

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: A2023-114292

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
SIGNATURE

**12 DECEMBER 2024
DATE**

In the matter between:

KEBRASCAN (PTY) LTD T/A ENGEN MARKET GATEWAY

First Appellant

TEBOHO THEOPHYLUS SEEKO

Second Appellant

CYNTHIA SEEKO

Third Appellant

and

ENGEN PETROLEUM LIMITED

Respondent

Coram: WINDELL et MAHALELO JJ et YACOOB J

Heard: 28 August 2024

Delivered: 12 December 2024

J U D G M E N T

WINDELL, J:

INTRODUCTION

[1] This is an appeal and cross-appeal against the judgment and order of Berger AJ. The appeal is with leave of the court a quo. For ease of reference, the parties will be referred to as in the court a quo: Engen Petroleum as ('the applicant') and the first, second and third respondents, as ('the respondents').

[2] The applicant is a registered wholesaler in terms of the Petroleum Products Act, 120 of 1977, and the owner of the Engen branded fuelling station situated at City Deep Extension 2 ('the site'). At the time of the institution of the proceedings against the respondents, the first respondent, Kebrascan (Pty) Ltd t/a Engen Market Gateway ('Kebrascan'), was a registered retailer and operated the site pursuant to and in terms of an 'Agreement of Lease and Operation of Service Station' ('the operating lease') concluded during March 2015. To avoid confusion, this was the latest iteration of an agreement whose initial commencement date was 01 November 2009. It is common cause that the applicant sold and delivered fuel and fuel related products ('the product') to Kebrascan in terms of the operating lease.

[3] On 3 November 2009 the second and third respondents signed a Deed of Suretyship in terms of which they bound themselves as surety and co-principal debtors together with Kebrascan to the applicant for all monies that 'are now or may hereafter be owing by the principal debtor to the creditor from any cause howsoever arising'.

[4] The lease agreement operated until 30 March 2020. During 2019, a dispute arose between the applicant and Kebrascan concerning the proposed sale of Kebrascan's business. This resulted in extensive litigation between the applicant and Kebrascan regarding the site up until March 2021.

[5] This litigation culminated in the conclusion of a settlement agreement, which essentially permitted Kebrascan to exit the Engen network by selling the site to an unrelated third party. The settlement agreement also facilitated the seamless transfer of the site and business from Kebrascan to the third party. It, amongst other things, entailed that Kebrascan continue to trade on the site in accordance with the operating lease.

[6] On 21 September 2021 Kebrascan sold its business at the site to a third party. Kebrascan, however, continued to remain in occupation of and operated the site, whilst the third party's retail license was being approved. The retail license was approved on 11 January 2022.

[7] Consequently, and in terms of the settlement agreement, Kebrascan had to hand over the site to the third party and vacate the site within 14 days from 11 January 2022 (25 January 2022), failing which Kebrascan, in terms of the settlement agreement, would be liable to the applicant in respect of certain holding over penalties. Kebrascan only vacated the property on 9 February 2022. Throughout the period of litigation, the conclusion of and the implementation of the sale agreement, the applicant continued to sell the product to Kebrascan.

[8] Before the court a quo, the applicant sought a money judgment against all three respondents in the sum of R5 765 223.96 (the main application). It was alleged that during or about the period 10 January 2022 to 9 February 2022, Kebrascan placed

orders for the product in accordance with the operating lease with the applicant. The applicant, through its duly authorised representatives, accepted such orders at its usual, alternatively normal, alternatively agreed price and accordingly sold and delivered the product to Kebrascan. The applicant also levied certain charges against Kebrascan pertaining to rates, refuse, electricity and water consumed by Kebrascan during the relevant period. Statements of account reflecting the relevant purchases and amounts owed by Kebrascan were attached to the founding affidavit.

[9] The applicant alleged that Kebrascan failed to pay for the product and charges. Similarly, the second and third respondents, who had bound themselves as surety and co-principal debtors together with Kebrascan to the applicant, failed and/or refused to settle the debt.

[10] The respondents opposed the main application. Kebrascan denied the allegation that it was indebted to the applicant in the sum of R5 765 223.96 and put the applicant to the proof thereof. It further alleged that whilst the operating lease between the applicant and Kebrascan was still in force, the applicant introduced an ACB (Automated Clearing Bureau) payment system, whereby orders for further product would not be delivered by the applicant without any payment by Kebrascan of the previous delivery. It was therefore denied that the applicant could have sold and delivered goods to Kebrascan in the amount of R5 491 161.72 without payment having been received.¹

[11] The second and third respondents denied signing a deed of suretyship for the lease that operated from April 2015 to 30 March 2020. They also alleged that

¹ This amount referred to by the respondents in their answering affidavit is the amount for the product sold, and excludes the other costs and charges.

Kebrascan provided the applicant with 'in-house guarantees', the purpose of which were to guard against any claims that the applicant may have against Kebrascan.

[12] The respondents instituted a counter-application in the amount of R14 800 000. In the counter-application Kebrascan sought payment from the applicant in the amount of R10 000 000, being the value of the goodwill of the business; an amount of R3 000 000 (value of the stock), and R1 800 000 (value of the assets). It was alleged, inter alia, that Kebrascan suffered damages as a result of the applicant's (a) failure to comply with the settlement agreement; (b) failure to apply stringent qualifying criteria on its preferred successor, and (c) acting in bad faith when it refused to approve SB Petroleum, a 'financially qualifying purchaser who was introduced by the first respondent'. The respondents further denied any liability in respect of the ancillary charges as these amounts were to be set-off against Kebrascan's counter-application.

[13] The court a quo granted the main application for a reduced amount of R4 158 071.10 and dismissed the counter-application. The following order was issued:

[55] In the result, I make the following order in relation to the main application:

55.1 The first, second and third respondents, jointly and severally, the one paying the other to be absolved, are directed to make payment to the applicant of:

55.1.1 the sum of R4 158 071.10.

55.1.2 interest on the sum of R4 158 071.10 at the rate of 4% above the ruling Prime Bank Overdraft Rate of the Standard Bank of South Africa, calculated from date of service of summons (23 May 2022) to date

of payment; and

55.1.3 cost of suit.

[56] In relation to the counter application, I make the following order:

56.1 Absolution from the instance is granted; and

56.2 There shall be no order as to costs.'

GROUND OF APPEAL

[14] The respondents only seek to have the judgment of the court a quo set aside in respect of the main application. The grounds are: first, even though the judgment amount was reduced from R5 765 223.00 to R4 158 071.10, the court a quo failed to take into account that the operating lease had terminated on 25 January 2022 and allowed claims after the said date. According to the respondents, the amounts owing as of 25 January 2022 amounted to R2 606 629.33. Second, the applicant failed to prove that the product was sold and delivered prior to 25 January 2022. Third, the certificate of balance dated 25 May 2022 is not sufficient to prove the amount owing. Fourth, and last, the court a quo should have considered the in-house insurance cover taken by the applicant against losses incurred as a result of Kebrascan's default in payment of fuel and lubricants sold and delivered. (The last two issues were not raised during the application for leave to appeal).

[15] In respondents' heads of argument, the respondents made submissions on two further issues, not raised during the initial argument and/or in the notice of appeal. These are (a) irreconcilable issues of fact incapable of resolution on the papers and (b) the applicant's attempt to make out its case in reply with the attachment of the delivery notes in the purported attempt to prove delivery of the product.

[16] The applicant's cross-appeal is founded on a single ground, i.e. the court decided issue(s) which were not put or fully argued in the papers or at the hearing. The result of this is that the court a quo unilaterally reduced the applicant's claim for product sold (excluding charges) from R5 491 161.72 to R4 158 071.10 - a difference of R1 333 090.62.

THE CERTIFICATE OF BALANCE/DISPUTE OF FACT

[17] The onus is on the applicant to prove Kebrascan's indebtedness. The parties included a term in the operating lease that the applicant would be entitled to prove Kebrascan's indebtedness by the production of a certificate of balance, which will constitute prima facie proof thereof.

[18] The certificate of balance set out Kebrascan's indebtedness in the amount of R5 765 223.96. The applicant also, as previously stated, attached a statement in the name of Kebrascan to the founding affidavit, recording the amounts owing, in confirmation of the amount recorded in the certificate of balance.

[19] In *Bank of Lisbon International Limited v Venter en 'n Ander*,² the court pointed out that reliance on a certificate of balance becomes problematic when 'other evidence' emerges which casts doubt on the correctness of the contents of the certificate. The evidentiary burden, (not the onus of proof), therefore rests on a defendant/respondent to disturb the evidentiary weight of the certificate of balance. In the absence of some evidence to the contrary, the fact in issue must be taken to have been proven.³ If the prima facie evidence or proof remains unrebutted at the close of

² 1990 (4) SA 463 (A) (at 478G).

³ *Scagell and Others v Attorney-General of the Western Cape and Others* 1997 (2) SA 368 (CC) at para 11.

a case, it becomes 'sufficient proof' of the fact or facts (on the issues with which it is concerned) required to be established by the party bearing the onus of proof.⁴

[20] Did Kebrascan adduce any evidence to disturb the prima facie evidence of its indebtedness? In its answering affidavit Kebrascan merely stated that no amounts were due and payable and questioned how the applicant could have sold and delivered goods to it in the amount of R5 491 161.72 for four months without payment. In this regard reference was made in paragraph 6.3 of its answering affidavit to the ACB system introduced by the applicant:

'6.3 Whilst the Operating Lease between the Applicant and the First Respondent was still in force, the Applicant introduced an ACB payment system (Automated Clearing Bureau) whereby payments for all goods sold and delivered would be made on the second day after delivery. No order would have been released by Applicant without any payment by First Respondent of the previous delivery.'

[21] Implied in the respondents' defence is that they accepted that the product had been sold and delivered as alleged by the applicant but denied that the corresponding payment had not been made as the applicant would not have sold or delivered any product to Kebrascan without payment of a previous delivery. It is important to note, as was found by the court a quo, that Kebrascan did not state positively that it had paid any of the amounts claimed by the applicant.

[22] The ACB system, simply put, is a direct debit order system. The applicant explained in its replying affidavit that in the event that a customer wishes to trade on a direct debit, they must submit a security deposit and execute a direct debit order mandate that authorises the applicant to charge their bank account upon delivery of

⁴ *Salmons v Jacoby* 1939 AD 588 at 593.

the product. The direct debit will execute a payment either in the mornings or around 15:00 in the afternoon. If the client has insufficient funds, the debit order will be rejected and returned to the client's account as unpaid.

[23] These allegations regarding the ACB system are mere speculation and are without merit. They do not qualify as evidence, do not create a dispute of fact and leave the court guessing as to the basis for the denials. The production of Kebrascan's bank statements showing successful debits would have settled the question once and for all. However, Kebrascan chose simply to obfuscate.

[24] It is trite that the certificate of balance (that constitutes prima facie proof of the amount outstanding) cannot be rebutted by bald, vague, or sketchy denials by the respondents.⁵ In the absence of any evidence to rebut the certificate of balance, it is sufficient proof of the amount owing to the applicant.

MAKING A CASE OUT IN REPLY

[25] In its replying affidavit to the respondents' answering affidavit, the applicant annexed delivery notes confirming the delivery of the products sold and delivered to Kebrascan. The respondents complain that this is an impermissible attempt by the applicant to prove Kebrascan's delivery of the product and that the court ought to have dismissed the claim on this basis alone.

[26] The criticism against the applicant's replying affidavit is unwarranted. The applicant sufficiently established and proved the cause of action by making the requisite averments and attaching the relevant documents to their founding affidavit. When in answer, the respondents raised the issue of the ACB system, the applicant

⁵ See *Breitenbach v Fiat (Edms) Bpk* 1976 (2) SA 226 (T) at 228E-G

in its replying affidavit confined itself to the allegations of the impossibility of delivery if there had not been payment made by Kebrascan and attached the delivery notes confirming that the product was sold and delivered to Kebrascan. They were attached to counter the respondents' averments, and not to verify the amount owing, as they did not account for payments made or debit orders returned.

[27] Kebrascan's vague approach to opposing the applicant's claim in their answering affidavits made it unclear whether it was the failure to pay or also the delivery of the product which was being placed in dispute. In fact, the respondents provided minimal information in opposing the applicant's claim in their answering affidavits. Instead, they concentrated on their counterclaim, which exceeded R14 million. They figuratively "placed all their eggs in one basket," as they were under the impression that they could offset any amount they owed the applicant against the counterclaim. It was only when their counterclaim failed, that they raised an issue with the replying affidavit.

[28] In my view, this is a clear attempt by the respondents to evade liability by now introducing unmeritorious 'defences' to the main application because their counterclaim was unsuccessful.

SURETYSHIP

[29] The second and third respondents admit that they signed the suretyship agreement. However, they maintain that this agreement is no longer valid because the primary agreement Kebrascan entered into with the applicant expired on 31 December 2013. Additionally, they contend that the 'new contract' contained insurance that was designed to alleviate the sureties' obligations.

[30] In support of their argument, they rely on *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another*⁶ in which the Supreme Court of Appeal held that a contract of suretyship is a separate contract from that of the principal debtor and his or her creditor. The court remarked as follows:

'It [the surety agreement] is, however, accessory to that main contract. Thus, for there to be a valid suretyship there has to be a valid principal obligation. Put differently, every suretyship is conditional upon the existence of a principal obligation. For, as Nienaber JA put it "(g)uaranteeing a non-existent debt is as pointless as multiplying by nought". It follows that a surety is not liable to a person to whom the principal debtor is not liable. It is well settled that the general rule is that a surety may avail himself or herself of any defences that the principal debtor has, save for those defences that are purely personal to the principal debtor.' (footnotes omitted)

[31] The submissions of the respondents are evidently inaccurate. Firstly, there is an operating lease that was extended from time to time between the applicant and Kebrascan. Consequently, there was a valid principal obligation. Secondly, the wording of the suretyship agreement clearly states that the deeds were intended to be continuous:

'This suretyship shall be a continuing and standing one, incapable of termination (even with respect to obligations of [Kebrascan] which may not yet have arisen at any time at which I may desire to terminate the same) without the prior written consent of the [applicant] and shall be in addition and without prejudice to any other securities now or hereafter to be held by the [applicant] from or on behalf of [Kebrascan]. Without limiting the generality of the foregoing, this suretyship shall remain in force as a continuing security, notwithstanding any intermediate

⁶ [2010] ZASCA 148; 2011 (2) SA 266 (SCA); [2011] 2 All SA 471 (SCA) at para 11.

settlement of account, and notwithstanding my death or legal disability, and shall be binding on my estate and my executor and administrator.'

[32] In addition, as referred to earlier in this judgment, the second and third respondents bound themselves as sureties and co-principal debtors with Kebrascan (the principal debtor) for the due and punctual payment to the applicant (creditor) for 'all monies as are now or may hereafter be owing by the Principal Debtor to the Creditor from any cause howsoever arising.' (Emphasis added)

[33] The respondents thus failed to raise a valid defence. The court a quo was correct in finding that there was no basis for the contention that the deeds of suretyship terminated when the first lease agreement came to an end and that the terms of insurance in the second lease agreement and not contained in the original lease agreement matters were irrelevant.

[34] The deeds of suretyship are independent undertakings made by the second and third respondents in favour of the applicant. They are not contingent upon the validity or continued existence of either or both of the lease agreements, but upon the existence of the principal debt between Kebrascan and the applicant.

THE CROSS-APPEAL

[35] The court a quo had to determine whether payment was made by and on behalf of Kebrascan. Kebrascan's opposition was however hopelessly vague. It provided no specific allegations regarding either payment, the placement or acceptance of orders, or the delivery thereof. These were not, therefore, ever properly placed in dispute for the court to determine.

[36] To prove Kebrascan's indebtedness, the applicant relied on a certificate of balance. Instead of determining whether the respondents adduced any evidence to disturb the certificate of balance which constituted prima facie proof of Kebrascan's indebtedness, the court a quo, stepped into the arena and "opposed" the applicant's claim. It held as follows:

'[34] It is clear that the applicant could not have been delivering its product to first respondent after 9 February 2022 and certainly not until 26 April 2022. The first respondent had vacated the premises on 9 February 2022, and the applicant had terminated the second lease agreement on 14 February 2022. There would not have been any reason for the applicant to have delivered product after it had cancelled its agreement with the first respondent.'

[35] As at 7 February 2022 the applicant claimed that an amount outstanding from the first respondent in respect of fuel and lubricants sold and delivered to it was the sum of R3 045 861.09.'

[37] In dealing with the certificate of balance, the court a quo rejected the evidentiary value of the certificate of balance by finding that it constituted only prima facie proof and that it had to give way to the evidence submitted in the form of the delivery notes in the replying affidavit. The court a quo equally, without any challenge to them by the respondents, rejected the statements provided by the applicant.

[38] In *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others*,⁷ the Namibian Supreme Court held:

'38. The facts of this case also make it necessary to briefly discuss the role of a judge in a civil case as opposed to a criminal case. The role of a judge in civil proceedings differs materially from the role of a judge in a criminal trial. For example, in criminal trials section 167 and 186 of the Criminal Procedure Act, 1977 authorise a judicial officer or Judge, in the circumstances

⁷ (SA 25 of 2008) [2011] NASC 3 (19 May 2011) at [38] to [40].

set out in section 186, to call witnesses. (*R v Hepworth* 1928 AD 265). In civil cases a Court cannot do so without the consent of the parties. (*Buys v Nancefield Trading Stores* 1926 TPD 513; *Simon alias Kwayipa v Van den Berg* 1954 (2) SA 612 (SR) at 613F – 614). The role of a Judge in a criminal trial is therefore much more inquisitorial than is the case in civil trials.

39. It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. If a point which a Judge considers material to the outcome of the case was not argued before the Judge, it is the Judge's duty to inform counsel on both sides and to invite them to submit arguments. (*Kauesa v Minister of Home Affairs (supra)* at 182H – 183I).

40. The above cases amply illustrate that in a civil case a Judge cannot go on a frolic of his or her own and decide issues which were not put or fully argued before him or her. The cases also establish that when at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the Court, the same principles would generally apply. The cases furthermore demonstrate that relaxation of these principles is not normally only possible with the consent or agreement of the parties. (See further the passage quoted in the case of *Rowe v Assistant Magistrate, Pretoria and Another* 1925 TPD 361 in the case of *Simon alias Kwayipa (supra)* at 613H *in fine* 614A – E)."

[39] Apart from the fact that the court a quo proceeded to consider issues that it was not properly called upon to consider (the sale and delivery of product during the period 9 February 2022 to 26 April 2022), it failed to call upon the parties and invite counsel on both sides to submit argument on the issue, to the extent that it may have interpreted the issues as having been pleaded.

[40] In doing so the court a quo erred. The court a quo's findings failed to take into account the purpose of attaching the delivery notes to the replying affidavit and that the applicant expressly alleged that the application related to sales during or about 10

January 2022 to 9 February 2022. It should have been clear that the delivery notes were not provided to record a full account of all sales during or about this period.

[41] In the result, the court a quo erred in granting judgment in favour of the applicant for the lesser amount.

[42] In the result, the following order is granted:

1. The appeal of the respondents is dismissed.
2. The cross-appeal of the applicant succeeds, and judgment is entered against the first, second and third respondents, jointly and severally, the one paying the other to be absolved in the following terms:
 - (a) payment in the amount of R5 765 223.96.
 - (b) payment of interest on the aforesaid amount at the rate of 4% above the ruling prime bank overdraft calculated from the date of service of summons, 23 May 2022, to date of payment.
 - (c) payment of the costs of suit and this appeal.


L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

[REDACTED]

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M.B. MAHALELO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

[REDACTED]

S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 December 2024.

APPEARANCES

Counsel for the applicant:

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Date of hearing:

28 August 2024

Date of judgment:

12 December 2024