



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

**CASE NO.: 2400/2021
2401/2021
Date heard: 26-04-2025
Date delivered: 28-02-2025**

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff

and

**NA-MYNS BOERDERY (PTY) LTD
HANS KANON BOERDERY CC
WILLEM VENTER SNYMAN
WILLEM VENTER SNYMAN**

**1st Defendant
2nd Defendant
3rd Defendant
4th Defendant**

AND

FIRSTRAND BANK LIMITED

Plaintiff

and

**HARRISDALE BOERDERY (PTY) LTD
HANS KANON BOERDERY CC
ABRAHAM ADRIAAN SNYMAN
JOHANNES NICOLAAS LIEBENBERG**

**1st Defendant
2nd Defendant
3rd Defendant
4th Defendant**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. In these applications for summary judgment, the plaintiff, Firststrand Bank Ltd, claims on overdraft facilities extended to the first defendant in case no

2400/2021, Na-Myns Boerdery (Pty) Ltd (Na-Myns), and the first defendant in case no 2401/21, Harrisdale Boerdery (Pty) Ltd (Harrisdale). The second to fourth defendants in both matters bound themselves as sureties for the obligations of Na-Myns and Harrisdale to the plaintiff.

2. The facility agreements entered into are largely similar, with the relevant clauses as follows:

2.1 The outstanding balance under the overdraft facility is repayable on demand and subject to annual review;

2.2 Interest shall accrue at the plaintiff's prime rate, that may vary from time to time, compounded monthly. Interest shall be calculated on the daily outstanding balance and capitalised monthly in arrears. Should the first defendant for any reason exceed the facility limit (R1.6 million in respect Na-Myns and R1.2 million in respect of Harrisdale), penalty interest shall be levied on the excess amount outstanding for that period. The penalty interest shall be compounded monthly, calculated on the amount in excess of the facility and capitalised monthly in arrears.

2.3 An event of default shall occur, should *inter alia*;

2.3.1 The first defendant fails to make a scheduled payment within 2 days of applicable due date;

2.3.2 any material indebtedness or obligation or any loan of the first defendant becomes due and payable prior to its specified maturity by reason of default;

2.3.3 the first defendant or surety perform any act analogous with an act of insolvency;

- 2.3.4 any order of court, whether provisional or final, and whether voluntarily or compulsory, be granted for the winding up or business rescue of the first defendant or surety;
- 2.3.5 the first defendant utilising the overdraft facility beyond the facility limit without prior written approval of the plaintiff;
- 2.4 In the event of default, the plaintiff shall *inter alia* be entitled to claim immediate repayment of all amounts outstanding under the facility agreement;
- 2.5 A certificate signed by a general manager of the plaintiff, setting forth the first defendant's indebtedness to the plaintiff shall, unless the contrary be proven, constitute *prima facie* proof of the first defendant's indebtedness and be valid as a liquid document in any court.
3. In the Harrisdale facility agreement, penalty interest (paragraph 2.2 above) was specified as an additional 3% above the plaintiff's prime rate.
4. The plaintiff alleges in its Particulars of Claim that both Harrisdale and Na-Myns have breached the terms of the overdraft facilities in that:
- 4.1 They failed to make scheduled payments due to the plaintiff;
- 4.2 One of the sureties in both matters, a certain Springfit Estates (Pty) Ltd, (Springfit), was finally wound up on 6 August 2021;
- 4.3 Harrisdale and Na-Myns have exceeded the limits of the overdraft facilities without the plaintiff's prior approval; and
- 4.4 In any event the respective outstanding balances under the overdraft facilities are repayable on demand.

5. The plaintiff thus claims payment in the amount of R1 92257,54 plus interest from Na-Myns and its sureties and from Harrisdale and its sureties as amount of R 1 498 068. 48 plus interest thereon.
6. The pleas of Na-Myns and Harrisdale, in similar fashion, contain mainly bold denials. So *inter alia* the defendants denied the jurisdiction of the court, only noted the contents of the facility agreements and denied the terms thereof, denied breach of the terms of the facility agreements by failing to make scheduled payments, denied that the winding up of Springfit constituted a breach of the agreements, denied that the overdraft facilities were exceeded without prior approval, denied that the outstanding balances were repayable on demand, denied the indebtedness of Na-Myns and Harrisdale, and only noted the contents of the deeds of suretyship and denied the terms thereof.
7. On the basis that the defendants have failed to disclose a defence in their pleas, the applications for summary judgement were launched.
8. In their affidavits resisting summary judgment Na-Myns and Harrisdale contend as follows:
 - 8.1 During February 2019 the plaintiff requested the following financial statements for the February 2018 financial year;
 - 8.1.1 From Na-Myns: of itself, Hans Kanon Boerdery CC, O2 Boerdery (Pty) Ltd, Harrisdale, Didimala Diamonds CC and Springfit Estates (Pty) Ltd;
 - 8.1.2 From Harrisdale: of itself, Hans Kanon Boerdery CC, Na-Myns, O2 Boerdery (Pty) Ltd, Didimala Diamonds CC and Springfit Estates (Pty) Ltd;

- 8.2 All the entities complied in providing the relevant financial statements with the exception of O2 Boerdery;
- 8.3 By reason of the failure of a single entity to provide its financial statements the plaintiff decided that it would not give "*the group*" a further chance and required the facilities to be paid back immediately;
- 8.4 The plaintiff erred in treating the various entities as part of a group structure, there being no holding/subsidiary relationship between any of the entities;
- 8.5 At the stage the plaintiff called in the facilities both Na-Myns and Harrisdale were up to date with serving the facility granted to it. Na-Myns even continued making payments on the account during 2019 and 2020;
- 8.6 Since the facilities were called up and they were not able to make immediate payment of the balance due to the plaintiff, the outstanding balances attracted interest on a month to month basis which is the only reason why the outstanding balances exceeded the facility limits as alleged;
- 8.7 Springfit was liquidated at the instance of the plaintiff who, once it called in the facilities of Na-Myns and Harrisdale, proceeded to call in the surety obligation of Springfit;
- 8.8 The agreement between the parties at all relevant times was that the plaintiff would act reasonably when considering the renewal of the facilities and that it would not act without just cause and without clear breach of the provisions of the overdraft facilities;
- 8.9 The conduct of the plaintiff in calling in the overdraft facilities granted and the sureties held by it, constitutes unconscionable conduct and/or conduct that is unfair and/or offends against public policy; and

- 8.10 The plaintiff has sufficient security for its claim by reason of the suretyship granted by Springfit. The value of the equity held in Springfit is in excess of R40 million whilst the total claims in the liquidated estate amount to approximately R6.5 million.
9. It is clear that the nature and ground of the defences raised in the opposing affidavits have not been dealt with at all in the pleas or are at odds with what has been pleaded. It is trite that a plea should comply with the provisions of Rules 18(4) and 22(2), in that it should clearly and concisely state all the material facts relied on for the defence in order for the plaintiff, in particular in summary judgment proceedings, to consider whether or not the defence as pleaded raises any issue for trial and to deal with it accordingly in the affidavit in support of summary judgment. Without a reasonable explanation for the inconsistencies the defences raised cannot be said to be *bona fide* and a defendant should fail in its opposition to summary judgment (See *Vukile Property Fund Limited v True Ruby Trading 1002 CC and Another GJ case no 2020/9705, 21 May 2021*, at paragraph 10).
10. A defendant who intends to disclose a *bona fide* defence in its affidavit which is not raised in its plea should first, deliver a notice of intention to amend the plea in terms of Rule 28(1). Thereafter the defendant should deliver an affidavit in which the nature and grounds of the defence and the material facts relied on are stated with reference to the notice of intention to amend the plea. In *Absa Bank Ltd v Meiring 2022(3) SA 449 (WCC)* the court summarised the position as follows at paragraph 20 thereof;

"It follows that a defendant in a summary judgment application which has failed to plead all its defences will be required to apply to amend its plea if it seeks to add any for the purposes of its opposition to summary judgment. A defendant's failure to have pleaded such defences initially will be material and, in addition to all the usual requirements to obtain the indulgence of being granted leave to amend, will require convincing

explanation if it is to exclude the possibility that a court might infer delaying tactics and a lack of bona fides.”

(See also *Belrex 95 CC v Barday* 2021(3) SA 178 (WCC))

11. *In casu* there has been no application for leave to amend the pleas of the defendants prior to the hearing of the summary judgment applications or even judgment. The closest counsel for the defendants, Mr Olivier, came to making submissions with regard to the necessity of amendments to the pleas was to contend that because both parties needed to amend their papers, summary judgment should be refused.
12. The contention that the plaintiff needed to amend its particulars of claim arose from the fact that the plaintiff did not annexe to its particulars of claim the deed of suretyship entered into by Springfit.
13. The above argument on behalf of the defendants is unfounded. Rule 18(6) requires a party who relies on a written contract to annexe it to its pleading. The plaintiff does not rely on the deed of suretyship signed by Springfit for its claims against the defendants, but on the liquidation of Springfit which is but one of the acts of default on which it relies. That Springfit was a surety and that it has been liquidated is not denied by the defendants. The facility agreements lists Springfit as one of the sureties. In any event in *Dass and Others v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD), Tshabalala JP stated at 53 B-G that non compliance with R 18(6), where the Rules have been substantially complied with and there is no prejudice to the defendant, can be condoned. No prejudice to the defendants have been raised.
14. The submission that the plaintiff needed to amend its particulars of claim lacks any merit in my view. In the absence of the defendants amending their pleas or at the very least filing notices of intention to amend their pleas their opposition to summary judgment should fail.

15. I nonetheless proceed to deal with the defences raised in the opposing affidavits, which in a nutshell are the following; (i) the terms of the facility agreement have not been breached, (ii) calling up of the facilities and calling in of the securities constitute unconscionable/unfair conduct which offends against public policy; and (iii) that plaintiff has sufficient security by reason of the suretyship of Springfit.

There was no breach of the facility agreement

16. Na-Myns and Harrisdale deny that they had failed to make scheduled payments in terms of the facility agreement. Na-Myns in fact goes further to state in its opposing affidavit that it made payments even after the facility was called up. However no proof of payment has been annexed to the opposing affidavits. In *Land and Agricultural Development Bank v Shidawaya* 2018 (2) SA 115 (GP), the court held at, paragraph 13 thereof, that where a defendant alleges payment the most logical thing to do would be to annex proof of payment and that failure to do so falls foul of Rule 32(3)(b) which requires a defendant to satisfy the court that it has a *bona fide* defence and to disclose fully the nature and grounds of the defence and the material facts relied upon therefor.
17. Na-Myns and Harrisdale admit that one of their sureties Springfit has been liquidated but deny that this factor constitutes a breach of the facility agreement on the basis that the plaintiff's conduct offends against public policy. I will deal with this aspect under the next heading.
18. Interestingly enough, Na-Myns and Harrisdale brought up another breach not mentioned by the plaintiff, that of O2 Boerdery not producing its financial statements when such were required by the plaintiff. Clauses 4.5 and 4.6, respectively of the facility agreements stipulate that one of the conditions to ensure ongoing availability of the overdraft facilities is that the:
"client undertakes to supply the Bank with its unqualified audited financial statements for the group", which includes *inter alia* O2 Boerdery (Pty) Ltd.

Na-Myns and Harrisdale bemoan the fact that the plaintiff treated the various entities as part of a group structure. They have however admitted that the plaintiff was in terms of the facility agreements entitled to review the overdraft facilities on an annual basis. Clause 4.2 of the Na-Myns facility agreement and Clause 4.5 of the Harrisdale facility agreement state *inter alia* the following: “*The client acknowledges that the Bank considers the facilities afforded to the client from time to time and the risk thereto on the strength of inter alia its securities . . .*”

“*Group*” is defined in the facility agreements as “*in the case of a company: that company, its subsidiaries and or co/subsidiaries as well as associate companies, as the case may be.*”

There can be no merit in this defence.

19. Na-Myns and Harrisdale do not deny that the outstanding balances on the facilities were repayable upon demand, which they failed to do.

That plaintiff's conduct is unconscionable and/or unfair and/or offends against public policy

20. This defence postulated in the opposing affidavits finds its genesis in the alleged unreasonable conduct of O2 Boerdery, over which they had no control, who failed to provide its financial statements to the plaintiff. This conduct resulted in the overdraft facilities of Na-Myns and Harrisdale being called up and the subsequent calling in of the surety obligations of Springfit which led to its liquidation at the instance of the plaintiff. In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC), the Constitutional Court acknowledged *pacta sunt servanda* (contractual obligations should be honoured), as crucial to economic development in that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed. It pointed out that it is not the only nor the most important principle informing the judicial control of contracts in our new constitutional era and that a careful balancing act is required, where other constitutional rights and values are

implicated, to determine whether enforcement of the contractual terms would be contrary to public policy (paragraph 87). The CC also held however that the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases (paragraph 89). *In casu* a worthy case for such relief has not been made out.

The plaintiff has sufficient security in Sprinfit

21. The allegations made in this regard are not supported by any material facts relied upon, absent which, the defence raised cannot be said to be *bona fide*.

22. I need to deal with one further aspect. In argument Mr Oliver for the defendants, raised the issue that the interest claimed by the plaintiff i.e., prime rate +3%, is not incorporated in the facility agreements and would constitute penalty interest. As stated herein in paragraph 3, the Harrisdale agreement makes provision for penalty interest of an additional 3% above prime rate. The Na-Myns agreement makes provision for penalty interest on the excess amount outstanding as per the plaintiff's Transactional Pricing letter which is distributed annually. In the particulars of claim the interest claimed on Na-Myn's outstanding balance is also pitched at 3% above prime rate. The argument is not that the interest claimed is particularly onerous or excessive, merely that it amount to penalty interest. In *Van Staden v Central SA Lands and Mines* 1969(4) SA 249 (w) at 351, Snyman J made it clear that the Conventional Penalties Act 15 of 1962 has as its objectives "(1) to make it plain beyond doubt that a *penalty stipulation arising out of the contractual obligation is enforceable at law*; and (2) to prevent the exaction of unfair or excessive penalties being stipulated for in contracts, and in this respect also to prevent both a penalty and damages being claimed in respect of the same act or omission on the part of the debtor".
(own underlining)

23. In *Steinberg v Lazard* 2006 (5) SA 42 (SCA) the SCA held at paragraph 7 thereof that:

“The legislature provided protection to a debtor against an excessive penalty. In terms of the section, as construed by this court, the debtor bears the onus of proving that the penalty is disproportionate to the prejudice suffered (by the creditor) and to what extent.”

(own insertion)

24. Needless to say the issue of penalty interest was neither pleaded nor raised in the opposing affidavits. The plaintiff who would have been able to deal with this defence in its supporting affidavit has been prejudiced in this regard.

Conclusion

25. Despite having regard to the impermissible defences raised, I am of the view that no genuine triable issues have been raised and that the plaintiff is entitled to the relief claimed. The facility agreements provide for costs on an attorney and client scale.

In the circumstances the following orders are made

In respect of case no 2401/21;

- 1. The defendants jointly and severally, the one to pay the other to be absolved shall pay to the plaintiff:**

1.1 The sum of R1 922 579,54 (one million nine hundred and twenty-two thousand five hundred and seventy-nine rand and fifty-four cents);

1.2 Interest on R1 922 579,54 at prime rate (7%) plus 3% per annum calculated daily and compounded monthly in arrears from 19 October 2021 to date of payment;

2. Costs of suit on an attorney and client scale.

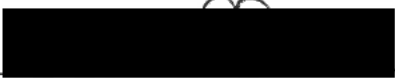
In respect of case no 2401/2021;

- 1. That the defendants be ordered to pay the plaintiff jointly and severally, the one to pay the other to be absolved;**

1.1 The sum of R1 498 068, 48 (one million four hundred and ninety-eight thousand sixty-eight rand and forty-eight cents);

1.2 Interest on R 1 498 068, 48 at prime rate (7%) plus 3% per anum calculated daily and compounded monthly in arrears from 19 October 2021 to date of payment.

2. Costs of suit on the attorney and client scale.


CC WILLIAMS
JUDGE

For Plaintiff: Adv A Eillert
De Klerk Van Gend Inc
c/o Van Heever Attorneys

For Defendants: Adv J Olivier
Japie van Zyl Attorneys Inc
c/o Van de Wall Inc