

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

Reportable Yes/No
Case No: 3952/2024

In the matter between:

ABSA BANK LIMITED

Plaintiff / Applicant

And

HENRY JOHANNES JOUBERT

First Defendant / Respondent

Identity number: 7[...]

SUSANNA CAROLINA JOUBERT

Second Defendant / Respondent

Identity number: 5[...]

CORAM: Hefer AJ

Heard: 28 November 2024

Delivered: 27 February 2025

ORDER

1. Summary judgment is granted against first defendant in the amount of R536,839.40 (Five Hundred Thirty Six Thousand Eight Hundred Thirty Nine Rand and Forty Cents).
2. Second defendant is granted leave to defend the action.

3. First defendant is to pay the cost of the summary judgment application on scale B .

JUDGMENT

Hefer AJ

- [1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of Court.

First defendant

- [2] The plaintiff's claim against the first defendant is based on a bank facility offer by the plaintiff which had been accepted by the first defendant on 12 July 2018.
- [3] The relevant express terms of such agreement, which had not been denied by first defendant were:
- (i) That an overdraft facility to the total facility limit of R540,000.00 be approved in favour of the first defendant;
 - (ii) That all amounts outstanding in terms of the agreement were payable on written demand; and
 - (iii) That as security for the first defendant's indebtedness, the plaintiff held the following: 'Unlimited suretyship by Mrs SC Joubert dated 19 July 2012'.
- [4] The facility agreement was further subject to the condition that sufficient payments would need to be made by the first defendant to the plaintiff in order for the plaintiff to reduce the facility with R100,000.00 to a credit limit of only R440,000.00 by 20 December 2018.

- [5] In his plea as well as his affidavit in opposition to the application for summary judgment, the first defendant first relies on a special plea of prescription.
- [6] The first defendant himself alleges that he had breached the specific terms and conditions of the facility agreement by not making any of the required payments in terms of the facility agreement since its inception thereof, and by not making the required payments for the overdraft facility to be reduced to R440,000.00 by 20 December 2018.
- [7] First defendant further alleges that due to his inability to make such payments it resulted in the subsequent suspension and cancellation of the overdraft facility. As a result, the first defendant stopped utilizing and/or could not utilize the overdraft facility any further.
- [8] In addition to not having made any payments toward and as required in terms of the facility agreement since 2018, the first defendant has also not acknowledged any indebtedness to the plaintiff since 2018. As such, the indebtedness of the first defendant to the plaintiff, according to the first defendant, has prescribed by no later than on or about 19 December 2021 given that the specific terms and conditions to reduce the overdraft facility by R100,000.00 was already breached on 20 December 2018, three years prior to and upon which date and due to such breach, the full payment became due.
- [9] According to the first defendant, whereas summons was only issued against the defendants on 17 July 2024 being more than six years after the overdraft facility was granted and more than five years after the breach of the agreement by the first defendant upon which date payment became due and payable, but which was not paid, the claim against first defendant had prescribed.

[10] The first defendant denies that he remained indebted to the plaintiff in any manner whatsoever in respect of the facility agreement as any claim which the plaintiff may have previously had against the first defendant in respect of the facility agreement entered into on 12 July 2018 has since become prescribed given that the plaintiff only issued summons on 17 July 2024:

- (i) Being more than three years after payment in respect of the facility agreement became due and payable; and
- (ii) Being more than three years after receipt by the plaintiff of any payment whatsoever by the first defendant in terms of the facility agreement; and
- (iii) Being more than three years after any acknowledgment was made by the first defendant of any amounts being due and payable by him to the plaintiff in respect of the facility agreement.

[11] First defendant further pleads that at the time of signing the facility agreement the first defendant did not read the terms and conditions thereof in the entirety, did not complete the agreement in full and had not noticed some of the terms and conditions or mistakes contained therein as it was presented to him in extremely small writing. The terms and conditions according to the first defendant, had also not been properly explained to the first defendant by the representative of the plaintiff who had instructed the first defendant to sign the facility agreement. The first defendant alleges that he signed the facility agreement in good faith but was at the time of signature thereof not aware, nor made aware by the representative of the plaintiff that the facility agreement placed reliance on an unlimited suretyship signed on 19 July 2012, more than six years prior to the signing of the facility agreement by the second defendant.

[12] The first defendant further alleges that he was never provided with a copy of the facility agreement by the representative of the plaintiff after the signature

thereof as required in terms of s 65(1) read with s 65(2)(a) of the National Credit Act 34 of 2005 to have been able to properly read through same afterwards and to have become aware of the above and/or any mistakes contained therein.

Second defendant

- [13] Plaintiff's claim against the second defendant is based on the liability of the second defendant in terms of the 'unlimited suretyship' dated 19 July 2012 referred to in the facility agreement.
- [14] To this, the second defendant raised the defence that more than twelve years ago, on 19 July 2012, she has entered into a suretyship / credit guarantee agreement with the plaintiff and thereby bound herself as surety and co-principal debtor with the first defendant in terms of a credit agreement that the plaintiff and the first defendant has concluded at the time, or which was about to be concluded between the plaintiff and the first defendant at that time.
- [15] The second defendant specifically pleads that the deed of suretyship confirms the *consensus ad idem* between the parties given the wording thereof, which will be dealt with herein later. The second defendant further specifically pleads that the deed of suretyship was not renewed or altered by agreement between the second defendant and the plaintiff thereafter and therefore could not apply to any other credit agreement between the plaintiff and the first defendant.
- [16] The second defendant pleads that the duties and obligations of the second defendant in respect of the indebtedness of the first defendant to the plaintiff were limited only to the credit agreement entered into between the plaintiff and the first defendant at the time of her having entered into the deed of suretyship which was on or about 19 July 2012. The deed of suretyship, according to the second defendant, could not and does not apply to the claim

of the plaintiff against the first defendant in terms of the facility agreement entered into between them on 12 July 2018.

- [17] The second defendant then further pleads that she was also not a party to, nor was she informed by either the plaintiff or the first defendant of the facility agreement having been entered into between the plaintiff and the defendant on 12 July 2018, to have agreed to be bound as surety and co-principal debtor in terms of the facility agreement based on a historic deed of suretyship entered into more than six years earlier and which was only applicable to a previous credit agreement.
- [18] According to the second defendant it would be *contra bonos mores* if she is to be held liable to fulfil the duties and obligations of the first defendant based on a historic deed of suretyship signed more than twelve years prior to the plaintiff having instituted its claim.
- [19] The plaintiff's claim against second defendant is further based on a mortgage bond registered during 2012 in favour of Absa Bank over property of which the second defendant is the registered owner. The second defendant then further raises a special plea. In terms of this special plea, the second defendant pleads that more than nineteen years ago, in terms of the Last Will and Testament of the parents of the second defendant, certain immovable properties were transferred into her name to be held by the second defendant on behalf of her children in terms of a *fideicommissum* and testamentary condition. The property mortgaged in terms of the 2012 suretyship by the second defendant, forms part of such immovable properties. According to the second defendant, in terms of the *fideicommissum* and testamentary condition, the properties were only to be held by the second defendant up until the date of the second defendant's passing for and on behalf of the children of the second defendant and was not allowed to be encumbered by the second defendant in respect of any alleged personal indebtedness. Whereas the mortgaged property is specifically held in terms of the

fideicommissum and testamentary condition by the second defendant up until the date of her passing on behalf of Mrs N Pienaar, the daughter of second defendant, according to the second defendant, Mrs Pienaar needed to consent to the property being mortgaged in favour of the plaintiff. According to the second defendant the mortgage bond is for that reason *ab initio void* .

[20] The defendants raised two points *in limine* in respect of the application in terms of Rule 32 which will now be dealt with first.

Invalidity of founding affidavit

[21] According to the defendants, the plaintiff's affidavit in support of the application for summary judgment, is non-compliant with Regulation 3(1) of the Regulations Governing the Administering of Oaths or Affirmation.

[22] In this regard, the defendants have drawn attention to the fact that Mr Maharaj, who has deposed to the founding affidavit in support of the application for summary judgment, has only identified him as a major business person, but has not stated his gender. From the certification by the Commissioner of Oaths, it appears that the Commissioner has failed to make a selection at the time on whether the deponent who attested to the founding affidavit before him, was indeed a female or male. The relevant portions of such certification, indeed refers to 'he/she' and not 'he'.

[23] In terms of Regulation (1) of such regulations, a deponent to a sworn affidavit shall sign the declaration in the presence of the Commissioner of Oaths.

[24] Both counsel have referred me to the matter of **Absa Bank Ltd v Botha NO and Others**¹. In that matter the Court stated the following in this regard:

¹ 2013 (5) SA 563 (GNP)

‘It is a basic requirement of an affidavit that it must be signed by the deponent in the presence of the Commissioner of Oaths. However, in the application for summary judgment which is the subject matter of these proceedings, it cannot be said that the plaintiff’s verifying affidavit complies with this requirement, because, although the deponent unambiguously describes herself as a ‘manageress’, which undeniably means that she is a female, the Commissioner of Oaths certified that the deponent to the affidavit, who purportedly signed it in his presence, was a male – clearly this could not have been the deponent’.²

[25] In the present matter however, the omission by the Commissioner of Oaths to delete the word ‘she’ where applicable, can only be as a result of an oversight by such Commissioner. In the **Absa**-matter, Kathree-Setloane J also stated the following:

‘Subject to whether there has been substantial compliance with the Regulations, the Court has a discretion to refuse an affidavit which does not comply with the Regulations. Should a Commissioner of Oaths not certify that the verifying founding affidavit in the summary judgment application have been sworn to or affirmed, the Court will be reluctant to apply the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium*, also known as the ‘presumption of regulatory, for purposes of making the assumption that the document had, in fact, been sworn to (or affirmed) and signed in the presence of the Commissioner of Oaths.’ (emphasis added)³

[26] Contrary to the facts of Botha (although it would have been preferable that the omission had been clarified by the Commissioner of Oaths in a supporting affidavit), the omission of the word ‘she’ does not justify the inference that the affidavit was not signed in the presence of the Commissioner of Oaths. This point *in limine* can therefore not be upheld.

The requisite personal knowledge

[27] According to the defendants, Mr Maharaj, the deponent to the founding affidavit in the application for summary judgment cannot and does not have

² p. 568 C – D.

³ p. 566, par. [8].

the personal knowledge of the facts pertaining to the defendants' indebtedness with the results that the applicant has not met the requirements of Rule 32(2)(a) pertaining to be able to 'swear positively to the facts'.

[28] Generally speaking, before a person can swear positively to facts in legal proceedings, they must be within his personal knowledge.

'... the mere assertion by a deponent that he 'can swear positively to the facts' (an assertion which merely reproduces the wording of the subrule) is not sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.'⁴

[29] In **Nedcor Bank Ltd v Behardien**⁵ it has been held that the affidavit by a legal advisor of the plaintiff bank, in which it is stated that the facts proposed to fall within the knowledge of the deponent and that the deponent can swear positively to these facts and confirm them, is sufficient.

[30] In **Absa Bank Ltd v Motsepe**⁶ summary judgment was granted despite the Court's concern that the deponent to the founding affidavit (a senior legal counsel in the employ of the plaintiff) merely had regard on her version to the records without stating why the contents of those records are within her personal knowledge.

[31] I am satisfied that for purposes of the present application, Mr Maharaj can indeed swear positively to the facts contained in his affidavit. He states that he has as senior legal counsel, in his possession and under his control all the plaintiff's records, accounts and other documents relevant to the claims forming the subject matter of the action instituted against the defendants. He further states that in the ordinary course of his duties and as such the aforesaid legal counsel and having regards to the plaintiff's records, accounts and other relevant documents in his possession and under his control, he has

⁴ Van Loggenberg, Superior Court Practice, Vol II, p. D1Rule32-26.

⁵ 2001 (1) SA 307 (C) at 310 F – 311 C

⁶ Unreported, GP Case No. 25761/2021 dated 22 November 2022

acquired personal knowledge of the defendants' business dealings and financial standing with the plaintiff and can positively swear to the facts alleged in the plaintiff's Particulars of Claim and amounts claimed. His authority to depose to the affidavit on behalf of the plaintiff can also not be disputed by the defendants.

[32] The second point *in limine* can therefore also not be upheld.

Attachment of liquid document

[33] Mr *Harms*, appearing on behalf of the defendants, contended that despite the fact that Rule 32(2)(c) requires an applicant to attach a copy of the liquid document upon which they rely to their founding affidavit, the applicant has not done so. He referred to the rules which specifically use the word 'shall'.

[34] According to Mr *Harms*, counsel for the plaintiff has also correctly stated that the applicant specifically relies on the 'business client agreement to enable Absa to utilize the certificate of balance as its liquid document to prove any alleged indebtedness of Mr and Mrs Joubert to the applicant'.

[35] Mr *Harms* referred me to two matters which were heard in the Gauteng Local Division during July 2014 (in which one of them Mr *Harms* also appeared on behalf of the defendant), namely **Absa Bank Ltd v Jenzen, Kevin Glynn (2014/877)** and **Absa Bank Ltd v Grobbelaar, James (2014/7728)**. In both these matters, Sutherland J dismissed the applications for summary judgment due to the fact that the respective written agreements which formed the basis of the plaintiff's claim, had not been attached to the Particulars of Claim.

[36] In the present matter however, all the written agreements relied upon by the applicant, had been attached to the Particulars of Claim. In **Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd**⁷, Musa J held that whereas the applicant

⁷ 2005 (2) SA 432 (CPD)

verified the cause of action in the summons to which was attached the bond, the 'attachment of the bond to the application would therefore have been superfluous and a duplication. Although this was not raised as an issue in the proceedings insofar as it may be necessary in terms of the rules, the Court condones such omission. The Court is satisfied that the respondent has not been prejudiced by such omission'.⁸

[37] I therefore hold that the omission to attach the relevant written agreements to the Rule 32 application, does not *per se* warrant the dismissal of the application for summary judgment.

[38] A further aspect which needs to be considered is the fact that the copy of the business client agreement, relied upon by the plaintiff, and attached to the Particulars of Claim, is not a copy of the alleged business agreement concluded between the plaintiff and first defendant. According to the plaintiff, '[d]espite a diligent search no copy of the signed business client agreement could be located and it is submitted that same is lost. A copy of a redacted version of a similar business client agreement entered into at the time in issue, being the year 2018, is attached hereto ...'.

[39] In response to these allegations, the first defendant specifically pleads that the blank copy of the business client agreement appended to the plaintiff's Particulars of Claim cannot be a true copy of the terms and the conditions that would have been applicable to the facility agreement as entered into between the plaintiff and the first defendant given that the copy provided by the plaintiff only came into existence on 25 October 2019.

[40] Initially, I was inclined to agree with the sentiments of Sutherland J in the matter of **Absa Bank Ltd v Grobbelaar** where he stated *inter alia* as follows:

'... The allegations include putting the plaintiff to the proof that the original foundation or document really was lost in the fire, that the exemplar, attached to the supposedly demonstrate what the contents of the lost document were, is indeed a true reflection of that agreement concluded in 2005 and not some other variant of a template that has evolved over time, and lastly, that several ostensible discrepancies appear to

⁸ p. 434 D – E.

exist in the documents attached which supposedly re-enforce the doubt shed on the exemplar being an accurate replica of the signed original.'

- [41] Even if there are some doubt whether the copy of a template of the bank client agreement is a correct reflection of the agreement between the plaintiff and first defendant, the fact remains that the liquid document on which the plaintiff's claim is founded is the certificate of balance which has been appended to the Particulars of Claim.
- [42] Even if one does not take into account the provisions of the business client agreement, and in particular that it was agreed upon that a certificate of balance would serve as *prima facie* proof of the amount owed by the first defendant to plaintiff, the certificate of balance does indeed serve as proof of the amount of indebtedness by the first defendant. It appears from the plea by the defendants that this amount is in any event not disputed.
- [43] The first defendant, in answer to the allegations by plaintiff to the effect that the plaintiff distributed the loan amount to the first defendant and also made the facility available to the first defendant, and that first defendant utilized the loan amount and/or facility, in admitting only that the overdraft facility had been made available, attempts to dispute that the loan amount of R540,000.00 had indeed been dispersed to the first defendant.
- [44] The question however then immediately arises where the first defendant in his plea pleads that he '... denies that he remained indebted to the plaintiff in any manner whatsoever in respect of the facility agreement as any claim which the plaintiff may have previously had against the first defendant has since become prescribed, where does this indebtedness stem from. "

This can only be from the amount of R540 ,000,00 indeed being distributed to first defendant .

Indebtedness of the first defendant

- [45] In the special plea of prescription the defendants rely thereon that it was a term of the facility agreement that sufficient payments would need to be made to reduce the facility with R100,000.00 to a credit limit of only R440,000.00 by 20 December 2018.
- [46] It is then pleaded that first defendant breached this term and condition by not making such payments by 20 December 2018. It is pleaded that the first defendant's indebtedness to the plaintiff prescribed by no later than on 19 December 2021.
- [47] Summons was only issued on 17 July 2024.
- [48] In terms of s 12(1) of the Prescription Act, 1969, prescription shall commence to run as soon as the debt is due. The essential question is thus when the first defendant's debt, the existence of which is not denied as the first defendant does not deny that he had the overdraft and pleads that he did not bring it within the R440,000.00 limit became due?
- [49] According to defendants, the debt became due on 20 December 2018 when the required payments for the overdraft facility to be reduced to R440,000.00 were not made.
- [50] It is an express provision of the overdraft facility that the facility was to continue until terminated by the applicant. It was further provided that the applicant can terminate such agreement by notifying first defendant and requesting first defendant to settle the balance within ten business days.
- [51] It appears from a letter dated 27 November 2023 by Messrs Symington De Kok Attorneys, the attorneys acting on behalf of the plaintiff, that first defendant, after he had applied for debt review in terms of the National Credit

Act was notified in terms of s 86(10) of the National Credit Act of the termination of the debt review.

[52] The first defendant himself states that the facility agreement has been suspended and terminated due to the first defendant not making the required payments in terms of the facility agreement by 20 December 2018.

[53] In **Truter and Another v Deyssel**⁹, Van Heerden JA held that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. when the entire set of facts in which the creditor must prove in order to succeed with his/her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his/her claim.

[54] In **Standard Bank v Miracle Mile Investments 67**¹⁰, the Court relying on the views of Van Heerden JA, held in the context of that matter a creditor acquiring a complete cause of action for the recovery of the debt could only occur if and when Standard Bank elected to give the requisite notices to the creditor. Mbha JA continued as follows:

‘Compliance with the jurisdictional requirements for acceleration of the outstanding balance is not simply a procedural matter but is essential in establishment a cause of action ... A creditor cannot be said to be in default, or guilty of dilatoriness, until he has made his election. The election and communication thereof in the form of the requisite notices are essential preconditions to create a cause of action in the first place ... Prescription would therefore commence to run only from the date of a notice claiming the outstanding balance ...’¹¹

[55] In **Stockdale and Another v Stockdale**¹², the Court held that notice was necessary for the debt to become due and that the period of prescription

⁹ 2006 (4) SA 168 (SCA)

¹⁰ 2017 (1) SA 185 (SCA)

¹¹ p. 194, par. [26].

¹² 2004 (1) SA 68 (C)

commenced only once notice was given with the result that the debt in that particular case has not become prescribed.

- [56] Applying the above principles to the present matter, it appears that prescription commenced only when notice of termination of the credit facility was given by the applicant, therefore 27 November 2023. The special plea of prescription can therefore not be upheld. Summons was issued within the three year period stipulated by the Prescription Act.

Liability of second defendant

- [57] In spite of a proper reading of the overdraft facility agreement, I was unable to trace reference to the so-called 'unlimited suretyship by Mrs Joubert dated 19 July 2012' relied upon by the plaintiff. It appears however that it is not being disputed by the defendants that the condition pertaining to the suretyship by the second defendant was part of the facility agreement. It is common cause that this suretyship was executed by the second defendant on the 19th of July 2012 in favour of plaintiff in terms of which second defendant bound herself as surety and co-principal debtor with the first defendant for and in respect of first defendant's liability to plaintiff.
- [58] It is plaintiff's case that the wording of the suretyship clearly also covers the plaintiff's claim against the first defendant in that in the suretyship the second defendant binds herself as surety in favour of Absa to repay any sum or sums of money on demand which first defendant 'may hereafter owe to the bank in terms of the credit agreement that the bank and the debtor concluded'.
- [59] According to Mr *Benade* appearing on behalf of the plaintiff, the second defendant bound herself as surety to repay any sum which first defendant owes to the bank. According to him, she also bound herself as surety to repay any sum which first defendant may thereafter owe to the bank in terms of a credit agreement that the plaintiff and Joubert concluded.

- [60] I cannot agree with this submission by Mr *Benade*. In the relevant wording of the suretyship it appears that Susanna Carolina Joubert 'bind myself as surety and co-principal debtor on my own and together in favour of the bank, its successors, or any people the bank owes or may hereafter owe to the bank in terms of the credit agreement that the bank and debtor concluded or about to conclude and to fulfil properly all obligations the debtor has to the bank in respect of this agreement. These sums of money owe to the bank shall also include all amounts that the bank is entitled to claim from the debtor in terms of the credit agreement and in accordance with the National Credit Act.'
- [61] In this regard I agree with the submissions by Mr *Harms* that the wording as above refers to a credit agreement (singular) which has already been concluded, resulting in an indebtedness already owed, alternatively, which is about to be concluded which will result in an indebtedness which will be entered into shortly thereafter. It does not refer, in any manner of interpretation whatsoever, to multiple agreements nor does it refer to agreements to be entered into well or *ad infinitum* into the future.
- [62] It can therefore not be said that 'second defendant's blinkered approach does not disclose a fairly triable and arguable issue' as submitted by Mr *Benade*.
- [63] Whereas the further relief relied upon by second defendant pertaining to the mortgage bond is ancillary to the suretyship, the defence raised by the defendants in this regard does not warrant any further discussion.
- [64] As far as cost is concerned, although the applicant had only been partially successful in its application for summary judgment, I deem it fair that the applicant be awarded costs in its favour.

Therefore, I make the following order:

Order

1. Summary judgment is granted against first defendant in the amount of R536,839.40 (Five Hundred Thirty Six Thousand Eight Hundred Thirty Nine Rand and Forty Cents).
2. Second defendant is granted leave to defend the action.
3. First defendant is to pay the cost of the summary judgment application on scale B.

J J F HEFER, AJ

Appearances:

On behalf of applicant:

Instructed by:

Adv HJ Benade
Symington De Kok Attorneys
Bloemfontein

On behalf of defendants:

Instructed by:

Adv CLH Harms
Christo Faber Attorneys
c/o Stander & Associates
Bloemfontein