

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 20 NOVEMBER 2024
SIGNATURE: _____

CASE NUMBER: 16547/2022

In the matter between:

The Standard Bank of South Africa

Applicant

And

Kyriacou, Pavlos

First Respondent

Thumos Properties (Pty) Ltd

Second Respondent

Kyriacou, Elriza

Third Respondent

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 20 November 2024.*

Summary: Summary Judgment-Rule 32, Uniform Rules of the Court. Suretyship agreement as co-principal debtor- General Law Amendment 50 of 1956. No good cause shown for the defence for not awarding the orders prayed for. Execution of immovable property to satisfy the debt owed by the surety as a co-principal debtor is justifiable.

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This was an application for a summary judgment in terms of Rule 32 of the Uniform Rules of the Court against the Third Respondent for a matter that was heard before me on 09 November 2023.

[2] The Plaintiff sought relief against the Respondents jointly and severally for:

[2.1] Payment of R16 919 205.65 but limited to R16 000 000.00 for Second and Third Respondents.

[2.2] Payment of interest on the amount of R16 919 205.65 at the agreed rate of 5.50 per annum from 01 March 2022 to date of payment.

[2.3] Liability of the Third Respondent for payment of capital and interest in terms of prayers 1 and 2 above shall be jointly and severally liable with the first and second respondents, the one paying the others to be absolved, but no judgment is to be granted against the first and second respondents in terms of this application.

[2.4] Against the Third Respondent only for an order in terms of which the mortgaged property for the Plaintiff is declared especially executable:

[2.4.1] Portion [] of the Farm Rietfontein [] Registration Division J.R. The Province of Gauteng; Measuring 1.0000 () hectares in extent; held by Deed of Transfer: No [] [].

- [2.5] Registrar is ordered to authorise to issue a writ of execution of the above property.
- [2.6] Payment of costs of the suit.
- [2.7] Condonation is granted for the filing of this application, to the extent it may be required.

[3] The application was resisted by the Third Respondent:

[3.1] disputing the validity of the agreement between the Plaintiff and the First Defendant; the suretyship agreement signed by the Third Respondent and the alleged amount due. The Third Respondent substantiated her defence and argued that:

[3.1.1] the requirements of Rule 32(1) are to be granted with reference to a liquid document; for a liquidated amount and for delivery of specified movable property or for ejectment and the Plaintiff's claim does not fall in any of the categories to fulfill the said Rule.

[3.1.2] She went further and concretised the defence against the suretyship agreement and contended that:

[3.1.2.1] The content; meaning extent or consequences of suretyship was not explained to her in any manner whatsoever;

[3.1.2.3] The fact and extent of the wording of the suretyship was not explained to her and especially the fact that the suretyship was for an indefinite period for any debt;

[3.1.2.4] The suretyship was not signed in the presence of the representative of the plaintiff, and she was not afforded an opportunity to have the document explained to her;

[3.1.2.5] It was not explained to the Third Respondent what the suretyship entails and that it can be used against her "*ad infinitum*" in the future and was under the impression and believed that suretyship was for a specific transaction;

[3.1.2.6] When the new credit facility was awarded pursuant to the credit agreement in respect of that was sent to the Port Alfred branch which was signed, and no suretyship agreement was entered into at that point and the First Respondent was satisfied that the new facility did not include a surety.

[3.1.2.7] The Third Respondent did not intend when signing the 2008 surety that she would bind herself for future applications and credit facilities with the Plaintiff and it was not explained to her that the surety can be used in the manner the Plaintiff allowed.

[4] The judgment in respect of prayers 1, 2, 3, 6 and 7 were granted in court just after hearing and argument whilst prayers 4 and 5 were reserved.

[5] It is now the consideration of the judgment for the rationality of prayers 4 and 5 that are the subject of the decision herein. This judgment is therefore limited to the reserved 4 and 5 prayers only.

[6] The core content to be determined is to establish whether the Third Respondent has a *bona fide* defence against the granting of prayers 4 and 5 as envisaged in the Particulars of Claim.

Discussion

[7] In this case, the Court moves from a premise of an understanding of the foundations of the application for summary judgments as prescribed in Rule 32 of the Uniform Rules of the Court. The said Rule provides that:

- (1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only:
 - (a) on a liquid document;
 - (b) for a liquidated amount in money;
 - (c) for delivery of specified movable property; or
 - (d) for ejectment.

[8] To date, voluminous jurisprudence has since been produced by the courts and it is now established that Rule 32 has been consistently applied for the development of the substantial body of case law that elucidates the way of the application and evaluation of the requirements for granting or refusing summary judgment. To determine the nature of the document as envisaged in Rule 32, Brand AJ in ***Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa 2011 (5) BCLR 505 (CC)*** held that:

in principle, however, a document is liquid if it demonstrates, by its terms, an unconditional acknowledgement of indebtedness in a fixed or ascertainable amount of money due to the plaintiff. Many different sorts of documents have been found to qualify as —liquid in terms of this definition and therefore sufficient to find provisional sentence. They include acknowledgments of debt, mortgage bonds, covering bonds, negotiable instruments, foreign court orders and architects' progress certificates, (*para 15*, footnotes omitted).

Similarly in an opposed application for a summary judgment as in this matter, Motzinger AJ in ***Pareto (Pty) Ltd v Theron (9804/2023) [2024] ZAWCHC 138***, stated that

considering the drastic nature of a summary judgement a helpful starting point when evaluating the request must always be whether the procedural requirements outlined in rule 32(1)(a - d) of the Uniform Rules of Court have been satisfied. Common sense dictates that a drastic remedy requires a high degree of strict compliance. The claim must therefore be based on a liquid document, or a liquidated amount of money, delivery of specified movable property or for ejectment, together with any claim for interest and costs, (*para 11*).

[9] In the context of this case, the Third Respondent's raised two special pleas against the Plaintiff's particulars of the claim relating to her liability that is grounded first on the implications of Rule 32 requirements in servicing the debt due. It is common cause that the parties entered into a loan agreement in terms of the facility known as "Liberator facility" which was accepted by the First Respondent on 26 March 2008 and allocated an account number 363 315 489. As of 4 February 2022, the First Respondent was in areas of R5 262 153. 38 after having defaulted from the initial agreement of paying monthly instalments of R259 152.93 of the original debt. The question which arises from the Third Respondent's default in servicing the debt due is whether the defendant's real defence and its *bona fides* do not subject this court speculation, (Toni AJ in ***Phillips v Phillips (292/2018) [2018] ZAECGHC 40***, *para 41*).

[10] This application for a summary judgment with the defence that it does not fall in any of the categories envisaged in Rule 32, the certificate of balance signed by the Plaintiff's deponent is indicative of the *prima facie* proof of the debt still due by the Third Respondent as a co-principal debtor to the First Respondent. Rule 32(2)(b) put the Plaintiff in cause to prove his action and requires:

(1) A verification of the cause of action and the amount, if any, claimed;

- (2) An identification of any point of law relied upon;
- (3) An identification of the facts upon which the plaintiff's claim is based upon; and
- (4) A brief explanation as to why the defence as pleaded does not raise any issue for trial.

[11] Accordingly, the Third Respondent made a strong argument that the Plaintiff failed to satisfy the requirements of Rule 32 in that the claim was not meant for a liquid amount or document. The filing of the affidavit by the Plaintiff's deponent has verified the cause of the Plaintiff's action and identified the points of law and the claim for a specific amount of money which forms the basis for a justifiable ground for the granting of the summary judgment. I am of the view that the Plaintiff has verified a justifiable cause of action and correctly identified the points of law relied upon and the claim for a specific amount of money was justified. The Third Respondent's argument that the claim is not based on a liquid document is misdirected because the execution of the property is designed to satisfy the debt owed. The defence raised is therefore not *bona fide* and not good in law.

[12] The second leg of this application relates to the legitimacy of the suretyship agreement. This Court acknowledges the accessory nature of the suretyship agreement because of the valid principal obligation of the debtor to the creditor as in this case, (Ponnan J in ***Odendal v Structured Investments (Pty) Ltd (482/13) [2014] ZASCA 89, paras 8-11***). In this case, the Third Respondent raises a myriad of issues about his lack of knowledge; the document (suretyship agreement) not being explained to her and signed without the Plaintiff's representative. It is also common cause that the parties entered into a suretyship agreement a suretyship agreement on 20 March 2008 at Pretoria as indicated in the particulars of claim (***POC 7***). The Third Respondent bound herself as a surety and co-principal debtor as envisaged in this agreement. The substance of prayers 4 and 5 is grounded on the validity and lawfulness of the said suretyship agreement. The substance of suretyship agreements is regulated by section 6 of the General Law Amendment Act 50 of 1956 which provides that: 'no contract of suretyship entered into after the commencement of this Act, should be valid, unless the terms thereof are embodied in the written document signed by or on behalf of the surety' ... An exposition of the substance of section 6 was given meaning by Jafta JA in ...***Inventive Labour Structuring (PTY) Limited v Dennis Corfe 31/2005*** who stated that 'for a suretyship agreement to be valid, the terms must be embodied in a written document signed by or on behalf of the surety. Once there is no qualm over the validity of the surety agreement, a surety's liability arises and is contingent upon the principal debtor's failure to satisfy the debt', (*paras 4-6*). I am also persuaded by Koen

J in **Aston v Lot 54 Alfon Park CC Case No AR 447/2011** who stated that a 'suretyship agreement must be construed strictly' (*para 8*) citing with approval **SA General Electric Co (Pty) Ltd v 6 Sharfman 1981 (1) SA 592 (W) at 597A to B**. In that case, it was held that 'in construing the deed of suretyship it is as well to remember that broadly speaking a suretyship receives as a rule a somewhat strict interpretation, so that it may not be extended beyond what was expressed or was at least covered by the intention and sense of the words of the suretyship' (*para 9*). I am further encouraged by the rules of strict interpretation which were affirmed by Motzinger AJ above relating to the interpretation of summary judgment due to their nature which requires careful consideration of the establishment of both parties *bona fides* of their claims.

[13] In this case, the suretyship agreement is not ambiguous as it identifies the creditor; the principal debtor and the surety as envisaged in paragraph 1 of the agreement. Drawing from Jafta JA above with reference to this matter, the agreement is formally valid because the creditor is a juristic person whilst the principal debtor is represented by a natural person which is the Third Respondent in this case. It therefore presents no shadow of doubt about the validity of the suretyship agreement and the defence about being unaware of the contents of documents falls to be dismissed on this ground alone, (*para 8*).

[14] I am finding it difficult to understand the attitude of the Third Respondent because she is not disputing the signature to the agreement except for the lack of knowledge with contents not being explained to her. This was a reckless conduct at its best as she is very articulate in the affidavit resisting the application. This is an insight to this Court of the knowledge she has relating to the signed agreements which require the self-awareness about the contents of the document being signed. Having regard to the context which emanated from the reading of the suretyship agreement, the Third Respondent's liability is endorsed by the validity of the principal debt which is not disputed by her. The contents of the document not being explained to her whilst appending her signature to it is a serious disregard of the law and particularly of her role in upholding the best interests of the First Respondent. The prescriptive explanation that is evident in Clause 16 which was signed by the Third Respondent as given and endorsed by her is indicative of the legitimacy of the suretyship agreement. I must express that the Third Respondent's signature justifies the validity of the agreement and not the lack of awareness which is not presented as a misrepresented document after having accepted the principal debt of the First Respondent.

[15] In this case, the principal debt is not challenged as invalid and therefore the suretyship agreement is not affected by the wild allegations of being unaware whilst she voluntarily consented and signed the agreement to be bound by the terms of the main debt. Simply put, there was no dispute of a valid and enforceable agreement between the Plaintiff and the First Respondent with whom the Third Respondent bound herself as co-principal debtor in the funding that was made available from “Liberator facility”. This Court is not to put the ‘cart before horse’ because there is no variation of the suretyship agreement except for the lack of awareness of its contents which is not justifiable in law.

[16] I am satisfied that a valid surety agreement has been concluded and the Third Respondent has not raised any *bona fide* defences which are justifiable in law. The Third Respondent failed hopelessly in defence of not knowing and the surety agreement not being explained to her. Lack of awareness of the contents of the suretyship is incompetent in law, vague and embarrassing to the intellectual capital of this court to evade liability without just cause. In my view, the Plaintiff was justified in the relief sought by producing the certificate of balance and the outstanding amount owing which entails the establishment of a valid claim.

[17] Accordingly, the following order is made:

[17.1] Property:

[17.1.1] Portion [] of the Farm Rietfontein [] Registration Division J.R.
The Province of Gauteng; Measuring 1.0000 () hectares in extent; held by
Deed of Transfer: No [] [] is declared especially executed.

[17.1.2] Registrar is ordered to authorise to issue a writ of execution of execution
of the property described in 17.1.1 above.

N NTLAMA-MAKHANYA
ACTING JUDGE, HIGH COURT
GAUTENG, PRETORIA

Date Heard: 09 November 2023

Date Delivered: 20 November 2024

Appearances:

Applicant:

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Respondents:

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