IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 19204/23

In the matter between:

MOMENTUM METROPOLITAN LIFE LIMITED	Applicant
and	
LAVENDER HILL TRADING 544 CC	First Respondent
NOLUVUYO ALICIA MAKALUZA	Second Respondent

Coram:	**NUKU J**
Heard on:	**18 February 2025**
Delivered on:	**11 March 2025**

JUDGMENT

NUKU, J

[1] This is an application for summary judgment against the second respondent, who bound herself in terms of a written deed of suretyship (**Deed of Suretyship**) dated 16 September 2022, jointly and severally as surety and co-principal debtor to the applicant for due payment by the first respondent of all amounts payable by the first respondent to the applicant arising from whatsoever cause.

[2] Alleging failure to pay by the first respondent, the applicant instituted an action against both respondents for the payment of a sum of R1 279 248,03, interest on the aforesaid amount at the rate of 11,25% per annum *a tempore more* and costs on an attorney and client scale. The respondents delivered their notice of intention to defend as well as their plea whereafter the applicant brought an application for summary judgment against both respondents.

[3] In opposing the application for summary judgment, the respondents raised two defences, the first being that this court lacks jurisdiction and the second being that they are not able to comment on the correctness of the amount claimed because of the applicant's failure to provide the first respondent with statements contemplated in the agreement between the applicant and the first respondent.

[4] The application came before Saldanha J on 24 May 2024 who postponed it without a date in addition to which he made the following orders, namely:

> '(b) The defendants shall file their Rule 28 (1) notice in order to amend their plea, within 5 days of this order, whereafter the rules in respect of amendment of pleadings as contained in Rule 28 will apply;
>
> (c) The plaintiff shall be entitled to:
>
> i. Re-enrol the current application for summary judgment should the defendants fail to (a) deliver their notice of intention to amend in terms of rule 28 (1) in time, or (b) fail to make any subsequent application to effect the amendment in time (if an objection to a

proposed amendment is made by the plaintiff), or (c) if such application is dismissed, or …'

[5] The respondents duly filed their Rule 28 (1) notice to which the applicant objected. The respondents, however, failed to apply for leave of the court to amend their plea. This prompted the applicant to re-enrol the application for summary judgment as it was entitled to do in terms of the order referred to above. On 1 October 2024, this being the date when the matter was re-enrolled to, the matter was postponed to 7 November 2024 for hearing on the semi-urgent roll.

[6] On 7 November 2024, the respondents delivered a second notice of intention to amend their plea in terms of Rule 28 (1). The amendment sought to be made to the respondents' plea only related to the second respondent and because of that, the application in respect of the second respondent was postponed without a date and an order similar to the one made by Saldanha J above was made. The applicant was afforded 10 days to object to the proposed amendment as well as leave to re-enrol the application for summary judgment in the event of the second respondent either not pursuing an application for leave to amend or being refused leave to amend.

[7] The applicant duly filed its objection after which the second respondent took no further steps to apply for leave to amend. The applicant re-enrolled the matter, again, as it was entitled to do so in terms of the order that postponed the application on 7 November 2024, and this is when the matter came before me in motion court on 18 February 2025.

[8] The only defences that had been pleaded when I heard the matter were the two defences referred to in paragraph [3] above. Mr Randall, who appeared for the second respondent advised that the second respondent had abandoned these two defences and that instead, he was instructed to make submissions on a legal point regarding the validity of the Deed of Suretyship.

[9] The legal point regarding the validity of the Deed of Suretyship, in short, was that it is invalid for lack of compliance with section 6 of the General Law Amendment Act 50 of 1956 (General Law Amendment Act) read with sections 13, 37 and 38 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA).

[10] Section 6 of the General Law Amendment Act deals with the formalities in respect of contracts of suretyship and provides, in the relevant part, that "*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*…"

[11] In the relevant parts, section 13 of ECTA provides that:

> '1. Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.
>
> 2. Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.'

[12] ECTA defines the term electronic signature to mean "*data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature*" and the term advanced electronic signature to mean *"an electronic signature which results from the process which has been accredited by the authority as provided for in section 37*". The term data is defined to mean "*electronic representation of information in any form*." Section 37 and 38 deal with accreditation of products and services as well as the criteria for accreditation, both of which are not relevant to the present application, it being common cause that the electronic signature used by the second respondent when signing the Deed of Suretyship is not an electronic signature that resulted from the process which has been accredited by the authority as provided for in section 37.

[13] The argument on behalf of the first respondent was that applicant was required to plead compliance with section 6 of the General Law Amendment Act as read with section 13 (1) of ECTA because the second respondent signed the Deed of Suretyship electronically. which requires the signature of a surety in a deed of suretyship, and it does not specify the type of signature. The applicant's failure to plead such compliance, so the argument went, means that the applicant has failed to establish the validity of the Deed of Suretyship and therefore is not entitled to judgment. Reference was made to ***Massbuild***[1], a decision of the Gauteng Division of the High Court, Johannesburg where Bester AJ dismissed an action against a surety based on, inter alia, plaintiff's failure to establish a valid and enforceable suretyship as the signature did not comply with the provisions of section 13 (1) of ECTA.

[14] Mr Wessels, who appeared on behalf of the applicant submitted that the defence sought to be advanced by the second respondent, in addition to it not having been pleaded both in her plea and affidavit opposing the summary judgment application, is untenable because she, in her plea, has admitted to having bound herself as a surety in favour of the applicant. In this regard, he referred the court to paragraph 14 of the plea where, in response to allegations contained in paragraphs 13 and 14, the respondents pleaded that "*The contents of the paragraphs under reply is admitted in as far as it corresponds with the provisions of the Deed of Suretyship appended to the Particulars of Claim and marked Annexure "D*"".

[15] There are several difficulties with the defence sought to be advanced by the second respondent. One of these difficulties flows from the second respondent's abandonment of all her pleaded grounds of opposition. Rule 32 (3) (b) of the Uniform Rules of Court requires of a respondent faced with an application for summary judgment to "*satisfy the court by way of affidavit (which shall be delivered within five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact*

[1] Massbuild (Pty) Ltd t/a Builders Warehouse Express, Builders Warehouse and Builders Trade Depot v Tikon Construction and Another (6986/2017) [2020] ZAGPHJHC (14 September 2020)

that the defendant has a bona fide defence to the action; such affidavit or evidence to disclose fully the nature and grounds of the defence and the material facts relied upon therefor." The abandonment by the second respondent of the only defences that she had pleaded in the affidavit opposing the summary judgment means, in essence, that there is no opposition to the summary judgment application.

[16] Even more problematic is the reliance by the second respondent on the provisions of the General Law Amendment Act to argue that the Deed of Suretyship is invalid when she, in her plea, admits having bound herself as a surety and co-principal debtor in favour of the applicant. The rhetorical question that one may ask is "*what then is the second respondent disputing*" because her admission that she bound herself as a surety in favour of the applicant must put paid to any possible ground of defence in circumstances where the Deed of Suretyship is embodied in a written document and has been signed by her, albeit not with an advanced electronic signature. Her argument amounts to no more than elevating form over substance. Massbuild is also of no assistance to the second respondent because the dispute there centred on whether the surety had signed the suretyship unlike here where the second respondent admits to having bound herself in favour of the applicant.

[17] There is no doubt that the second respondent has failed to satisfy the court of the nature and grounds of her defence and the legal point she sought to rely on is bad in law.

[18] The first respondent's indebtedness to the applicant arose from a financial service agreement in term of which the first respondent sold certain insurance policies, received some commission payments which it was liable to refund in the event of those insurance policies lapsing or being cancelled within a certain period of time. Certain insurance policies that had been sold by the first respondent, in respect of which it had received commission payments, either lapsed or were cancelled resulting in the first respondent being obliged to pay the applicant a sum of R1 279 248.03, which the first respondent failed to pay.

[19] Paragraph 13 of the Deed of Suretyship made provision for the indebtedness of the second respondent to be proven by a certificate signed by any of the applicant's managers or accountants. Such certificate evidencing the indebtedness of the second respondent has, indeed, been provided and as such the applicant is entitled to summary judgment in its favour.

[20] The Deed of Suretyship provides for costs on an attorney and client scale. That is the bargain to which the parties bound themselves and no cogent reason has been advanced to interfere therewith. Costs will, thus, be awarded on an attorney and client scale including those costs that had been reserved on occasions when the matter was postponed without the allocation of costs.

[21] In the result I make the following order:

21.1 The application for summary judgment is granted;

21.2 The second respondent is ordered to pay the applicant a sum of R1 279 248.03 together with interest thereon at the rate of 11,25% per annum *a tempore morae*;

21.3 The second respondent shall pay the applicant's costs on an attorney and client scale including costs occasioned by the postponement of the matter where costs in relation to such postponement had not been determined.

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LG NUKU

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant	:	Adv. Wessels
Instructed by	:	Johan Fourie: Fourie Basson & Veldman Attorneys
For the First Respondent	:	Adv. R Randall
Instructed by	:	MJ Van Rensburg: Horn Van Rensburg Attorneys