

REPUBLIC OF SOUTH AFRICA



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

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES/NO

24.03.2025

DATE

SIGNATURE

Case No: 2023/045944

IN THE MATTER BETWEEN:

NEDBANK LIMITED

PLAINTIFF

AND

DELTA FLEX (PTY) LTD

1st DEFENDANT

QUINTUS VAN DEN BERG

2nd DEFENDANT

JUDGMENT [ex tempore]

SIWENDU J

[1] The applicant, Nedbank Limited (Nedbank) applied for summary judgment (the application) alleging the first and second defendants defaulted on payments of instalments on a COVID- 19 SME loan facility (the loan facility) concluded in September 2020.

[2] The first defendant is Delta Flex (Pty) Ltd (Delta Flex), a registered company based in Centurion. The second defendant is Mr Quintus Van Der Berg (Mr Van Der Berg) and currently the sole director of Delta Flex. Delta Flex and Mr Van Der Berg are collectively referred to as the defendants.

[3] The background to the application can be summarised briefly. Nedbank alleged that on or about 4 September 2020 it concluded a COVID-19 Term Loan Facility with Delta Flex in an amount of R1 200000.00. The loan facility was a fixed term loan payable in instalments of R25 539.42 over a fixed period of sixty months from 01 November 2021 to 01 October 2026. It was accepted and advanced to Delta Flex. Nedbank sued Mr Van Der Berg as the second defendant in his capacity as surety and co-principal debtor because he bound himself *in solidum* with Delta Flex in terms of the Deed of Suretyship executed with the loan facility.

[4] In the event of a default, the terms of the loan facility entitled Nedbank to exercise its right to claim all amounts owing to it. In May 2023, when Delta Flex defaulted on its payment obligations. Nedbank alleged that as of 15 May 2023, Delta Flex was in arrears in the sum of R140 114.02 and the monthly instalment payable was now R27 717.66. The accelerated claim due was R1 276 538.08 based on the agreed variable interest a rate of 11.25% per annum calculated from 20 April 2023.

[5] Nedbank instituted an action against the defendants, for the payment of R1 276 538.08 (limited to R1 200 000.00 in respect of Mr Van Der Berg) together with interest at the prime rate of 11.25% per annum calculated from 20 April 2023 to the date of final (both days inclusive) and capitalised monthly until the date of final payment.

[6] The above sum due was confirmed in a certificate of balance dated 24 April 2023 by one Alicia Masilela. The loan facility agreement provided that a

certificate of balance signed by Nedbank's managers would be *prima facie* proof of Delta Flex's indebtedness.

[7] In addition to the background, the litigation history has relevance to the defences raised and the reasons for the order. At inception, the defendants were represented by Malherbe Rigg & Ranwell Inc. The attorney notified Nedbank of their intention to defend the claim on 9 June 2023, and filed their plea dated 17 May 2024 a year later, after the delivery of the notice of bar, dated 10 day of May 2024.

[8] Nedbank then applied for the summary judgment, which was opposed by the defendants in an affidavit dated 2 August 2024, deposed to by Mr Van Der Berg. Nedbank's attorneys served the notice of the set down of the summary judgment application on Malherbe Rigg & Ranwell Inc on 29 November 2024. On 16 January 2025, approximately two weeks before the hearing, the defendants' attorneys withdrew as attorneys of record.

[9] The application served before the court on 3 February 2025. At the hearing, Mr Nardus Coetzee purported to represent the defendants and assist Mr Van Der Berg in his capacity as the Auditor of Delta Flex. On 7 February 2025, the court granted the summary judgment and provided its reasons *ex tempore*. These are the written reasons on which the *ex tempore* judgment and order is based.

[10] Three questions arose, namely: (a) whether Mr Nardus Coetzee could legally represent the defendants, (b) the effect of the withdrawal of legal representation, and postponement sought (c) whether the defendants have a *bona fide* defence to the claim and or there was a triable issue warranting that the defendants are granted leave to defend the claim.

[11] Based on the case in *Manong and Associates (Pty) Ltd v Minister of Public Works and Another*¹ where a managing director of a company purported to

¹ 2010 (2) SA 167 (SCA) at paras 7 to 14

represent a company, the Court determined that a person in the position of Mr Nardus Coetzee or Mr Van Der Berg does not enjoy the right, such as counsel or an attorney to represent the court on behalf of a company. The Court has a residual judicial discretion to allow non-professional representation in a particular case, and may relax the rule in “rare”, “exceptional” circumstances. However, leave must be sought by way of a properly motivated, timeously lodged formal application showing good cause why, in a particular case, the rule should be relaxed. This was raised with Mr Nardus Coetzee.

[12] This approach has been followed in this Division in *Investec Securities (Pty) Ltd v Corwil Investments Holdings (Pty) Ltd and Others and Corwil Investments Holdings (Pty) Ltd and Another v Investec Securities (Pty) Ltd*.²

[13] Although as already alluded to, the attorneys withdrew some two weeks before the hearing, the defendants failed to make a formal application motivating for a departure from the rule. They had sufficient time to do so. There was no reason to depart from it.

[14] Furthermore, when viewed with the merits of the defence, which I will turn to later, the withdrawal of the attorneys of record raised spectre of the caution noted by the Court in *Take & Save Trading CC and Others v The Standard Bank of SA Ltd*.³ There the Court stated that the timing of such a withdrawal cannot be taken lightly as it is often used as a strategy for delay. Importantly, in the present case, there was sufficient time to make the application, alternatively seek legal representation. No cogent reasons were advanced for the failure to do so.

[15] Turning to the merits of the defence, in their plea, the defendants did not dispute accepting the loan Nedbank and use of the facility. However, they denied:

(a) the arrears,

² Unreported Judgment Case No 2021/11126 by Wepener J and later by Manoim J – [2022] ZAGPJHC 888 (20 July 2022)

³ (21/2003) [2004] ZASCA 1; 2004 (4) SA 1 (SCA); [2004] 1 All SA 597 (SCA) (27 February 2004)

(b) indebtedness

(c) that the certificate of balance is *prima facie* proof their indebtedness, and

(d) that the agreement to exclude the application of the NCA.

[16] Other than the question whether the NCA applied to the loan facility, in my assessment, the plea constituted a bare denial of liability and failed disclose facts upon which the denial of liability is based as required by the rules, which could enable Nedbank to properly assess the merits of the defence.

[17] In so far as the opposition to the summary judgment is concerned, the affidavit disposed to by Mr Van Der Berg, claimed that Nedbank is not entitled to judgment because its application is fatally defective. The material complaints that emerge are that Nedbank's affidavit verifies a cause of action, which is at variance with what is contained the particulars of claim in that:

- (a) The certificate of balance is not signed by a manager but by a Recoveries Officer (Collections and Recoveries) and records an indebtedness in respect of a "C19LOAN"
- (b) It "Seemingly deals" with an agreement other than that relied on in the particulars of claim which is neither a (i) mortgage; nor a (ii) instalment sale account; nor a (iii) vehicle account, over which the deponent according to him, has control.
- (c) There is a discrepancy between the opening date of 7 September 2020, and what is pleaded in the particulars while the particulars of claim read attachment to the particulars which all assert the conclusion of an agreement on 4 September 2020.
- (c) One would have expected some type of explanation concerning the discrepancies between what is alleged in the particulars of claim and what emerges *ex facie* the attachments.
- (d) Nedbank ought to have excepted to the plea rather than proceed by way of summary judgment.

[18] In *Maharaj v Barclays National Bank Ltd*⁴ Corbett JA held that in summary judgment applications:

“ 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... sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.”

[19] In *Arend and Another v Astra Furnishers (Pty) Ltd*⁵ the court held that the discretion may be exercised in a defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is a good one.

[20] None of the defences by the defendants raise a triable issue which could deny Nedbank's entitlement to judgment. The defendants do not dispute the receipt of the loan facility. They made much of the reference to "C19 LOAN" on which I accept is consonant with the abbreviation for Covid -19 Loan. Although the date on which the loan was recorded or captured in Nedbank's the electronic data base system differs from the date when the loan was concluded, nothing turns on this as to the substance and the existed of the loan.

[21] The confirmation of the application correctly reflects the details of the debtor. The cause of action is premised on no other facility advanced to Delta Flex other than the Covid 19 Loan Facility. As already stated, the defendants do not deny the sum advanced to Delta Flex. Nothing turns on this.

⁴ 1976 (1) SA 418 (A) at 423F - G,

⁵ 1974 (1) SA 298 (C) at 304F - 305H)

[22] In so far as the Certificate of Balance, although it must be signed by a manager, the terms of the loan facility states that the capacity and authority of the author need not be proved. Importantly, the defendants fail to disclose facts to dislodge the *prima facie* proof of their indebtedness which is at the heart of the claim against them and is reflected in the statement of balance in addition to the Certificate. Mr Van Der Berg as the deponent was well placed to disclose details of payments made to Nedbank and provide proof of the absence of the indebtedness. None was provided.

[23] The Term Loan facility makes it clear that the National Credit Act 34 of 2005 (NCA) does not apply to the loan and to the deed of suretyship. I agreed with Nedbank's contention that over and above the specific exclusion under the NCA, the first defendant is a juristic person whose asset value or annual turnover at the time the secured loan agreement was made, equalled or exceeded the value determined by the Minister in terms of section 7(1). In the application, Delta Flex recorded its turnover was R18,224,755,00.

[24] As to the contention that Nedbank ought to have excepted to the plea rather than proceed by way of summary judgment, it does lie in the mouth of a defaulting debtor who fails to disclose a triable issue in its defence to determine the course a creditor must take in such circumstances.

[25] Accordingly, summary judgment was granted and the order made based on the variable rate of interest and the agreed terms that the defendants would be liable for costs on an attorney and client scale. In the result the following order was made:

[26] Judgment is granted against the First and Second Defendants jointly and severally the one paying the other to be absolved for:

- a. the payment to the Plaintiff of the amount of R1 276 538.08 (limited to R1 200 000.00 in respect of Second Defendant) together with interest

at a rate 11.25% per annum calculated from 20 April 2023 to the date of final payment (both days inclusive) and capitalised monthly.

b. Cost on an attorney and client scale.

NTY SIWENDU
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment is handed down electronically by circulation to the Applicant's Legal Representative and the Respondents by email, publication on Case Lines. The date for the handing down is deemed 24 March 2025

Date of appearance: 05 and 07 February 2025

Date Judgment delivered: 24 March 2025

Appearances:

For the Plaintiff: Advocate R Peterson

Instructed by: Lowndes Dlamini Attorneys

For the Defendants:

First Defendant (no legal representation)

Second Defendant (In person)