IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable/Not reportable

Case number: 5691/2019

In the matter between:

SASFIN BANK LIMITED	**FIRST PLAINTIFF**
SUNLYN (PTY) LTD	**SECOND PLAINTIFF**
and	
MAKATSANG CLEANING SERVICES (PTY) LTD	**FIRST DEFENDANT**
GERT STEFANUS VENTER	**SECOND DEFENDANT**
FRANCOIS DU TOIT	**THIRD DEFENDANT**

Coram: Loubser J
Heard: 23 July 2024
Delivered: 17 October 2024

Summary: Value of evidence presented by corporation's employee as to the indebtedness of the Defendants, as it appears from documents she has access to and with which she has familiarized herself – in action proceedings where such evidence remained unchallenged and uncontradicted.

ORDER

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1. The Second and Third Defendants are ordered to pay the First Plaintiff, jointly and severally, the one paying the other to be absolved, the sum of R520

900.01 together with interest on the said amount at the rate of 16.25% per annum from 1 April 2019 to date of final payment.

2. The Second and Third Defendants are ordered to pay the costs of suit, including the cost of the summary judgement application, on the attorney and client scale, including the fees of counsel on scale C, jointly and severally, the one paying the other to be absolved.

JUDGMENT

LOUBSER J

[1] In this action the Plaintiffs claim from the Second and Third Defendants, jointly and severely, an amount of R520 900.01 plus interest at the rate of 16.25% per annum from 1 April 2019 to the date of payment. In terms of the Particulars of Claim, the claim arises from a written guarantee signed by the Second and Third Defendants on 29 June 2016 whereby they bound themselves jointly and severely as guarantors and co-principal debtors for the proper and punctual payment by the First Defendant to Itec or its cessionaries of all amounts owing in terms of a rental agreement between the First Defendant and Itec.

[2] The Plaintiffs further pleaded that the First Defendant committed a material breach of contract by failing to maintain regular monthly payments in terms of the rental agreement, resulting in an outstanding debt totaling R520 900.01 plus interest. The First Defendant, however, was placed in liquidation on 5 April 2018, and hence the claim against the Second and Third Defendants.

[3] Furthermore, it is the case for the Plaintiffs that Itec ceded all its rights, title and interest in the rental agreement to Absa Finance, which in turn ceded those rights to the Second Plaintiff. The Second Plaintiff then ceded the rights to the First Plaintiff. The position is therefore that, in terms of all the cessions, it is actually only the First Plaintiff who is now claiming from the Second and Third Defendants.

[4] In terms of the rental agreement concluded between Itec and the First Defendant, Itec rented certain office equipment as described in an addendum to the agreement, to the First Defendant. The agreement further stipulated that, *inter alia*, Itec would be entitled to cede all of its rights in and to the agreement to any third party without notice to the First

Defendant. A certificate signed by any of the managers of Itec would be proof of the amount of the indebtedness of the First Defendant, and it would not be necessary for Itec to prove the appointment of the person signing such certificate. This same stipulation also appears in the guarantee signed by the Second and Third Defendants.

[5] In their Plea, the Second and Third Defendants pleaded that they have no knowledge of the cessions that took place, as alleged. The allegation that the rental agreement was concluded by duly authorised representatives of Itec and the First Defendant, was met by a blunt denial. The material terms of the agreement relating to Itec's entitlement to cede its rights and to the clause stipulating that a certificate signed by a manager would serve as proof of the indebtedness of the First Defendant, was also bluntly denied in the Plea. However, the Second and Third Defendants admitted that they have signed the guarantee concerned, and they also admitted the material terms of the guarantee. Curiously enough, one of the material terms of the guarantee stipulated that a certificate signed by an Itec manager of other authorised person, would be proof of the amount of the First Defendant's indebtedness, and that it would not be necessary for Itec to prove the appointment of the person signing the certificate.

[6] Furthermore, the Second and Third Defendants 'vehemently' denied the allegations that the First Defendant failed to maintain regular monthly payments. No further particulars were provided to substantiate this denial. They also bluntly denied the alleged outstanding amount of R520 900.01, as confirmed in a certificate of balance issued by the First Plaintiff.

[7] Upon receipt of this Plea, the First Plaintiff made application for summary judgement against the Second and Third Defendants on the premise that they have not disclosed a *bona fide* defence and that the plea has been filed solely for the purpose of delay. The application came before Mbhele, ADJP. In dismissing the application, she pointed to the fact that the two Defendants deny that they owe the amount claimed in the summons, and that they have requested the Plaintiffs to furnish them with detailed statements reflecting all the payments made from the inception of the contract. The statements then provided showed the following: The total amount owing as at 30 April 2019 is R549 462.45, as opposed to R520 900.01 reflected in the certificate of balance attached to the summons. Further, there is an amount described in the statement as 'Non Rental Charges/Past Due Amount' totaling R168 540.95. Thirdly, the Plaintiff further claims legal fees/costs in the amount of R23 252.75 and late charges in the amount of R9 858.32, which amounts are not catered for in the contract. The learned Judge then mentioned that all the

aforementioned amounts have not been explained nor accounted for in the summons. She dismissed the application with costs to be costs in the cause, and granted the Second and Third Defendants leave to defend the action.

[8] The action proceedings then came before this Court. The Plaintiff called only one witness to testify, namely Ms. Minenhle Moyo. She is the legal co-ordinator of the First Plaintiff. She testified that if there is some breach of a contract that was concluded with the First Plaintiff, the matter ends up with her. If necessary, the matter is then handed over to attorneys. The First Plaintiff has a centralized storage space for all documents, and she has access to all those documents. She testified that she has familiarised herself with all the documents relevant to this case. She further explained that the First and Second Plaintiffs belong to the same group of companies, and they do business in the buying of rental agreements. The Second Plaintiff is the marketing arm of the First Plaintiff. Itec is a supplier of equipment, and she deals with Itec on a regular basis.

[9] Ms. Moyo further dealt with the rental agreement entered into between Itec and the First Defendant, and more specifically with the material terms thereof, as already alluded to herein. She also traversed the cession instruments of the rights in and to the rental agreement from Itec to Absa Finance, from Absa Finance to the Second Plaintiff, and from the Second Plaintiff to the First Plaintiff. Ms. Moyo then referred to the certificate of balance issued by the First Plaintiff and mentioned that the certificate was signed by a Mr. Vorster, who is the senior litigation manager of the First Plaintiff. She also confirmed that the First Defendant has failed to make payment in terms of the rental agreement and is indebted to the First Plaintiff in the amount reflected in the certificate of balance.

[10] In cross-examination Ms. Moyo testified that this is her fifth year with the First Plaintiff, and that she became the legal co-ordinator of the First Plaintiff, after summons was issued. She conceded that the main cession agreement between Itec and Absa Finance was not concluded on 24 April 2004, as alleged in the Particulars of Claim, but on 29 April 2004. She further confirmed that she does not know Mr. Duyver, who has signed the main cession agreement on behalf of Itec.

[11] Significantly, the evidence of this witness regarding the terms of the rental agreement, the cessions of the rights in terms of the agreement, the failure of the First Defendant to make payment as stipulated in the rental agreement, and the amount of the claim as reflected in the certificate of balance, remained unchallenged during the cross-examination. After the cross-examination, the case of the Plaintiff was closed, whereupon

the Second and Third Defendants also closed their case.

[12] In presenting final argument in the matter, counsel for the Plaintiffs submitted that the Plaintiffs are entitled to judgement against the two Defendants, since the Plaintiffs have succeeded in discharging the onus resting upon them. On behalf of the Defendants, it was submitted that the Plaintiffs have failed to prove that the entities named Absa Finance, Sunlyn and Sasfin (the Second and First Plaintiffs respectively) were incorporated entities and that the cessions, as alleged, had taken place. They have further failed to prove that there was a failure to pay rentals on the part of the First Defendant, and what the outstanding amount payable by the Defendants actually is. By reason of the failure to prove these aspects, the Court should make an order of absolution of the instance, it was submitted.

[13] Now it is common cause between the parties that Itec and the First Defendant concluded a written rental agreement on or about 19th June 2016, and the terms of the agreement are not in dispute. It is also common cause that the Second and Third Defendants bound themselves jointly and severally as guarantors on behalf of the First Defendant. What is in dispute, is that the Plaintiffs are juristic persons, that the aforesaid cessions indeed took place, that the parties in the cession agreements were represented by authorized representatives, and that the outstanding amount in respect of the rental agreement amounts to the sum of R520 900.01, as it appears from the certificate of balance issued by the First Plaintiff.

[14] Having regard to what is in dispute, the question arises to what extent the Court can rely on the evidence of Ms. Moyo. To put it differently, what is the evidentiary value of her testimony? It is clear that she was not personally involved in the transactions that took place between the parties and the other entities involved. She was not even the legal co-ordinator of the First Plaintiff at the time that summons was issued in this matter. Now that she has become the legal co-ordinator, she has access to all documents held in the centralized storage space of the First Plaintiff. She has familiarized herself with all documents relevant to this case. In presenting evidence, she placed, *inter alia*, the rental agreement, the guarantee provided by the two Defendants, the contracts of cession and the certificate of balance before the Court. She also confirmed that the First Defendant has failed to make payment in terms of the rental agreement and that the outstanding amount is the one reflected in the certificate of balance.

[15] The evidence of Ms. Moyo at least constitutes *prima facie* evidence of the aspects

that the Plaintiffs have to prove. For instance, the cessions of the rights of Itec and the fact that the instruments of cession were signed by duly authorized representatives of the relevant parties, appear to have so taken place on the face of the documents itself. At the same time, the Second and Third Defendants failed to challenge the evidence on any of these or the other aspects in respect of which Ms. Moyo testified. To make it worse, they failed to provide any evidence to contradict the evidence so presented.

[16] In Firstrand Bank Ltd v Johannes Jacobus Meyer and Another[1] it was held that "the deponent is indeed an office bearer of the plaintiff who would ordinarily in the discharge of his duties obtain personal knowledge of arrear payments and the extent thereof. He declares that he is in possession of all the plaintiff's documentation relating to the cause of action. It is not in dispute on the papers that this is correct. In the circumstances, I do not consider that the second argument can succeed." In the present case, the rental agreement expressly provides for the right to cede and to transfer all rights in and to the rental agreement, without prior notice to the First Defendant. The Plaintiffs have placed before this Court the relevant written instruments of cession which on the face of it appears to be regular and valid. In Hippo Quarries (Tvl) (Pty) ltd v Eardley[2] the following was stated by Nienaber, JA: "The cession was thus an essential link in the plaintiff's case against the defendant. The plaintiff had to prove its authenticity. It did so by producing an apparently regular and valid written cession. The evidentiary burden thereupon shifted to the defendant to show that the document in reality was not what it seemed to be."[3]

[17] In any event, it needs mentioning that it is not open to persons in the position of the Second and Third Defendants herein, who were not parties to the cession agreements, to challenge the validity of those agreements. It is only the contracting parties themselves that can do so.[4]

[18] It follows that, on a balance of probabilities, the evidence of Ms. Moyo stands to be accepted by this Court. It is consequently found on the basis of the documents that she placed before the Court, that the Plaintiffs are juristic persons, that the cessions in question did indeed take place, and that the parties in the cession agreements were represented by duly authorized representatives. However, something more has to be said about the

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[1] Unreported decision of the Eastern Cape Division per Esteen, J under case number 3482/2010 delivered on 17 March 2011

[2] 1992 (1) SA 867 (AD)

[3] At 873 D-E

[4] Letseng Diamonds Ltd v JCI Ltd and Others 2009(4) SA 58 (SCA) at para 23; Corporate Finance Solutions (Pty) Ltd v Dwergieland Kleuterskool CC and Others, unreported Judgment of the Full Bench of South Gauteng High Court, case no. A5020/2011

certificate of balance issued by the First Plaintiff and the consequent amount of the claim instituted by the Plaintiffs.

[19] The certificate of balance no doubt provides *prima facie* proof of the amount of indebtedness of the First Defendant. When no evidence is presented by the Defendants to disturb that *prima facie* evidence provided by the certificate then the evidence becomes sufficient proof, for instance where the Defendants closed their case without having led any evidence whatever.[5] This is what happened in the present case.

[20] Both the rental agreement and the guarantee signed by the Defendants stipulate that a certificate signed by any of the managers of Itec would be proof of the amount of the indebtedness of the First Defendant. It has been submitted on behalf of the Defendants that the present certificate issued is worthless because it was not signed by a manager of Itec, but by a manager of a different entity, namely the First Plaintiff. I do not agree with this contention. In their guarantee, the Second and Third Defendant agreed that a certificate signed by an Itec manager or other authorized person, would be proof of the amount of the First Defendant's indebtedness. In their plea, they admitted the material terms of the guarantee.

[21] In presenting final agreement, counsel for the Defendants conceded that the contents of the rental agreement between Itec and the First Defendant is not in dispute. The rental agreement stipulated that Itec would be entitled to cede all of its rights in and to the agreement to any third party without notice to the First Defendant. This being the case, the Second and Third Defendants can hardly pretend that it was not within their contemplation that a cessionary of Itec would need to issue the said certificate in order to show the amount of indebtedness. It speaks for itself that the need for such a certificate could arise only a long time after the cession had taken place, during which period the First Defendant could have breached the rental agreement without any involvement or knowledge of Itec. Viewed as such, it can safely be accepted that it was tacitly agreed between the Defendants and Itec that the certificate could be issued not only by Itec, but also by any of its cessionaries at the relevant moment. I consequently find that the certificate issued by the First Plaintiff is a true and acceptable reflection of the indebtedness of the first Defendant at the time.

[22] In the premises, the action of the Plaintiffs must succeed. As to costs, the Second and Third Defendants have agreed in clause 11 of the guarantee that any costs orders

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[5] Senekal v Trust Bank of Africa Ltd 1978(3) SA 375 (AD) at 383 B-C

shall be made on the attorney and client scale. I have no reason to depart from that agreement.

[23] The following order is made:

1. The Second and Third Defendants are ordered to pay the First Plaintiff, jointly and severally, the one paying the other to be absolved, the sum of R520 900.01 together with interest on the said amount at the rate of 16.25% per annum from 1 April 2019 to date of final payment.

2. The Second and Third Defendants are ordered to pay the costs of suit, including the cost of the summary judgement application, on the attorney and client scale, including the fees of counsel on scale C, jointly and severally, the one paying the other to be absolved.

[redacted]

P.J. LOUBSER, J

For the Plaintiffs:	Adv. S. Aucamp
Instructed by:	ODBB Attorneys Inc, Sandton c/o Symington and De Kok, Bloemfontein
For the Second and Third Defendants:	Adv. S. J. Reinders
Instructed by:	Van Wyk and Preller Inc, Bloemfontein