

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

Case number: 046733/2023

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED: NO.

Date **26 September 2024**

Signature

In the matter between:

FIRSTRAND BANK LIMITED

(Reg. No. 1929/001225/06)

Applicant

and

**INITIATIVE FOR SPECIALIZED RESOURCE
MANAGEMENT (PTY) LTD**

(Reg. No.: 2017/444417/07)

First respondent

DANIEL FRANCOIS DU TOIT

(ID No 6[...])

Second respondent

RUDOLPH JOHANNES VAN WYK RAUTENBACH

(ID No 8[...])

Third respondent

JUDGMENT

WILLIAMS, AJ

- [1] The applicant applied for judgment to be granted, jointly and severally, against the three respondents. On 27 October 2023 the Honourable Tshombe J granted judgment against the first respondent, the principal debtor, for payment of R2,855,712.17, plus interest and attorney and client costs, as agreed.
- [2] The application against the second and third respondents was postponed. After the exchange of affidavits, it now served before me.
- [3] The alleged liability of the second and third respondents is based on alleged Deeds of Suretyship. The second and third respondents do not dispute signing the suretyship, however, the second respondent says he only initialled the document throughout (i.e. on every page). He never signed it in full on the page which called for a full signature.
- [4] Firstly, I deal with two ancillary points raised by the respondents.
- 4.1. Both the second and third respondents (I refer to defences raised in their respective answering affidavits) contend that the applications against them is premature. They say that an unresolved (i.e. pending) Rule 30 application precludes the main application from being entertained. That application alleges that the main application should fail because the founding affidavit was “*commissioned*” by an attorney, *ex officio*, under circumstances where the attorney is “connected” to the applicant’s attorney of record.
- 4.2. It is, however, common cause that the founding affidavit was again signed, albeit after commencement of these proceedings, before another (an independent) Commissioner of Oaths who duly commissioned it. The re-signed (and re-commissioned) founding affidavit was served on 31 July 2023.

4.3. The objection to the re-signed (and re-commissioned) founding affidavit is without substance.

4.4. There is ample authority that I can condone any deficit in that realm.

4.5. There is no real prejudice here – it being trite that whether you win or lose the case is not the measure whether condonation should be granted or not. I grant condonation insofar as is necessary.

4.6. I do however hold further that the applicant would only be entitled to costs from the date upon which it filed the correctly commissioned founding affidavit.

[5] 5.1. The second respondent also contended that the documents were not properly uploaded to CaseLines.

5.2. It is lamented that when preparing Heads of Argument it was not possible to refer to the specific pagination, as later uploaded to CaseLines. This issue became resolved.

5.3. It is not a basis upon which the matter should have become postponed, nor a basis upon which judgment should not be granted. All the relevant issues were properly ventilated.

[6] I now deal with the only two real issues:

6.1. whether the second respondent can escape liability because he only initialled the page which called for his full signature. The second respondent relies on **Melville & Another v The Master and Others** 1984 (3) SA 387 (C), which states that it is incumbent upon the claimant (applicant in this instance) to prove compliance with the formalities of Act 50 of 1956, as confirmed most recently in **Jurgens v Volkskas Bank Ltd** [1993] 1 ALLSA 199 (A);

6.2. whether the applicants' failure to incorporate into the original Notice of Motion a date of hearing, rendered the application a nullity. Second respondent says that on the basis of **Simross Vinteners (Pty) Ltd v Vermeulen**; **VRG Africa (Pty) Ltd v Walters t/a Tren Litho**; **Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen** 1978 (1) SA 779 (T) at 782B, and **Gallagher v Norman's Transport Alliance (Pty) Ltd** 1992 (3) SA 500 (W) at 502E to 503C), that the application was fatally defective.

[7] **Ad the "signature" defence:**

7.1. Section 6 of the General Law Amendment Act, 50 of 1956 ("the Act") demands that the Deed of Suretyship be "*signed*" by the surety. Signature is not defined in the Act. **LAWSA** Vol 26, paragraph 195 (First Re-Issue), postulates that a signature may take the form of a written version of the signer's name or his or her initials. The authors argue that whether only initials are a signature for purposes of the Act, would depend on the intention with which the initials were made.

7.2. Caney's **The Law of Suretyship** (6th Edition), argues that the word "sign" is derived from the Latin "*signum*" which (only) means a mark. The argument progresses that "signed" as demanded by the Act, could mean merely the placing of a mark on the document (which identifies the person signing) and it is placed on the contract with the intention of identifying such person (page 69). Whether a person writes his or her full name and surname, or merely deploys his or her initials, is irrelevant.

7.3. Indeed, if regard be had to the dictum of Margo J N in **Standard Bank of South Africa Ltd v Bhamjee & Another** 1978 (4) SA 39 (W), the signature or initial must authenticate, in a manner intended to cover the whole contract.

7.4. Second respondent has however quoted, in this regard, the matter of **Melville & Another v The Master & Others** 1984 (3) SA 387 (C). That

matter dealt with the requirement in the Wills Act, prior to it being amended by the Law of Succession Amendment Act, 43 of 1992. That Act was needed to change the definition of “sign” to include also the making of initials, rather than a full signature. Before the amendment it was held in **Melville & Another** that an initial does not constitute a signature and that the particular Will was invalid.

- 7.5. Also before the amendment, **Harpur NO v Govindamall & Another** 1993 (4) SA 751 (A) confirmed that the word “signature” must be interpreted against ordinary popular sense. The Appellate Division held that to “*sign*” does not include the making of initials only. The Will in that matter also was held to be invalid.
- 7.6. The ratio in **Harpur NO**-case was that the requirement of signatures (in that case that of the witnesses to the Will) was meant to provide a safeguard against fraud, uncertainty and speculation. This ratio was also adopted and applied in **Webster v The Master & Others** 1996 (1) SA 34 (D).
- 7.7. Two of the annotations to the decision in the **Harpur NO**-case both dealt with electronic, but full signatures. They did not turn on the issue that the signatory had merely placed an initial. However, in one of those matters, **Borcherds & Another v Duxbury & Others** 2021 (1) SA 410 (ECP), emphasized that Courts lately follow a pragmatic approach to “signatures”. The main function of a signature being accepted, is to authenticate the identity of the signatory and, more importantly, to evidence an intention to be bound.
- 7.8. I am tempted, in the absence of an amendment to this General Law’s Amendment Act, to hold that because the second respondent only initialled the page of the Deed of Suretyship, that it does not comply with the Act. But based on the modern trend that emphasizes the intention to be bound, I hold that the second respondent initialling the whole document, complies with section 6 of the Act.

7.8.1. In his answering affidavit the second respondent simply mentions that his initials appear on each of the individual pages of the Deed of Suretyship but that the space provided for his signature is “empty”. He does not contend (and could presumably not as an experienced businessman contend, credibly) that he did not intend to bind himself as surety for the debt.

7.8.2. There is thus no issue as to the identity, nor as to his intention to be bound.

7.8.3. Also, on an objective basis (divorced from these facts), the legislature in the case of Wills were justly more inclined to stipulate for a full signature, to prevent fraud, than it would have been for suretyships.

[8] **Ad the “failure” to include a date of hearing in the original Notice of Motion:**

8.1. The application was served on the second respondent on 24 May 2023. His attorneys filed the Notice to Oppose on 12 June 2023. This was before the target date of 27 October 2023. The second respondent initially opted not to file an answering affidavit. Settlement negotiations ensued.

8.2. On 23 October 2023 the second respondent realized that the applicant wished to pursue the application. The second respondent’s attorney, Mr Verster, deposed to an affidavit seeking a postponement. The basis was that the second respondent (and possibly other respondents) were only told on 23 October 2023 that their settlement proposals were not acceptable. The matter was duly postponed.

8.3. The second respondent’s counsel has attached to his Heads of Argument, a copy of the Notice of Motion, allegedly served on the

second respondent. It does not have the target date of 27 October 2024 typed or written in.

- 8.4. It is argued, on the basis of an unreported judgment in **R H Plant Hire CC v Kobus Vlok & 2 Others** (North Gauteng Case No 2023/018299) that the proceedings here are a nullity, because of non-compliance with Uniform Rule 6(5)(b)(iii). That sub-rule contemplates that an applicant must state in the Notice of Motion when the matter will be heard, if it is not opposed.
- 8.5. The authorities relied on the **R H Plant Hire CC**-judgment that are not applicable to the instant matter. The **R H Plant Hire CC**-case relied essentially on **Simross Vintners (Pty) Ltd v Vermeulen; VRH Africa (Pty) Ltd v Walter t/a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen** 1978 (1) SA 779 (T). That case is authority for the proposition that a Notice of Motion is a nullity if a target date is not stated. The **Simross Vintners**-case dealt with cases where an applicant, applying for sequestration of the respondent on a *nulla bona* (and thus is exempted from having to serve on the respondent) addresses, i.e. seeks to give notice in terms of Rule 6(2) to the respondent, but fails to state the date when the matter will be before Court.
- 8.6. In the instant matter the application was served, opposition was given and ultimately an answering affidavit was filed. As stated by the authors in **Erasmus**, *Superior Court Practice*, the reason for the sub-rule is that the respondent should be afforded an opportunity to file an answer and/or to be heard. Here the second respondent was served, unlike in the **Simross Vintness**-case.
- 8.7. After the **Simross Vintness**-judgment there have been several judgments to the effect that procedural irregularity such as this, are not nullities – and can be condoned. See **Krugel v Minister of Police** 1981 (1) SA 765 (T).

8.8. **Mynhardt v Mynhardt** 1986 (1) SA 456 (T) is authority for the proposition that the fact that the second respondent answered, constitutes a waiver of the right to rely on the purported nullity of the proceedings. This is in line with **Chasen v Ritter** 1992 (4) SA 323 (SE), where the headnote states that “*distinction between a proceeding which is irregular (and can be condoned) and proceeding which is a nullity (and cannot be condoned) is artificial and serves no real purpose and of little practical value -*”. Exactly the dictum also of the **Mynhardt**-case.

8.9. I thus decline to hold that in the circumstances the applicants’ Notice of Motion was a nullity. The alleged failure to include a target date can, should and is hereby condoned.

8.10. Significantly the Supreme Court of Appeal has latterly even condoned the absence of the Registrar’s signature on a Summons (which was held in the circumstances to have interrupted prescription and was not a nullity). This overturned previous Appellate Division authority on the point. See **Motloung & Another v Sheriff, Pretoria East & Others** 2020 (5) SA 123 (SCA) and **Minister of Prisons & Another v Jongilanga** 1985 (3) SA 117 (A). The latter case held that whether or not procedural irregularity results in a nullity, still has to be seen in the context of the rules as a whole – also in the context of the remedial provisions of Rules 27(3), which allows for condonation being granted.

[9] In the result I grant judgment against the first and second respondents, jointly and severally (also being joint and several with the judgment granted against the first respondent) for:

1. Payment of R2,855,712.17 (Two Million Eight Hundred and Fifty Five Thousand Seven Hundred and Twelve Rand and Seventeen Cents), in respect of account number 6[...];

2. Payment of interest on the said amount of R2,855,712.17 (Two Million Eight Hundred and Fifty Five Thousand Seven Hundred and Twelve Rand and Seventeen Cents) at the applicant's prime lending rate (currently 11,25% (eleven comma twenty five per centum) per annum), plus 2% (two per centum), thus 13,25% (thirteen comma twenty five per centum) per annum, compounded monthly, from 30 April 2023, until date of payment, both days inclusive;
3. The costs of this application subsequent to 31 July 2022 on the scale as between attorney and client.

WILLIAMS AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date heard : 15 April 2024

Date of judgment : 26 September 2024

Representation for the applicant :	Adv W Steyn Instructed by Thethe Swart Inc.
Representation for the second respondent:	Adv Gert Jacobs Instructed by Verster Attorneys
Representative for third respondent:	Adv P Marx Instructed by Gerhard Botha Attorneys