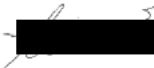


REPUBLIC OF SOUTH AFRICA



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

Case No.: 2024-101129

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
30 May 2025	
DATE	SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

First Applicant

and

BRAZEN FREIGHT SA (PTY) LTD

First Respondent

WAYNE DE DONKER

Second Respondent

MANOJ CHAGGAN NARAN

Third Respondent

JUDGMENT

Noko, J

Introduction

[1] The applicant launched proceedings against the respondents for payment of the sum of R43 092.95 in respect of the following Claim A: R227,223.66; Claim B: R51,659.58 and Claim C, being amounts in arrears in respect of loans and overdraft facility accounts held by the first respondent. The second and third respondents are sued in their capacities as sureties and co-principal debtors with the first respondent.

[2] Both the first and second respondents are not opposing the application and the applicant seeks that default judgment be granted against them as set out in the notice of motion.

[3] The third respondent has delivered an opposing affidavit and has further launched proceedings in terms of Rule 13 seeking an order against the second respondent to pay him an amount of R300 000.00, alternatively that the second respondent be ordered to indemnify him for any sum he may be ordered to pay the applicant.

Parties

[4] The applicant is Standard Bank of South Africa Limited, a public company registered in accordance with the laws of the Republic of South Africa. The applicant is also registered as a deposit-taking institution in terms of the Banks Act.¹ The applicant conducts its business at 6 Simmonds Street, Johannesburg.

[5] The first respondent is Brazen Freight SA (Pty) Ltd, a private company with registration numbers (2015/363742/07) registered in accordance with the laws of the Republic of South Africa with its *domicilium citandi et executandi* at 39 Lepus Road, Crown Extension 8, Johannesburg.

[6] The second respondent is Wayne De Donker, an adult male with his *domicilium citandi et executandi* at 12 Barbara Van Wyk Street, Discovery Ext 10, Roodepoort, Johannesburg.

¹ 94 of 1990.

[7] The third Respondent is Manoj Chaggan Naran, an adult male whose *domicilium citandi et executandi* is 12 Almeisan Western Lane, Wilgeheuwel. Florida, Johannesburg.

Background

[8] The applicant and the first respondent entered into three written agreements. First, a Business Flexible Facility agreement with a principal debt of R428 750.00. The facility was for a term of 1270 days and repayable with capitalised interest at a rate of 22.5% The first respondent would repay the loan by paying an amount equal to its revenue percentage, set at 4.62%.

[9] The first respondent breached the agreement by, *inter alia*, failing to make a minimum payment due on the account, and was in arrears in the amount of R1 325.53 as of 9 June 2023. The applicant demanded payment of the arrears on 3 July 2023 and subsequently cancelled the agreement on 26 September 2023. The amount due at the date of cancellation was R43 092.95 as set out in the Certificate of Balance attached to the applicant's founding affidavit.

[10] The second agreement was for an overdraft facility which was initially limited to the amount of R270 000.00 and was repayable with interest at a rate of 7.15% per annum above the applicant's prime overdraft interest rate. The facility was cancelled on 26 September 2023 due to the first respondent's failure to make minimum payments due on the account. The balance as at 3 August 2023 was R233 895.21 as set out in the Certificate of Balance annexed to the applicant's founding affidavit.

[11] The third agreement entered into was a Covid-19 emergency term loan agreement entered into on 29 May 2020 in the sum of R399 000.00. The loan was repayable at R8 272.27 per month which included interest at 7.75% per month over a period of 65 months. The agreement was cancelled on 26 September 2023 due to first respondent's failure to make timeous payments. The balance due was R286 446.15 as set out in the Certificate of Balance attached to the applicant's founding affidavit.

[12] The second respondent entered into a guarantee agreement for the repayment of the sums due by the first respondent and unconditionally guaranteed payment of the first respondent's debts. The guarantee was only limited to the Covid-19 loan.

[13] The second and third respondents signed suretyship agreements on 15 January 2018 and bound themselves jointly and severally as sureties and co-principal debtors for the payment of all present and future indebtedness of the first respondent to the applicant. The suretyship was limited to R700 000.00. The sureties renounced the benefits of excussion and division and agreed to be liable for collection costs, default administration charges and other costs associated with legal proceedings for collection of monies due.

[14] The applicant has demanded payment of the sum due under the above agreements and proceeded to launch these proceedings pursuant to the respondents' failure to pay the amounts as demanded.

Parties submissions and contentions

Narrowing of issues

[15] The applicant's counsel submitted that a discussion was held with the third respondent's counsel and agreed that the contentions raised by the third respondent regarding the authority of the deponent of the applicant's affidavit, and the dispute about of the signing of the suretyship as raised in the answering affidavit are no longer persisted with. The third respondent's s counsel confirmed the discussion and the agreement.

[16] The applicant's counsel further stated that the third respondent has raised the issue of condonation in respect of the late delivery of the replying affidavit. Stated further that it is no longer necessary for the Court to consider the merits of the opposition thereto, and that only the issue of costs remains to be determined in this regard.

[17] The question of condonation lies within the repository of the Court's discretion. In view of the fact that the third respondent opted not to challenge the application for condonation, I decided to grant same and also ordered that the applicant should be liable for the costs associated with the application.

Application for amendment

[18] The applicant's counsel moved an application from the bar for the notice of motion to be amended to include a claim for the amount in claim A which was inadvertently not included in the notice of motion though dealt with in the applicant's founding papers. Further, that the respondents would not suffer any prejudice if the application for the amendment is granted.

[19] The counsel for the third respondent contended that Rule 28 of the Uniform Rules affords the respondent an opportunity to consider a notice to amend. That since the applicant did not serve the notice of intention to amend, the third respondent is deprived of the opportunity as set out in Rule 28.

[20] I noted that the amendment sought by the applicant relates to a claim for the amount of R43 092.95 which is reflected in the applicant's founding affidavit, letter of demand and the Certificate of Balance. Noting that the affidavits also serve as evidence, the third respondent has considered and responded to all facts set out in the affidavit. There is nothing new which is being introduced which may need another reflection. There is also no need for the third respondent to depose to an affidavit to react specifically to what is in the amended notice of motion. If averments on claim A have not been specifically denied in the answering affidavit, then they are not disputed and have been admitted.

[21] It is settled in our jurisprudence that the Court considering the application for amendment should have regard to the question of prejudice and whether the application is being launched maliciously. It was also stated in *Affordable Medicines Trust and others v Minister of Health and others*² that:

“The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases in the governing principles in *Commercial Union Assurance Company Limited v Waymark NO*. The practical rule that emerges from these cases is that amendments will always

² 2006 (3) SA 247 (CC) at para 9. See also *Imperial Bank Limited v Barnard and Others NNO* 2013 (5) SA 612 (SCA) at para 8 which says, “... an application for amendment will always be allowed ‘unless it is mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement’.”

be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or ‘unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed’. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?”

[22] To this end I find that there is no prejudice to visit the respondents, and the application for amendment is granted. In any event, the prayer for further and alternative relief should be invoked to cater for the inclusion of the amount in claim A.

Merits

[23] Based on the background set out above, the applicant submitted that a case has been made out for judgment as prayed for against all the respondents.

[24] The third respondent averred that he terminated his directorship with the first respondent during June 2018 and at the same time sold his shares to the second respondent for R300 000,00. The said amount was to be paid by the second respondent over a period of 12 months. In their termination agreement the second respondent further undertook to ensure that the third respondent is released from the suretyship agreement entered into with the applicant. Further, that the second respondent indemnified him from any liability he may be sued for, arising or linked to the company after his resignation. The second respondent has failed to pay the agreed amount of R300 000,00 and failed to ensure that the third respondent’s suretyship obligation is terminated. On the basis of the foregoing, a rule 13 notice has been launched against the second respondent and was served but remains unopposed.

[25] In view of the reluctance by the second respondent to ensure that the suretyship is terminated, he, the third respondent then called the applicant in September 2018 and informed the account manager that he is terminating the suretyship. He has no recollection as to when exactly the call was made, and also who answered the call on behalf of the applicant. He however believes that it was the business account manager who took his call. He referred to the provisions of clause 63 of the suretyship agreement which provides

for the termination of suretyship. The said termination, the third respondent continued, is valid and effective since the suretyship agreement makes no provision for the Shifren rule which requires any amendment to be in writing.

[26] It is therefore submitted, counsel for third respondent continued, that in the event that the applicant wishes to dispute this assertion, then there would be a bona fide dispute which cannot be resolved in the motion court. Since the applicant has not prayed for referral to oral evidence the Court should therefore dismiss the claim against the third respondent, alternatively exercise its discretion and refer the matter to oral evidence or trial.

[27] The applicant on the other hand contends that the fact that the third respondent does not know when the termination was made, and further who answered the call on the part of the applicant means that his contention cannot be relied on. In addition, the termination should have been made in writing without which the third respondent's basis for opposition should not be upheld.

[28] The applicant states in its heads of argument that in reply to the third party notice, the respondent stated that the agreement with the second respondent was that he would ensure that he is released from suretyship with the applicant who failed to do so. At the same time he alleges that he did so by himself. This is contradictory and the contention should be dismissed. In addition, counsel argued, that the suretyship agreement was joint, and where variation is to be implemented it must be done in writing by all. This is a statutory requirement, he submitted.

Issues

[29] Issues for determination are whether the applicant has made out a case against the third respondent, and whether the third respondent's basis for opposition is sustainable.

Legal principles

[30] Section 6 of the General Law Amendment Act³ provides that no contract of suretyship is valid unless the terms are embodied in a written document signed by or on behalf of the surety. It was stated, though in passing, in *HNR Properties CC v Standard Bank of SA Ltd*⁴ that a non-variation clause is not necessary in a contract of suretyship by reason of the provisions of section 6 of the Act. It was also held in *Tsaperas and Others v Boland Bank Ltd*⁵ also referred to in *HNR Properties CC* where it was stated that:

“Although a suretyship agreement requires writing and the surety’s signature for validity, there are no formalities for a valid cancellation. A surety is also generally entitled to cancel by notice and unilaterally his future obligations under a continuing guarantee. If the agreement prescribes formalities for the amendment or determination of the suretyship, these are binding upon both parties.”⁶

Further that

“No one suggested that the oral cancellation agreement was prohibited by the statute regulating the formalities of suretyships. ...But a non-variation clause is unnecessary in a contract of suretyship.”⁷

[31] It is stated in *Amler’s Precedents of Pleadings*⁸ that “Termination may also be by agreement, oral or otherwise, unless the deed [of suretyship] prescribes formalities for cancellation.” (underling added). In support of the contention that termination may not necessarily require to be in writing, payment or reimbursement of the amount tendered by the surety from the principal debtor also terminates a suretyship.⁹

[32] The applicant referred to the Supreme Court Appeal in *African Life Property Holdings (Pty) Ltd v Score Food Holdings Ltd*¹⁰ where the court held that amendments to suretyship should comply with the formalities which were complied with at the initial formation of the suretyship agreement. In this case the third respondent does not contend

³ 50 of 1956.

⁴ 2004 (4) SA 471 (SCA) at para 19.

⁵ 1996 (1) SA 719 (A).

⁶ *Id* para 724 B – C.

⁷ *Id* at 725 B.

⁸ Harms *Amler’s Precedents of Pleadings* 9th Ed (LexisNexis, 2018) at 351.

⁹ CJ Nagel (Ed) *Commercial Law* 4th Ed (LexisNexis, 2011) at 396 .

¹⁰ 1995 (2) SA 230 (A).

that the suretyship was amended, but that it was terminated.¹¹ To this end this judgment is distinguishable. The reasoning should also apply to the judgment referred by the applicant's counsel in *Nelson v Hodgetts Timbers (East London) (Pty) Ltd*¹² which underpinned the applicant's contention in their heads of argument that "The joint suretyship, could only have been amended/varied by complying with the formalities." In any event, as the counsel for third respondent has argued, the agreement makes provision for the words "I/We" and one would assume that if any of the words were not applicable same should have been crossed out.¹³

[33] The authorities referred and the sentiments echoed above indicates that the General Law Amendment Act sets out requirements for a valid suretyship agreement but does not make provision for a valid cancellation more specifically that it must also be in writing. That notwithstanding, the said judgments are not authorities on whether oral cancellation is valid or not, as they relate to cases where the agreements were subject to the Shifren clause. As such an indication on the validity or otherwise of oral cancellation was said in passing.

[34] The third respondent contends that this *lis* is not properly placed in the motion court and this should have been foreseen by the applicant who should have launched action proceedings. To this end the application should be dismissed. Rule 6(5)(g) of the Uniform Rules endows the presiding judge with a discretion to refer a matter to trial or for oral evidence. There is no evidence fortifying the third respondent's contention that the possibility of a dispute arising was foreseen by the applicant. The said dispute is limited to determining whether the suretyship agreement was cancelled as contended by the third respondent. I therefore find that it is necessary to refer the issue for oral evidence.

[35] Regarding the third respondent's Rule 13 application which is not opposed by the first and second respondents and in view of the finding that the matter be referred to oral

¹¹ Ordinarily, termination ends the agreement whereas amendment refers to changes to some of the terms of the agreement.

¹²1973 (3) SA 37 (A) .

¹³ The suretyship agreement provides that: "My/our liability under this suretyship will not be effected by any renewal, change or withdrawal of any facilities, or indulgences, granted by the bank to the debtor, or any delay, omission or failure by the bank to enforce its rights or to inform me/us of any breach by the debtor. If I/we terminate this suretyship, I/we will remain liable for the amount of the debts as at the termination date, including revived debts, contingent or actual liabilities, interest and costs."

evidence it would therefore be premature to make a finding that the second respondent be ordered to contribute any monies or indemnify the third respondent.

Conclusion

[36] Having concluded that a suretyship agreement in this instance is capable of termination orally, the opposition by the applicant is therefore unsustainable. At the same time the evidence by the third respondent requires to be verified by a trial judge through cross examination hence the specific issue should be referred to oral evidence.

Costs

[37] The costs should be reserved for determination by the court which will finally adjudicate over this *lis*.

Order

[38] I make the following order:

1. The first and second respondents are ordered to pay the applicant amount of R563 434,31, jointly and severally, the one paying the other to be absolved.
2. The first and second respondents are ordered to pay costs of the application on attorneys and client scale, jointly and severally the one paying the other to be absolved.
3. The application against the third respondent is referred to oral evidence, as specified below:
 - 3.1. That the affidavits exchanged by the parties be considered as pleadings,
 - 3.2. The parties be entitled to invoke the provisions of rule 35 of the Uniform Rules of Court.
 - 3.3. The issue for determination is whether the suretyship was terminated orally as stated by the third respondent.
4. The relief against the first and second respondents sought in terms of Rule 13 of the Uniform Rules of Court is referred to the oral court as set out in para 3 above.

5. The costs in relation to the claim against the third Respondent are reserved for determination by the Court which will adjudicate over oral evidence as set out above.



M V Noko
Judge of the High Court.

This judgement was prepared and authored by Noko J and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 30 May 2025.

Date of hearing: 30 April 2025.

Date of judgment: 30 May 2025.

Appearances

For the Applicant: J Rossouw, instructed by Stupel & Berman Inc.

For the Third Respondent: J W Kloek, instructed by Roxanne Barnard Attorneys