document itself and the nature of the transaction between the parties. By nature of the transaction, I do not mean its legal classification. I mean what transpired between the parties which led to the signing of the document and other relevant admissible evidence which assists in explaining the basis upon which the signature was placed. It would embrace instances where the party who presented the form was aware that the other party was illiterate. It would include misrepresentations made by the creditor or other conduct which a court considers sufficiently blameworthy so as to relieve a party from some, or all, of the ordinary consequences of his signature"* [Underlining my own]

36. The Covid 19 loan guarantee scheme, when introduced was novel. Loan agreements (and suretyship agreements) concluded pursuant to the scheme, were concluded for the first time from 2020. *In casu*, the exact working of the scheme, still remains shrouded in mystery. Save for a terse reference to the scheme in the loan agreement and the particulars of claim, the only information as to the nature thereof presented was the media statement attached to the plea. There is no positive indication from the side of the Applicant as to the correct methodology for debt collection in terms of its agreements with SARB and Treasury. Instead, it regards the suretyship agreement as one which would have been concluded within the context of a loan obtained in the normal course. Whether or not there is a legislative or contractual scheme governing Covid 19 loans, that could affect the standard methodology for debt collection

pursuant to a suretyship agreement, is unknown to this Court. Herein lies the reasonableness of the defence raised by the Respondent: On the strength of the media pronouncement (the content of which the Applicant does not disavow) there certainly is scope for arguing that the Respondent could reasonably have believed that debt collection would first commence against Treasury, before it would against him as surety. If he succeeds in proving at trial that he relayed this belief to the agent of the Applicant and that said agent should have, but failed to, correct him, he could succeed in his defence based on *iustus error*.

37. I am therefore satisfied that the defence brought is *bona fide* and, if proven, valid in law.⁵

38. As a result, the following order is made:

ORDER

1. The application for summary judgment is dismissed.
2. Costs of the application shall be costs in the main action


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K STRYDOM
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA

⁵ *Tumileng Trading CC V National Security and Fire (Pty) Ltd* [2020] ZAWCHC 52

Judgment reserved: 7 May 2024

Judgment delivered: 19 June 2024

Appearances:

For the Applicant:

Adv CL Markram-Jooste

Instructed by: Hack Stupel & Ross

For the Respondents:

Adv R van Dyk

Instructed by: Eddie du Toit Attorneys Inc