

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

Case Number: 2024-034828.

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: NO

26.5.2025

In the matter between:

NEDBANK LIMITED

Applicant

And

ARNOLD STEYNBERG

First Respondent

MARTHINUS GODFRIED STRUWIG

Second Respondent

XBS GROUP (PTY) LTD

Third Respondent

LBS HOLDINGS (PTY) LTD

Fourth Respondent

JUDGMENT

NOKO J

Introduction.

[1] The applicant launched an application against respondents for judgment in the sum of R65 168 242.62 due from the third respondent in respect of sale instalment agreements entered into with the third respondent. The suit against the respondents is predicated on the suretyship agreements entered into with the applicant for the liabilities of the third respondent towards the applicant.

[2] The first respondent is being sued for R43 200 000.00 (jointly and severally with the other respondents) plus interest thereon at 13.25% per annum, compounded daily and capitalized of final payment both days inclusive monthly from 12 October 2023 to date of payment. The second, third and fourth respondents are being sued jointly and severally with one another and first respondent, the one paying the other to be absolved, for the payment of the sum of R65 168 242.62.

[3] The total of the amount claimed is reflected in the certificate of balance attached to the applicant's founding papers.¹

[4] The application is opposed by both first and second respondents. The third and fourth respondents are placed under liquidation and are not represented or participating in this *lis*.

Parties

[5] The applicant is Nedbank Limited, a registered bank and a public company with registration number 1951/000009/06 duly incorporated in accordance with the company laws of the Republic of South Africa. The applicant's place of business is situated at [...] Floor, M[...] M[...] Campus, 1[...] B[...] Avenue, W[...] G [...], Pretoria.

[6] The first respondent is Arnold Steynberg, an adult male whose *domicilium citandi et executandi* is 1[...] W[...] Drive, W[...] G[...] E [...], Pretoria.

¹ The Certificate is issued in terms of clause 6 of the Suretyship Agreement, at CL 02-91.

[7] The second respondent is Marthinus Godfried Struwig, an adult male whose *domicilium citandi et executandi* is 7[...] Unit 1[...], M[...], Mahikeng.

[8] The third respondent is XBS Group (Pty) Ltd a private company duly incorporated in accordance with the company laws of the Republic of South Africa, with its *domicilium citandi et executandi* at Site 5[...] P[...] Mall, 2[...] G[...] Road, M[...] Park Pretoria.

[9] The fourth respondent is LBS Holdings (Pty) Ltd a private company duly incorporated in accordance with the company laws of the Republic of South Africa with its registered address at DED Building, MIGA, Ramatlabama, Mahikeng, North West Province.

Background

[10] During 2022 the applicant and XBS Quantum (Pty) Ltd (formerly known as Loubser Bulk Services (Pty) Ltd (“XBS”) entered into several instalment sale agreements of motor vehicles (“vehicle/s”). The ownership of each vehicle remained with the applicant until full payment of each vehicle is effected.

[11] The first and second respondents entered into suretyship agreements in terms of which they agreed to stand as sureties and co-principal debtors in favour of the applicant for XBS’ obligations arising from the instalment sale agreements on 18 and 20 September 2022 respectively. The first respondent’s liability under the suretyship agreement was limited to amount of R43 200 000.00 plus interest and legal costs whereas the liability for second, third and fourth respondents was limited to R108 000 000.00 plus interest and legal costs. The sureties waived their rights to the common law exceptions of *excussion and division*; renounced exception of *non numeratae pecuniae, non-causa debiti and errore calculi*.²

[12] The liquidators appointed in the estate of XBS, namely, Mr K van der Westhuizen and Ms T Vimbi accepted the claim by the applicant in the said sum of

² See clause 11 and 12 of the agreement at CL 02-91.

R65 168 242.62 on 30 October 2023. The liquidators sold the vehicles via public auction for R48 179 250.00 and paid a provisional dividend in the sum of R32 283 050.14 to the applicant from the proceeds of the auction.³

[13] Pursuant to the liquidation of XBS the applicant instituted these proceedings against the respondents qua sureties for the payment of the balance due by XBS (*in liquidation*).

[14] On the first day of hearing before me (i.e. 29 April 2025), the second respondent's counsel brought an application from the bar for the postponement of the application as he was not ready, having been instructed few days before. He therefore needed to appraise himself with the case and also file heads of argument. The first respondent did not take issue with the request for postponement and agreed that the second respondent should be given an opportunity to prepare and argue its defence. After the discussion with the parties, I ordered that the application be postponed to 2 May 2025 and second respondent should file heads on 30 April 2025 and be ready to argue the matter on 2 May 2025.

Parties' contentions and submissions

Condonation

[15] The second respondent applied for condonation of the late filing of the answering affidavit. The explanation provided by the second respondent is plausible and there is no prejudice to be suffered by other parties. With no opposition from the other parties, I granted condonation for the late filing of the answering affidavit.

Points in limine

[16] First respondent contended that the applicant has irregularly sought to amend the notice of motion by amending the amount claimed in the founding papers without

³ This payment was not disclosed at the time when the applicant instituted the proceedings against the respondents and only stated in the Applicant's Replying Affidavit.

serving a notice of intention to amend which would afford the respondent an opportunity to consider and object (if appropriate) to the said notice which process is regulated by Rule 28 of the Uniform Rules of Court.

[17] The first respondent further contended that the applicant has changed its cause of action by attaching a revised certificate of balance containing a different amount. This route is prescribed by the rules and the applicant should have either invoked, the first respondent's counsels contended, the provisions of rule 6(5)(e) and sought to introduce new material, alternatively refer the matter to oral evidence or started the proceedings afresh. The rules and authorities are clear that a party's case should be made in its founding papers and introduction of new issues should generally not be accommodated.

[18] The second respondent supports the arguments raised by the first respondent regarding the irregular process of amending the court papers which was not in accordance with the Rule 28.

[19] The applicant in reply, argued that the notice to amend and the new certificate were intended only to change the amount due being R36 147 859.75 as determined after the deduction of the provisional payment effected by the liquidator. Counsel argued that this would not prejudice the respondents.

[20] Applicant's counsel further put in dispute the argument that the applicant is introducing a new cause of action in the reply. She contends that the suit is predicated on the suretyship agreement entered into between the parties. That the Certificate of balance is not a cause of action but a method to show proof of the amount due. To this end she persists that the notice of amendment should nevertheless be accepted by the Court as none of the respondents will be prejudiced by its introduction.

[21] It is trite that affidavits filed in legal proceedings serve as both evidence and pleadings and the applicant is required to detail its case in the founding affidavit.⁴ To this end, it is impermissible for a party to introduce new evidence in the replying affidavit. That being a general legal proposition, it is also trite that a court may under exceptional circumstances receive new material in the replying affidavit. One may defer to the sentiments echoed in *Rippert's Estate*⁵ where the court held⁶ that the rule was not absolute and the court has discretion to permit new material in the replying affidavit.⁷ One of the considerations would be whether the applicant knew of the material prior to the launching of the proceedings. It was stated in *Shakot Investments (Pty) Ltd*⁸ that:

“In consideration of the question whether to permit or strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily be between a case in which the new material is first brought to light by the applicant who knew of it at a time when his founding affidavit was prepared and a case in which facts alleging that respondent's answering affidavit reveal the existence of effective ground for relief sought by the applicant. In the latter type of case the Court would obviously be more readily allow the applicant in his replying after and enlarge upon what has been revealed by the respondent, and to set up such additional ground for a leaf as might arise therefrom.”

[22] There is no argument mounted by the applicant that there are exceptional circumstances to warrant the admission of new material in the replying affidavit

⁴ See *Botha v Smuts and Another* 2025 (1) SA 581 (CC) at para 58 where the court set out the principle as follows that “In our law, there is a general rule that in motion proceedings “it is to be founding affidavit which a judge will look to determine what the complaint is. Ordinarily a new case or new facts in support of the relief claimed should not be advanced in their planning affidavit or on appeal. There are exceptions to the general rule which I consider below.

⁵ *Body Corporate, Shaftesbury Section Tile Scheme v Rippert's Estate and Others* 2003 (5) SA 1 (C). See also *Hano Trading CC v JR 209 Investment (Pty) Ltd* [2021] ZASCA 127 (21 September 2012)

⁶ Having referred to *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* 1978 (1) SA 173(W).

⁷ See also *Hano Trading CC v JR 209 Investment (Pty) Ltd* [2021] ZASCA 127 (21 September 2012)

⁸ *Shakot Investments (Pty) Ltd v Town Council of Borough Stanger* 1976 (2) SA 701 (D) at 705H-706B

except the argument that there is no prejudice⁹ to visit the respondent and that instead the amendment is to respondents' benefit.

[23] The contention that the respondents would not suffer any prejudice if the rules were not followed is unsustainable. The rule enjoins the applicant to afford the respondents an opportunity to consider the notice to amend and raise an objection if they so find necessary. Subject to what I set out in the conclusion; the point raised by the respondents that the new material cannot be raised in the reply is sustainable.

Merits

[24] The applicant contended that an act of placing XBS under liquidation is identified as one of the acts of default which triggered the launching of the proceedings against the respondents. In addition, the indebtedness has been established as the amount for which the respondents are being sued has been admitted by the liquidators. Furthermore, the National Credit Act is not applicable as the dispute relates to the amount in excess of R250 000.00.

[25] Applicant's counsel stated further that contrary to the first respondent's submission that he is being sued for the amount which is in excess of his liability as set out in the suretyship agreement, prayer 1 of the notice of motion states that the applicant is sued for R43 200 000.00 being the limit set out in the suretyship agreement. To this end the counsel argues that the applicant has made out a case for judgment as prayed for against the first respondent.

[26] The counsel for the first respondent raised several defences on which it was argued that the claims by the applicant should be dismissed. Firstly, counsel for the first respondent demonstrated that the applicant's counsel is incorrect that the claim against him is limited to the amount set out in the suretyship as prayer 2 in the notice of motion provides for judgment against the other respondents jointly and severally with the first respondent. I therefore find that the point raised by the first respondent

⁹ It was held that prejudice is not the test, and it is incumbent on the applicant to establish exceptional circumstances which render it fair to permit filing of additional affidavit. See *Impala Platinum Ltd v Monageng Mothiba N.O. and Others* (ZALCJHB 475 (10 June 2016)).

is valid and sustainable and this issue is decided on the version of the first respondent that his liability is limited.

[27] Secondly, the first respondent contended that the certificate of balance attached to the founding papers is disputed as it does not reflect the correct balance due to the applicant because the applicant had received payment from the liquidators subsequent to the sale of the vehicles at an auction. The conduct of the applicant of not disclosing this fact, counsel argued, amounts to attempt to be paid twice for the same debt which conduct should not be countenanced by this Court. Furthermore, failure to disclose the amount received meant that the applicant approached the Court with unclean hands.

[28] The applicant in retort contended that clause 10 of the suretyship agreement stipulates in no uncertain terms that payments effected can be retained by the applicant as security until the indebtedness is cleared and to this end there is nothing untoward for having claimed the total amount as appearing in the founding papers. In the premises, counsel argued, the dispute raised by the first respondent is unsustainable. That notwithstanding, counsel argued further, the applicant is prepared to ask that an order be granted for the lesser amount.

[29] Thirdly, first respondent further contends that the amount which was paid to the applicant by the liquidator is provisional and this implies that further payments will be effected in due course. In retort the applicant correctly contended that this argument is bound to fail as the first respondent has waived the common law exception relative hereto.

[30] Fourthly, first respondent, contended that the applicant acknowledged receipt of R32 283 050.14 from the liquidators who (liquidators) received R48 179 250.00 from the auction. The difference between the two amounts, being in the region of R15 000 000.00, need to be accounted for before judgment is granted against the respondents. The applicant submitted, correctly, that this contention is hopeless in view of the common law exception relative hereto is waived.

[31] Fifthly, the first respondent contended XBS had a debtors book valued at R21 000 000.00 and to his surprise the liquidators contended that the said debtors are fractured. This argument was also unsustainable in the face of the waiver of exception. In any event it can be construed as *res inter alios acta* vis a vis enforcement of the suretyship agreement.

[32] The second respondent joined issue with the first respondent and in addition submitted that there is no dispute about the indebtedness to the applicant. The issue relate to the determination of the exact amount which is due. The applicant in retort contended that the amount has already been admitted by the liquidators and the Master of the High Court and second respondent's contention is unsustainable.

[33] Also not related closely to the claim under suretyship agreement the respondents contended that the liquidators did not conduct themselves fairly and to the benefit of the creditors. The respondents made an offer to the liquidators which offer could have defrayed amount which was due to the applicant and the applicant rejected it. In the end, the vehicles were sold for the less than the offer which was presented by the respondents. In response, argument continued, the liquidator imposed unreasonable conditions which were unachievable and unrealistic. The respondents are considering available legal recourses to take against the liquidators.

[34] In retort, the applicant submitted that the conduct of the liquidators was beyond reproach and the respondents were also kept abreast of the developments. If the respondents were keen to buy the vehicles, counsel for the applicant continued, they would have attended the auction and bid for the vehicles. In any event, counsel contended, this is an accusation against the liquidators and cannot successfully be used against the applicant in this suit.

[35] Applicant's counsel argued further that the parties do not necessarily dispute indebtedness to the applicant but only the amount. Bearing in mind the indebtedness has been accepted by the liquidators and Master of the High Court. The amount due is capable of determination or quantified without difficulty and it is R36 147 859.75. To this end, the dispute being raised by the respondents does not warrant dismissal

of the application nor the referral of the application for oral evidence in terms of rule 6(5)(f) of the Uniform Rules which endowed the Court with a discretion under the circumstances to refer the issue in dispute for oral evidence or trial.

Issues

[36] Issues for determination are whether the applicant had made out a case for the relief sought and whether defences raised by the respondents are sustainable.

Legal principles and analysis

[37] The applicant referred to certain clauses in the suretyship agreement which are directly implicated in this *lis*. Clause 6 provides that as proof of the amount due a Certificate of Balance issued by the manager, whose authority and capacity would need not be proved, would be sufficient proof without more. The certificate of balance shall upon its mere production be binding and be *prima facie* proof of the amounts which are due to the applicant.

[38] Clause 10 provides that “Any moneys paid by us to Nedbank under this surety may, at Nedbank’s discretion, be treated as security held by Nedbank until Nedbank recovers the principal debtor’s indebtedness in full.”¹⁰

[39] Clause 11 provides that “We renounce the benefit of excussion (*beneficium ordinis seu excussionis*), which means that we are no longer entitled to claim that Nedbank first exhaust its remedies against the principal debtor before proceeding against us in terms of this suretyship. We also renounce the benefit of division (*beneficium divisionis*), which means that we are no longer entitled to claim that our obligation be divided proportionately between us, any Co-sureties and the principal debtor.”¹¹

¹⁰ See Suretyship Agreement at CL 02-90

¹¹ See Suretyship Agreement at CL 02-91

[40] Clause 12 which provides that “We also renounce, to the extent not prohibited by National Credit Act, 2005, the legal exception of *non-numeratae pecuniae*, which means that we are no longer entitled to claim that no moneys were in fact paid over to the principal debtor, legal exception of *non-cause debiti*, which means that we are no longer entitled to claim that the principal debt for which we undertook liability does not exist; the legal exception of *errori calculi*, which means that we are no longer entitled to claim that the amount claimed has been incorrectly calculated and the legal exception of revision of account, which means that you are no longer entitled to claim that Nedbank revises its accounting in respect of our or the principal debtor’s indebtedness. We also renounce all other exceptions which might or could be pleaded in defence to the payment of our obligation, or any part thereof, with the force and effect of which exception we declare ourselves to be fully acquainted.”¹²

[41] The two defences which require closer scrutiny is the argument that a bona fide dispute was raised in that the amount claimed does not fall within the limit said out in the suretyship agreement. The first respondent was correct in this regard that if there is a valid claim against him it can only be limited to the amount of R43 200 000.00. This aspect was conceded by the applicant and subject to the findings below my decision will be in accordance with the first respondent’s version.

[42] The second dispute relates to the challenge that the amount in the Certificate of balance does not reflect the correct amount as the liquidator has paid the applicant from the proceeds of the auction. The applicant’s version is that the dispute is unsustainable because in terms of clause 10 of the suretyship agreement monies paid by the sureties may be retained as security until the total indebtedness is cleared. To the extent that the monies so paid by the liquidator (and not sureties) which were only admitted in the replying affidavit did not extinguish the debt the applicant had the right to keep the aforesaid payment till total debt is paid.

[43] The dispute raised by the first respondent does not unsettle the basis of the claim, which is predicated on the indebtedness admitted by the liquidator. In any event the applicant submitted that the cause of action has not changed and ordinarily

¹² See Suretyship Agreement CL 02-420.

the court may still grant an order for the amount which is proved. To this end I find that clause 10 is a valid answer to the dispute raised by the first respondent as against the indebtedness that has been admitted by the liquidators. However, I cannot close my eyes to the concession in the reply that the amount has been reduced granting an order for the lesser amount would not prejudice the respondents and would be a decision consistent with the version of the respondents that at least the balance should take into account payment already made by the liquidators.

[44] The contention that there is an amount of R15 000 000.00 not accounted for by the liquidator is defeated by the waiver of the common law exception set out above. Another contention that the payment was provisional and further payment would be made in due course by the liquidator cannot be a valid defence and is defeated by the waiver of exception stated above. Further contentions raised regarding a debtor's book and damages suffered as a result of the liquidator having sold the vehicles for less are *res inter alios acta* as to the applicant and the respondents qua sureties.

[45] The foregoing reasons applies to the second respondent whose main gripe relates to the amount payable and not the indebtedness. The amount has been proved and admitted by the liquidators which has now been reduced by the applicant. I therefore find the opposition to be unsustainable.

Conclusion.

[46] Ordinarily disputes should not be enveloped in a fog which hides or distorts reality. The reality in *casu* is that there is indebtedness which was admitted and the amount is an issue. The decision on the amount is in sync with the versions of the respondents that the claimed amount should be reduced by the total amounts received by the applicant from the liquidators. Other defences were just raised to be rejected.

Costs

[47] The applicant and the first respondent were in unison that the second respondent should be ordered to pay costs for the postponement of 29 April 2025 as the matter was postponed at his instance. The current counsel for the second respondent was not present at the hearing on Tuesday, 29 April 2025 and she is unable to present a view but she acknowledged that the issue of costs is within the enclave of the court.

[48] It is also trite that generally costs follow the result. No arguments were advanced to persuade me to deviate from this well-trodden path.

Order

[49] In the premises, I make the following order:

1. The first and second respondents are ordered to pay the applicant R36 147 859.75 jointly and severally the one paying the other to be absolved.
2. The first and second respondents are also ordered to pay interest on the said sum of R36 147 859.75 at Nedbank's prime lending rate applicable currently, 11.75% plus 0.50%, thus 12.25% per annum, compounded daily and capitalized monthly from 14 August 2024 to date of final payment both days inclusive.
3. The second respondent is ordered to pay the wasted costs occasioned by the postponement on 29 April 2025.
4. Save as aforesaid both first and second respondent are ordered to pay the costs on party and party scale and scale B for the Counsel.

M V NOKO

Judge of the High Court
Gauteng Division, Johannesburg.

DISCLAIMER: This judgment was prepared and authored by Judge Noko 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 Case Lines. The date for hand-down is deemed to be 22 May 2025.

Dates:

Hearing: 2 May 2025.

Judgment: 26 May 2025

Appearance:

For the Applicant: S Kabelo, instructed by Kwa Attorneys.

For the first Respondent: JJ Scheepers, instructed by Bennecke Thom Incorporated.

For the second Respondent: M Du Plessis, instructed by Vermaak Beeslaar Attorneys.