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

CASE NO: 2022-024180

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

06.01.2024

In the matter between:

FIRSTRAND BANK LIMITED
TRADING AS FIRST NATIONAL BANK
(Registration number: 1929/001225/06)

Plaintiff

and

SIGNATURE BAKERY (PTY) LIMITED
(Registration number: 2015/100244/07)

First Defendant

MOHAMED R VARIAWA
(Identity number: 6[...])

Second Defendant

Delivered: 6 January 2025 – This judgment is handed down electronically by circulation to the parties' representatives via email, uploading it to CaseLines and releasing it to SAFLII.

ORDER

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1. The second defendant shall pay the plaintiff's costs in the application to postpone the summary judgment application.
 2. The late delivery of the second defendant's affidavit opposing summary judgment is condoned.
 3. Summary Judgment is granted against the second defendant for:
 - 3.1. Payment of R312 717.89.
 - 3.2. Interest on the above amount at the prime lending rate plus 9.25%, calculated daily on the outstanding balance and capitalised monthly in arrears from 1 August 2021 to the final payment date.
 - 3.3. Costs of the action on the attorney and client scale.
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JUDGMENT

BESTER AJ:

[1] The plaintiff, FirstRand Bank Limited trading as First National Bank, sued the first defendant, Signature Bakery (Pty) Ltd, and the second defendant, Mohamed Variawa, for payment of R312 717.89 plus interest. The claims rely respectively on an overdraft facility and a suretyship.

[2] The first defendant does not defend the action, and an application for default judgment is pending. The second defendant opposes the action. On 6 December 2022, the plaintiff launched an application for summary judgment against the second defendant, which is opposed. The opposing affidavit was delivered out of time. The plaintiff opposes the condonation application for the late delivery of the affidavit.

[3] Shortly before the date set for the hearing of the summary judgment application, the second defendant delivered an application to postpone the hearing. The plaintiff opposes that application as well.

The postponement application

[4] The plaintiff delivered its practice note and heads of argument in July 2023. On 11 October 2023, the second defendant's attorneys withdrew from the matter without having filed a practice note and heads of argument.

[5] On 25 June 2024, the plaintiff's attorneys served the notice of set down of the opposed summary judgment for 2 September 2024 on the second defendant. This elicited no response from the second defendant. On 16 August 2024, the plaintiff's attorneys sent a proposed joint practice note to the second defendant and asked for his comments thereto by 19 August 2024. This communication also did not elicit any response from the second defendant.

[6] On Thursday, 27 August 2024, the second defendant delivered an application to postpone the hearing of the application to allow him to obtain legal representation.

[7] The Constitutional Court held in *Lekolwane*¹:

"The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An application for a postponement seeks an indulgence from the court. A postponement will not be granted unless this court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the application given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interests."

[8] This approach is followed in the high courts as well.²

¹ *Lekolwane and Another v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) at para 17.

[9] In *Unitrans Fuel and Chemical*³ the Full Court of this Division cautioned that the level of detail required for an explanation does not vary with the length of the delay.

[10] In his affidavit supporting the application to postpone the hearing, the second defendant states that, when the plaintiff served its heads of argument and practice note on 27 July 2023, he experienced severe financial and health problems. As a result, he claims, he could not afford to pay counsel to prepare his heads of argument. The second defendant does not offer any facts to support his conclusions. In the absence of the primary facts on which they are based, secondary facts are the deponent's conclusions and, thus, an opinion only. A witness must provide the facts, not merely his conclusion from the facts.⁴

[11] The second defendant did not provide any facts to explain the delay over the subsequent 13 months until he delivered the application to postpone the hearing. He merely states:

“However, I am arranging a loan to defend this claim. I am hopeful that I will have funds within 4 – 6 weeks. This will allow me to pay Counsel to prepare my heads of argument and practice note.”

[12] The second defendant provides no details supporting his hopeful outlook on his situation. He does not explain with whom he has sought to arrange a loan and why the funds may be available within a few weeks. He also does not explain why he could not have done so earlier. The second defendant is merely speculating as to his future ability to secure funding for his legal costs.

² See for instance *Magistrate Pangarkar v Botha and Another* 2015 (1) SA 503 (SCA) at paras 27 and 28.

³ *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* 2010 (5) SA 340 (GSJ) at paras 14 to 17.

⁴ *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C - E; and *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) at para 28.

[13] The second defendant has not given a full and satisfactory explanation for his alleged need for more time and did not bring the application timeously. A postponement will not be in the interests of justice. As a result, I refused the application and allowed the hearing to proceed. There is no reason why the second respondent should not bear the costs of the unsuccessful application.

The condonation application

[14] The second defendant delivered his opposing affidavit the day before the initial hearing date of the summary judgment application instead of the five days required by Uniform Rule 32(3)(b).

[15] An applicant for condonation must fully explain the delay, which must cover the entire period and which explanation must be reasonable.⁵

[16] The opposing affidavit deals with condonation in a few brief paragraphs. Although the explanation is not very convincing, I consider it in the interests of justice to allow the opposing affidavit. As a result, the late delivery of the opposing affidavit is condoned.

The test for summary judgment

[17] The test in a summary judgment application remains as formulated in *Maharaj*⁶ and *Breytenbach*⁷, even after the amendment of the rule in 2019.⁸

[18] In *Maharaj*⁹ the Appellate Division explained the approach as follows:

“Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to

⁵ *Van Wyk v Unitas Hospital & Another* 2008 (2) SALR 472 (CC) at para 22.

⁶ *Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 (A) at 426A-E.

⁷ *Breytenbach v Fiat SA Edms) Bpk* 1976 (2) SA 226 (T) at 228B-H.

⁸ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para 13.

⁹ *Maharaj* above n6.

decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence."

The defences

[19] The second defendant admits the first defendant's breach of the overdraft facility and that the amount claimed against the first defendant is due. He also admits to signing the suretyship agreement. At the time, he was a director of the first defendant. It is not apparent from the papers whether he still is. The second defendant raised several defences to the claim against him, which I deal with in turn.

The challenge to jurisdiction

[20] The second defendant raised a special plea that the plaintiff has abused the hierarchy of courts by bringing its claim in the High Court instead of the Magistrate's Court because the amount of the plaintiff's claim falls within the jurisdiction of the Magistrate's Court.

[21] For this reason, he contends that this Court does not have jurisdiction to adjudicate the plaintiff's claim. In the alternative, he pleads that the Court should

“decline to entertain the plaintiff’s claim”. The basis for the alternative is not evident from either the plea or the opposing affidavit.

[22] In *Mpongo*¹⁰ the Supreme Court of Appeal concluded that a High Court’s jurisdiction is not ousted in cases where a Magistrate’s Court has jurisdiction. As a result, the special plea does not raise a triable issue.

Ambiguous or incomplete terms of the suretyship

[23] The second defendant contends that the suretyship agreement is ambiguous or incomplete in its terms and, therefore, is unenforceable for failing to comply with the formal requirements of suretyship agreements.

[24] A suretyship is invalid if it does not comply with the formal requirements of section 6 of the General Law Amendment Act 50 of 1956, which requires the terms thereof to be embodied in a written document signed by or on behalf of the surety:

“No contract of suretyship entered into after the commencement of this Act shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments.”

[25] The terms of a contract of suretyship are the identity of the creditor, the identity of the debtor, the identity of the surety, and the nature and amount of the principal debt.¹¹

[26] What, then, is the defect complained of? The second defendant points to clause 3 of the agreement, contending that it is unclear whether his liability is unlimited or, if limited, to what amount. The clause reads as follows:

¹⁰ *Standard Bank of South Africa Ltd and Others v Mpongo and Others* 2021 (6) SA 403 (SCA) in para 86.

¹¹ *Sapirstein and Others v Anglo African Shipping Co (SA) Limited* 1978 (4) SA 1 (A) at 12 B-D; *Fourelmel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 344 H – 345 D.

“3. **Amount** – The amount recoverable from me/us shall be unlimited/limited to
Mr Mohamed R Variawa (Id ...)¹² RUnlimited ()
Plus interest or finance charges on that amount, ...”

[27] It appears from the face of the document that the word “Unlimited” was typed in next to the letter R, where the value of a limited surety would ordinarily be inserted. Read as a whole, the clause, in my view, does not leave room for the second defendant’s challenge.

[28] This is further borne out by clause 1 of the document, which states that the second defendant bound himself “*for the due payment by the Debtor of all and any monies which the Debtor may now or from time to time hereafter owe ...*”.

[29] The nature and amount of the principal debt seem to me to be set out in the agreement. In my view, the second respondent has not raised a *bona fide* defence based on the formal requirements for a suretyship.

Misrepresentation

[30] The second defendant claims that the plaintiff made a misrepresentation to him, which resulted in the suretyship being unenforceable against him.

[31] He claims that the bank official who assisted him when he signed the suretyship told him, before signature, that he was binding himself to a maximum liability of R250 000.00. He cannot recall the person’s name. The second defendant argues that the official must have known that the surety is unlimited, as he deals with suretyships “*on a daily basis*”. On this basis, the second defendant reasons that the official knowingly or negligently made a false representation.

¹² Identity number omitted.

[32] A person is presumed to know the contents of a document they sign. In *KPMG*¹³ the Supreme Court of Appeal approved the explanation for the presumption in *Glen Comeragh*¹⁴:

'The fact that a person has put his signature to a document gives rise to a presumption of fact that he knew what it contained. The reason given (in Hoffmann *South African Law of Evidence* 2nd ed at 391) is that "people do not usually sign documents without reading them" . . . It would not in my view be at all unusual for a person signing such a document [a standard form of contract] not to read it, whether because of laxity, unwariness, heedlessness, or confidence in the integrity of the[offeror]. In my view, a more satisfactory basis for the presumption of fact is that a person by his conduct in putting his signature to a document admits that he is acquainted with its contents (cf *Knocker v Standard Bank of SA Ltd* 1933 AD 128). The admission is not of course conclusive, but it is sufficient to establish that fact *prima facie*.'

[33] The second defendant admits that he signed the agreement. He does not state whether he read the document or not, and if not, why he did not do so. The document clearly warns that the agreement imposes onerous obligations upon the surety. It reflects the unlimited nature of the obligation twice, as dealt with above. The second defendant provides no basis upon which he may be excused from not having read the document or understood the unlimited nature thereof. As a result, I conclude that he has not raised a triable issue.

Rectification

[34] In the alternative to the defence that the suretyship agreement is void because of a misrepresentation, the second defendant contends that the suretyship agreement should be rectified because it was the parties' common intention to limit his suretyship to R250 000.00. The proposition goes further. The second defendant claims that the parties' common intention was also that "*once the principal amount of R250 000.00 was discharged by the first defendant in terms of the overdraft*

¹³ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) in para 28.

¹⁴ *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd and Another* 1979 (3) SA 210 (T) at 215A – C.

agreement, the suretyship agreement would automatically terminate” and that it was the intention that he would not waive his common law defences, as the document states.

[35] These are rather extensive changes from what appears to be the plaintiff’s standard terms of suretyship. Yet the second defendant, who bears the onus at trial to prove the true common intention of the parties,¹⁵ provides no detail of how any of these terms were agreed upon. Although he does not need to prove his defence at summary judgment, he must satisfy this court that he has a *bona fide* defence. He must put up facts, which, if proven at trial, will constitute an answer to the plaintiff’s claim.¹⁶ He has not done so, having provided his conclusions, thus his opinion, rather than the underlying facts.

[36] I am thus not satisfied that the second defendant has raised a *bona fide* defence.

Calculation of the amount owing

[37] The second defendant also contends that the calculation of the amount owed is not set out. Hence, he cannot identify which parts relate to the principal debt and which to costs and interest. This would be of concern if the surety were limited in any way for which no *bona fide* basis has been laid. The issue needs not to be considered further.

The National Credit Act

[38] The second defendant seeks to rely on non-compliance with sections 129 and 130 of the National Credit Act 34 of 2005 (the NCA) because these clauses are referred to in the overdraft facility. However, from the document, it is clear that the clauses are only relevant if the NCA regulates the agreement.

¹⁵ *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) in para 21.

¹⁶ *Breytenbach* above note 7.

[39] The plaintiff has attached a certificate of turnover in respect of the first defendant, showing that the first defendant, a juristic entity, had a turnover above the threshold determined in terms of Section 7(1) of the NCA and, therefore, the NCA is not applicable, in terms of Section 4(1)(b) of that Act. The second defendant does not challenge this evidence.

[40] A mere mention of the NCA in the document does not render it applicable. The Legislature decides when legislation applies.¹⁷ As a result, this argument also does not raise a *bona fide* defence.

Breach notice

[41] Lastly, the second defendant contends that the plaintiff did not comply with the procedure prescribed in clause 7 of the overdraft facility agreement. The clause provides for a procedure in the event of the first defendant being in breach of the agreement.

[42] This proposed defence also does not assist the second defendant. His obligation to pay under the suretyship arises upon the first defendant's default, which he has admitted. Whether or not any further steps have been taken against the first defendant does not influence the second defendant's liability.

Conclusion

[43] In my view, the second defendant has not raised a *bona fide* defence, and there is no reason for me to exercise my discretion against summary judgment.

[44] I make the following order:

- a) The second defendant shall pay the plaintiff's costs in the application to postpone the summary judgment application.

¹⁷ *EJ v WJ and Another* 2024 (6) SA 400 (SCA) in para 30; *RMB Private Bank (A Division of FirstRand Bank Ltd) v Kaydeez Therapies CC (in Liquidation)* 2013 (6) SA 308 (GSJ) in para 15.

- b) The late delivery of the second defendant's affidavit opposing summary judgment is condoned.
- c) Summary Judgment is granted against the second defendant for:
 - i) Payment of R312 717.89.
 - ii) Interest on the above amount at the prime lending rate plus 9.25%, calculated daily on the outstanding balance and capitalised monthly in arrears from 1 August 2021 to the final payment date.
 - iii) Costs of the action on the attorney and client scale.

A Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard: 2 September 2024

Judgment Date: 6 January 2025

Appearance for the Applicant: R. Carvalheira, instructed by Schuler Heerschop
Pienaar Xaba Inc Attorneys
NS Nxumalo drew the heads of argument

Appearance for the First Defendant: Unrepresented

Appearance for the Second Defendant: In person