



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

1. REPORTABLE: YES/NO

2. OF INTEREST TO OTHER JUDGES: YES/NO

3. REVISED

DATE: 21 June 2024 SIGNATURE:

CASE NUMBER: 2023-043387

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

APPLICANT

and

NEKSES COMMUNICATION (PTY) LTD

FIRST RESPONDENT

PERCY LESLIE SCHOLTZ

SECOND RESPONDENT

JUDGMENT

COERTZEN AJ:

- [1] The applicant applies for judgment against the first respondent for payment of the full outstanding balance on the first respondent's overdraft facility held with

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the applicant. The applicant also applies for judgment against the second respondent, who guaranteed the first respondent's debts.

- [2] The first and second respondents ('the respondents') did not file an answering affidavit. They rely exclusively on a notice in terms of r 6(5)(d)(iii).

THE APPROACH:

- [3] A r 6(5)(d)(iii) notice is neither a pleading nor an affidavit. It may be delivered in lieu of an answering affidavit, or together with an answering affidavit. Where a respondent elects not to file an answering affidavit, the court may determine the application on the evidence in the founding affidavit and on the points of law raised in the notice. The allegations in the founding affidavit must be taken as established facts. A respondent will not be permitted to plead facts or to produce evidence in support of the points of law raised, which should have been placed before the court in an answering affidavit - *Minister of Finance v Public Protector and Others* 2022 (1) SA 244 (GP), 13 – 16.
- [4] Where a respondent also intends to oppose the 'merits', the point of law must preferably be taken as a point *in limine* in the answering affidavit itself – *Pienaar Brothers Proprietary Limited v Brian Pienaar North Proprietary Limited and Others* (21220/21) [2023] ZAWCHC 151 (20 June 2023), 33.
- [5] A respondent will generally not be allowed to delay the case by raising unsuccessful preliminary points, only to thereafter seek a postponement, as this will result in an undue protraction of the proceedings and in a piecemeal handling of the matter, which is contrary to the very concept of the application procedure – *WP Fresh Distributors (Pty) Ltd v Klaaste NO and Others* (16473/12) [2013] ZAWCHC 95 (23 April 2013), 6.



THE APPLICANT'S CASE IN THE FOUNDING AFFIDAVIT:

[6] The applicant's case in the founding affidavit can be summarised as follows:

[6.1] The applicant lent and advanced an amount of R1,000,000.00 to the first respondent on an overdraft facility, in terms of a written business overdraft agreement concluded between the applicant and the first respondent, on 28 February 2020.

[6.2] The overdraft agreement comprises of Part A & Part B, as attached to the founding affidavit.

[6.3] The overdraft sum would attract interest at a variable rate.

[6.4] The overdraft term would be 12 months, reviewable at the applicant's request on an annual basis.

[6.5] In terms of clause 6 of Part A, the overdraft was repayable in full on demand in the circumstances outlined in clause 4 of Part B.

[6.6] The first respondent would default in terms of the overdraft agreement if, *inter alia*, the first respondent failed to pay any amount to the applicant in terms of the overdraft agreement on the due date; and/or if there was a material deterioration in the first respondent's financial position as reasonably assessed by the applicant.

[6.7] If the first respondent defaulted in terms of the overdraft agreement, the applicant could, *inter alia*, after giving written notice to the first respondent, institute legal proceedings to enforce the overdraft agreement, which included to claim the total amount outstanding on the overdraft.

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[6.8] In terms of a written guarantee, signed by the second respondent on 25 November 2019, the second respondent, as guarantor, unconditionally guaranteed and undertook as a principal and independent obligation to and in favour of the applicant, to make due, punctual and full payment of all the past, present and future debts of the first respondent in terms of or arising in connection with agreements concluded or to be concluded between the first respondent and the applicant. The total amount recoverable from the second respondent is limited to R1,000,000.00, together with interest and costs.

[6.9] The first respondent breached the overdraft agreement in that, *inter alia*, the first respondent failed to make payment under the overdraft agreement as and when payment fell due.

[6.10] On 13 June 2022, the applicant, through its attorneys, in writing demanded payment from the first respondent of the full outstanding balance in terms of the overdraft, and from the second respondent, as guarantor. The respondents were given 10 business days from date of the respective written demands to make payment to the applicant.

[6.11] The respondents failed to make payment to the applicant.

[6.12] The applicant relies on certificates of balance to prove the amount owing by the first and second respondents.

[6.13] The provisions of the National Credit Act, 34 of 2005, do not apply.

THE POINT OF LAW RELIED ON IN THE RESPONDENTS' NOTICE:

[7] The relevant paragraphs of the respondents' notice read as follows:



1.11 Clause 4.1 of Part B to the overdraft agreement lists the circumstances under which the principal debtor, i.e. the First Respondent, would be in default in terms of the agreement.

1.12 The Applicant's evidence is that the First Respondent breached the overdraft agreement in that, inter alia, it failed to make payment under the overdraft agreement as and when payment fell due.

1.13 Clause 4.2 of Part B to the overdraft agreement records that:

"If you are in default, we may"

- [more fully quoted in paragraph 15 of this judgment].

1.14 Clause 4.2 of the agreement accordingly requires of the Applicant to, in writing, notify the principal debtor (i.e. the First Respondent) to rectify its breach within 10 (ten) days of the written notice having been sent.

1.15 Clause 4.3 qualifies the aforesaid and records that:

"We may commence with legal proceedings if"

- [more fully quoted in paragraph 16 of this judgment].

1.16 Clause 4.3 accordingly affords the Applicant the right to proceed with legal action against the principal debtor (i.e. the First Respondent) subsequent to having complied with clause 4.2 and having, in writing, demanded that the principal debtor (i.e. the First Respondent) rectify its breach within 10 (ten) days of the written notice having been sent.

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1.18 The Applicant, in paragraph 31 of the founding affidavit, asserts that on 13 June 2022 the Applicant's attorneys transmitted letters of demand to First and

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Second Respondents as per the letters appended as Annexure “FA5” and “FA6” to the founding affidavit.

1.18.1 Paragraph 2 of the letter records that:

- [See paragraph 8 of this judgment].

1.18.2 The letter of demand then demands that:

- [See paragraph 8 of this judgment].

1.19 Ex facie the letter relied upon by the Applicant, appended as Annexure “FA5” to the founding affidavit, the letter does not afford the First Respondent 10 (ten) days written notice within which to rectify the alleged breach.

1.20 The Applicant has not complied with clause 4.2 of the agreement in having failed to, in writing, demand that the principal debtor (i.e. the First Respondent) rectify its breach within 10 (ten) days of the written notice having been sent.

1.21 The Applicant is, consequent upon its aforementioned failure, precluded from commencing with legal action against the principal debtor (i.e. the First Respondent).

1.22 Consequent upon the aforesaid, and premised on the operation of Clauses 4.2 and 4.3 of the overdraft agreement relied upon by the Applicant for its claim against the First Respondent, the Applicant is premature in having launched these proceedings.

1.23 The Applicant is accordingly not entitled to enforce its claim by way of legal proceedings against the First Respondent (and concomitantly against the Second Respondent as surety).’



EVALUATION AND CONCLUSION:

[8] The default relied on by the applicant in the founding affidavit, is an allegation that the first respondent breached the overdraft agreement, in that, the first respondent *“failed to make payment under the Overdraft Agreement as and when payment fell due.”* In the letter of demand addressed to the first respondent, the applicant, through its attorneys, notified the first respondent as follows:

- ‘2. You are indebted to our client in the sum of R 1 097 501.97 together with interest thereon... (the Indebtedness’), arising from the Overdraft Agreement conducted on the Banking Account...
3. You have breached the Overdraft Agreement in that, *inter alia*:
 - 3.1 You have failed to make payment of any amount/s payable in terms of the Overdraft Agreement as and when same fell due; and
 - 3.2 There is, in the opinion of our client, a material deterioration in your financial position.
4. Furthermore, the overdraft facility is repayable on demand.
5. Our client hereby demands that you pay the Indebtedness into our trust account within 10 (ten) business days from date hereof..., failing which our client shall, *inter alia*, institute legal proceedings for the recovery of your obligations to it immediately and without further notification...’

[9] An overdraft is ordinarily repayable on demand - *Bothma-Batho Transport (Pty) Ltd & v Nedbank Ltd* (223/14) [2015] ZASCA 31 (25 March 2015), 17.

[10] In argument, counsel for the applicant sought to rely on the fact that in the founding affidavit, the applicant relies on the first respondent’s ‘breaches’ (plural). According to the argument, the founding affidavit and the annexures

thereto must be read in context. Counsel for the applicant also submitted that because an overdraft is repayable on demand, and that notice to the first respondent, prior to the institution of legal proceedings, was not strictly required.

[11] Counsel for the respondents accepted that as a general proposition, an overdraft is repayable on demand. However, according to the argument, the parties have contracted differently in the present matter. I was referred to *Standard Bank of South Africa Ltd v Hand 2012 (3) SA 319 (GSJ)*.

[12] Clause 6.1 of Part A of the overdraft agreement provides:

‘6.1 This loan is reviewable every 12 (twelve) months or at our request and is payable in full on demand in the circumstances outlined in the Default clause of Part B. – [emphasis added].

[13] It is therefore necessary to consider the circumstances outlined in the default clause in Part B of the overdraft agreement.

[14] Clause 4.1 determines when default in terms of the overdraft agreement will occur. The clause provides:

‘4.1 Default in terms of this agreement will occur if:

4.1.1 you fail to pay any amount payable to us under this Agreement on the due date; and/or

4.1.2 there is a material deterioration, in our reasonable opinion, in your financial position; and/or...’

[15] Clause 4.2 determines which options and remedies are available to the applicant when default occurs. These remedies are set out in the alternative, and may in my view be exercised either in conjunction with each other, or separately, as follows:



'If you are in default, we may - give you written notice of such default requesting that you rectify the default; and/or immediately restrict activity or suspend all or part of the Credit Limit/Reduced Credit Limit on your Loan Account and/or Current Account, without notice to you; and/or withdraw the whole or part of the Credit Limit/Reduced Credit Limit, by giving you 10 (ten) Business Days written notice of the intended withdrawal to you; and/or review the terms and conditions applicable to the Loan; and/or increase the rate of interest charged; and/or commence legal proceedings to enforce this Agreement, including exercising our rights in terms of any Collateral held, if applicable.' – [emphasis added].

- [16] The contentious provisions are contained in clause 4.3, which provides:

'We may commence with legal proceedings if we have given you notice as referred to in clause 4.2 above and you have been in default under this Agreement for at least 20 (twenty) Business Days and at least 10 (ten) Business Days have elapsed since we delivered the notice contemplated in clause 4.2 above and in the case of a notice, you have not responded to that notice or have responded to the notice by rejecting our proposal.'

- [17] The crux of the point of law raised by the respondents is that the applicant failed to give written notice to the first respondent as contemplated in clause 4.2, to rectify the first respondent's default within 10 business days, before commencing legal proceedings. According to the argument, the applicant is precluded from commencing with legal action against the first respondent, and the present application is premature.

- [18] In my view the point of law relied on by the respondents is without merit. In terms of clause 4.2, the applicant "may" (amongst other options open to it), give notice to the first respondent, requesting the first respondent to rectify its default. The fact that the applicant "may" give such a notice, does not in my view detract from the remaining options and remedies made available to the applicant in terms of clause 4.2, which do not involve the giving of such a notice to remedy the default.

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- [19] It follows that clause 4.3 only applies if the applicant has opted to give the first respondent written notice to rectify the default. The applicant is however in my view not obliged in terms of the agreement to give such notice. The applicant may commence with legal proceedings to enforce the agreement, and to exercise its rights in terms of any collateral held – (i.e. the last option made available to the applicant in terms of clause 4.2), without the requirement of a prior notice to the first respondent to rectify its default.
- [20] The judgment in *Hand* does not assist the respondents. The court there found that the creditor failed to allege and prove that it had earned the right to cancel an instalment sale agreement. The question of ‘*due demand*’ before cancellation does not arise in the present matter. I have already found that the applicant was not obliged to give a notice to the first respondent as contemplated in clause 4.2 before demanding repayment of the overdraft.
- [21] It follows that the applicant was entitled to demand repayment of the overdraft as soon as a default, as contemplated in the default clause in Part B, occurred, which includes a failure to pay any amount payable to the applicant on due date (as alleged in the founding affidavit) and/or if there was a material deterioration, in the applicant’s reasonable opinion, in the first respondent’s financial position (as stated in the letter of demand).
- [22] It is an uncontested, established fact a default occurred as contemplated in clause 4.1. It is an uncontested, established fact that the applicant in writing demanded repayment of the overdraft by written notice to the first respondent, within 10 business days, failing which legal action will be instituted.
- [23] It was not in dispute at the hearing that the second respondent, as guarantor, is liable under the guarantee for the first respondent’s indebtedness, for repayment of the overdraft.

[24] The amounts certified in terms of the applicant's certificates of balance as proof of the outstanding balance due and payable to the applicant, are not disputed by the respondents.

[25] It follows that the applicant is entitled to an order for payment as against the first and second respondents, jointly and severally.

[26] The overdraft agreement provides for attorney and client costs in the event of the applicant instituting legal proceedings to enforce the overdraft agreement. The applicant seeks an order for costs accordingly.

[27] In the result I grant judgment in favour of the applicant against the first and second respondents, jointly and severally, the one paying, the other to be absolved – (which judgment shall be limited as against the second respondent, to a maximum aggregate amount of R1,000,000.00, plus interest and costs), for:

1. Payment of the sum of R1,212,658.58;
2. Interest to date of payment at the rate of 14.600% *per annum*, calculated daily and compounded monthly in arrears from 25 February 2023, both dates inclusive.
3. Costs of the application on a scale as between attorney and client.


YVAN COERTZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 18 March 2024

Date of judgment: 21 June 2024

The judgment was provided electronically by circulation to the parties' legal representatives by email and by uploading the judgment to the electronic case file on Caselines. The date and time for delivery of the judgment is deemed to be at 10h00 on 21 June 2024.

Appearances:

Counsel for the applicant:

M De Oliveira

Instructed by:

Jason Michael Smith Inc. Attorneys

Counsel for the first and second respondents: M Jacobs

Instructed by:

Jacobs Roos Fouche Inc. Attorneys